

A.F.R.RESERVED**ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW****ORIGINAL APPLICATION No. 586 of 2021**Thursday, this the 23rd day of March, 2023**“Hon’ble Mr. Justice Ravindra Nath Kakkar, Member (J)”****“Hon’ble Maj Gen Sanjay Singh, Member (A)”**

Sub Lt Ashish Kumar Pandey (Retd) (53372-W)

S/o Shri Mohan Pandey, R/O 2/33, EWS Swarn Jayanti Vihar,

Koylanagar, Kanpur Nagar, Uttar Pradesh - 208011

..... **Applicant**Ld. Counsel for the : **None is present for the applicant.**

Applicant

Versus

1. Union of India, Through the Secretary, Ministry of Defence, DHQ PO, New Delhi - 110011.
2. The Chief of Naval Staff, IHQ MoD (Navy) 108, Talkatora Stadium Avenue, New Delhi - 110001.
3. Cmde Ajay Patney, Commanding Officer, INS Valsura, Jamnagar, Gujarat, PIN Code – 361150

.....**Respondents**Ld. Counsel for the
Respondents.**:Shri Arun Kumar Sahu,
Central Government Counsel.**

ORDER

“Per Hon’ble Mr. Justice Ravindra Nath Kakkar, Member (J)”

1. The instant Original Application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 for the following reliefs:-

(a) *To direct the Respondents to produce all relevant records of the Applicant pertaining to his commission, the training regulations and examination results, answer sheets of the examination in which the applicant is declared failed etc.*

(b) *To direct the Respondents to bring on record the data of the entire batch of cadets pertaining to Batch No. O-175 and O-176 along with those who were given a further opportunity to improve their performance or change of branch.*

(c) *To set aside the Impugned Orders dated 08.07.2021 and reinstate Applicant in Navy.*

(d) *To direct the Respondents to allow him to continue in training.*

(e) *Alternatively, grant the Applicant an opportunity to switch to Administrative or other branch as per his qualification.*

(f) *To grant such other relief appropriate to the facts and circumstances of the case as deemed fit and proper.*

2. Briefly stated facts of the case are that applicant was selected for Short Service Commission in Indian Navy in General Service- Electrical Branch as Sub Lieutenant on 01.05.2019. He was commissioned in Indian Navy on 01.07.2019. He completed Basic Training and Nuclear, Biological and Chemical warfare Defence Course. He was hospitalized for 4 weeks on 18.03.2020. He failed in 7 subjects in professional training. He was relegated to next course. He again failed in 7 subjects in professional training. A show cause notice was issued and applicant was dismissed from service. Being aggrieved, applicant has filed instant O.A. with the prayer to direct respondents to reinstate him in service and to allow him to continue in training.

3. On the basis of documents available on record it transpires that applicant was commissioned on 01.07.2019 in Indian Navy as Short Service Commission Officer and passed his

basic training with good scores. He proceeded on leave of 21 days after which he was directed to report at INS Kolkata for Ship Training for a period of 21 days. After Ship Training, he underwent Nuclear, Biological and Chemical Warfare Defense Course (NBCD) for a period of 14 days from 12.12.2019 to 26.12.2019. The applicant reported for professional training at INS Valsura on 27.01.2020. He was tortured and demoralized by Cmde Ajay Patney and Capt M Navin which resulted in mental illness and applicant was hospitalized for four weeks. The applicant resumed his training on 18.03.2020 after recovery. Nationwide lockdown was imposed on 21.03.2020 due to pandemic situation leading to suspension of all academic classes. A Board of Inquiry (BOI) was initiated against the applicant but applicant was neither informed grounds for initiation of BOI nor the result of the same. Despite being subjected to such harassment, the applicant attended all classes but he was declared fail and he was relegated to Phase-1 of the next batch i.e. Batch No O-176 with his juniors. Applicant was informed to pay money for completing his training which he refused. Applicant was declared fail in Electrical Specialization Course examination. He reappeared for examination but to no

avail. The applicant also appeared for Radar Examination but he was declared failed. The applicant was relegated for 2nd time and was served with a Show Cause Notice dated 12.01.2021 wherein it was stated that the applicant's further retention in service is not desirable as he has not shown progress in his academics. The applicant submitted reply to show cause notice vide his letter dated 22.01.2021 requesting for retention in service. Applicant was discharged from service on 08.07.2021. Applicant submitted that he is a young, motivated and sincere officer who has undergone the requisite basic and ship training. He completed his B. Tech degree with good scores. Applicant has become a victim of partial and biased conduct resulting his discharge. The applicant was eligible for change of branch such as Administrative Branch but he was not given any option. Applicant has been illegally discharged from service. Applicant prayed that respondents be directed to switch him in Administrative or other Branch and allow him to complete his training.

4. On the other hand, learned counsel for the respondents submitted that applicant joined Indian Navy in Short Service Commission (Electrical Tech) scheme and was commissioned

on 01.07.2019. The applicant was undergoing ab-initio training in accordance with Navy Order 21/15. Ab- initio training is grouped under two heads, Basic Courses and Professional Courses. The applicant has completed his initial/basic course (Naval Orientation Course) at Indian Naval Academy, Ezhimala. Post completion of basic course, the applicant reported to INS Kolkata for afloat acquaintance for three weeks. On post completion of acquaintance, the applicant reported to INS Valsura on 26.01.2020 for undergoing professional course i.e. Electrical Specialisation Course. During course, the applicant failed in 7 subjects and he was relegated to next course. He again failed in 7 subjects and he was found unsuitable for further training and accordingly, he was discharged from service on 08.07.2021 in accordance with Para 30 (a) of Navy Order 21/15 and Regulations 126 Para 10 (b) of Regs Navy Part III. Refuting the argument of the applicant that he was ill treated by the training staff, learned counsel for the respondents submitted that Indian Naval Academy (for short 'the INA') has a 'Zero Tolerance' policy towards any sort of man handling. The applicant had never raised any complaint of mental torturing by his seniors and no such incident was also reported at any point of time during his stay in the academy. Basic and advanced technological subjects are taught during Phase 1 which is

covered over 22 weeks, focuses on technology training essential for assimilation of the technologies used on the naval platforms. The training curriculum is designed in order to make trainee officers competent to direct men and undertake first and second line of maintenance/ repairs of electrical weapon/ sensors onboard ships/submarines. The trainee officers are subjected to sub courses on leadership, management, divisional duties etc at Shivaji, Hamla, CELABS, MWC and Milit Pune for a duration of 12 weeks. The training pattern of Electrical Specialisation Course is very systematic with increasing academic and practical rigour. The applicant did not take interest in clearing the subjects which he had repeated for the second time during Phase 1 of Electrical Specialisation Course (0-176). The applicant was repeatedly counselled by course officer, Head of Department, Training Captain and the Commanding Officer. Para 30 of Navy Order 21/15 stipulates that cadets/ officer trainees will be liable for withdrawal and discharge from service on second time relegation. Regulations 126 {10}(b) of Regs Navy Part II stipulates that 'Those who pass in initial training examination shall be sent to sea for further training. Those who fail to qualify three or more subjects for second time in Phase 1 of Electrical Specialisation Course shall be discharged from service being unsuitable. Accordingly,

approval of IHQ MOD (N)/DNT vide letter dated 08.07.2021 was accorded for withdrawal of the applicant from Vaslura and discharge from service on relegation for second time. On an overall assessment of capabilities of the applicant, the respondents has opined that in view of persisting physical deformity as well as failure in more than 3 subjects after relegation, it is not in the interest of the service to retain him in service.

5. Now the applicant has filed instant O.A. with the prayer to reinstate him in service. The applicant is not entitled for reinstatement in service due to following reasons: -

(a) As per para 15 (a) of Navy Order 21/15 pass marks in each subject is 55% and aggregate 60% to clear the semester. The applicant failed in seven subjects in Phase 1 of Electrical Specialisation Course O-175 and he was relegated to next course O-176.

(b) In Phase 1 of Electrical Specialisation Course (O-176) applicant again failed in second chance in seven subjects and his candidature was withdrawn in terms of Para 30 (a) of Navy Order 21/15.

(c) He was given focussed attention and counselling from the trainers of the establishment, but he could not secure minimum qualifying marks.

(d) His performance was below average as he ranked 102 out of 103 cadets in the course.

6. We have heard learned counsel for the respondents and perused the documents available on record.

7. The question before us for consideration is as follows:-

(a) Whether the applicant is in the category of under training (probation), or indeed he had completed his mandatory training, thereby being qualified, Electrical Branch SSC Naval Officer?

(b) Was the request for change of branch within the Navy, a legitimate right of the applicant?

(c) Was the Navy justified in terminating the services of the officer and termination of service was in accordance with law?

8. As far as first question that whether the applicant is a probationer or he is qualified SSC Naval Officer is concerned, Para 21 (a) of Navy Order 21/15 deals with Failure in Major Courses (Regulations for relegation) which stipulates as follows:-

(a) Trainees will be required to repeat the particular technical course/ phase in the following conditions:

- (i) Failure in three or more subjects.*
- (ii) Failure in any subject in re-examination.*
- (iii) Failure to obtain required minimum specified aggregate marks even after re-examination.*
- (iv) For having missed more than 15% of the training time in any particular phase/ course on account of leave other than sick leave.*

9. Para 30 of Navy Order 21/15 deals with Withdrawal and Discharge from service (Rule for Discharge) which stipulates that cadets/ midshipman/ Officer Trainees will be liable for withdrawal and discharge from service on the following grounds (subject of IHQ MoD (N) approval):-

(a) Relegation/Repetition for the second time during each phase of initial training. This would include second failure in Watch Keeping/ Competency board for E and L Branch Officers. Relegation/ repetition based on medical grounds/ service exigencies will not be counted under this clause.

10. Regulations 126 {10 (b)} of Regs Navy Part III stipulates that *“Those who pass in initial training examination shall be sent to sea for further training, where they will have to obtain a certificate of competency on completion of the sea training. Cases of failure in*

the examination shall be referred to the Chief of Naval Staff, for consideration. Those who fail in the examination may, at the discretion of the Chief of the Naval Staff, be given further training in the subjects in which they had failed and be re-examined. Such of these officers who, in the opinion of the Chief of the Naval Staff, will not benefit by further training shall be discharged from the service as being unsuitable. Those who fail in the examination at the second attempt shall also be discharge from the service as being unsuitable”.

11. In the instant case, the applicant was failed to qualify in three or more subjects for the second time in Phase 1 of Electrical Specialisation Course. Therefore, the applicant was liable to be discharged from service in accordance with Navy Order 21/15 and Regulations 126 {10(b)} of Regs Navy Part III. Accordingly, approval of IHQ MoD (N) DNT vide letter dated 08.07.2021 was accorded for withdrawal of the applicant from Valsura and discharge from service on relegation for second time in Phase 1 of Electrical Specialisation Course. Para 9 states that *‘An officer shall be on probation for a period of 1 year or until such time as completion of initial training whichever is later.* Regulation 160 of Navy Regulation states that *‘An officer who has been given the opportunity to obtain a certificate of competency but fails to be so within one year of being the opportunity, shall be liable to be discharged from the service at the*

discretion of the Govt'.

12. The applicant has contended that he was fully qualified by completing the initial training specified in regulation 126 para 10 (a) above. The respondents have contended, that till officer completes the training mentioned in regulation 126 paras 10 (a) & (b) above, the officer remains a probationer/under trainee. Initial qualification training cannot be contended to be completed, unless the Electrical Specialisation Course is passed.

13. On consideration of the rival contention, we are of the view that regulation 126 para 10(a) and (b) have to be read in their totality, and by no stretch of logic can, initial training of a Naval Officer, be made to be circumscribed, to the extent of all training *de hors* the consequent Competency Board. It is not possible to train Naval Officers on board warships, without their competency being established in Electrical Specialisation Course, as well as their qualification in the required tests.

14. Failure to qualify in this Board, in the case of applicant, indeed retains him in the category of under trainee/ probation officer. The Constitutional provisions under Article 311 of the Constitution are well known and a probationer acquires no right to any post; further the period of probation, if extended beyond that initially prescribed, is also an acceptable fact, due to circumstances and in the absence

of a confirmation, extension or overrun of the period initially prescribed, does not confer any benefit or permanency to the individual. Constitutional judgments in this regard, are illuminating on this issue.

15. When related to the provisions of Article 311 of the Constitution, (despite being only selectively applicable to the Armed Forces).

- (a) **Probationer:** *A probationer is a person who has been appointed on trial and has no right to the post held by him. (UT of Tripura Vs. G.C. Dutta Choudhury, AIR 1963 SC 601 1963 Supp (1) SCR 266:1963(2)).*
- (b) **Status of a probationer after expiry of specified period of probation:** *Where the Rules or the order of appointment expressly provide that the probationer will be automatically confirmed on the expiry of a specified period or on expiry of the maximum period fixed, it is obvious that no order of confirmation will be required after the expiry of the period. In the absence of such an express provision, merely because his original period of probation on an extended period has expired. He continues to be a probationer until there is an affirmative order of his confirmation by a competent authority on being satisfied as to his worth. (Sukhbans Singh Vs. State of Punjab, AIR 1962 SC 1711; Rama Swamy GS Vs. IG of Police Air 1966 SC 175 (179); Union of India Vs. Arun Kumar Roy (1986) 1 SCC 675(para 15); AIR 1986 SC 737; Madan Gopal Vs. State of Punjab AIR 1963 SC 531, Indra Kumar Chopra Vs. Pradeshik Co- operative Dairy Foundation Ltd (1992) 2 CLJ 424 (para 16).*

16. In backdrop of aforesaid discussions, we are of the view that the applicant did not complete his mandatory training as required, in order to be classified as trained officers, and indeed remained under trainees/ probationers.

17. The second question is regarding change of Branch. Change of branch for an under trainee officer in a designated branch of the Navy, is not a right. In the instant case, it is clear that the electrical branch is a distinct and specialized branch within the Navy, as also is the logistic branch of the Navy. It is also evident that there are direct intakes of officers in the logistic branch and it is not merely recipient of rejects/officers who are unable to perform in other branches. As such the applicant cannot claim any right for having side stepped, or being re-inducted in another branch of the Navy. It is surprising to observe that the officers are also motivated to side step in a logistic branch (or at arms branch etc) since it is less rigorous and challenging. Such considerations in young officers seem inappropriate. The Navy has also qualified that while such change of branch were permitted earlier, they have been stopped as a policy, since there emerged a deleterious trend in officers, who took the rigorous of the Electrical Specialisation Course lightly being assumed that in failure they would be adjusted in the more congenial logistic branch. The court is also seized of the fact that officers who are either Naval aviators or observers, have different

terms and conditions of service and also a different functional paradigm hence conditions for them to be adjusted, if grounded, in other Naval branches does not have a commonality with that of officers of the electrical branch of the Navy.

18. As far as third question regarding justification of termination of service of the applicant is concerned, specific performance of the applicant during training as Short Service Commissioned Electrical Officer is self-explanatory and explicit. The officer has not been able to succeed in the mandatory Electrical Specialisation Course. The officer in his turn consequent to training was tested by a Naval Board and he failed to qualify in the tests conducted for his batch. Subsequently, in order to immediately present the officer with a second chance to overcome his short comings, he was given a subsequent test by the Board. In this also the officer remained unsuccessful. It is evident that despite re-attempt, the officer remained unsuccessful.

19. It is also evident that adequate coaching and advise was given to the applicant during the period of his Electrical Specialization Course. Despite all these efforts the applicant has remained unsuccessful. The Navy has also adequately intimated progress and consequence to his parents/guardians, as well as to the applicant himself, so that there can be no doubt or apprehension

that the applicant was not in any way aware of the consequence of failure. Given the fact that the Indian Navy has to train officers for war, on ships that are meant to prosecute war/armed interventions in extremely high risk situations, it cannot be accepted that officer who do not qualify on duties mandated on a ship, have a locus-standi to be retained despite repeated failure. We, therefore, finds no reason why the officer, could not be terminated, and the justification of the Navy to proceed with his withdrawal/termination is endorsed.

20. The provisions, for this termination/withdrawal, are contained in the No. 31/2006 as well as regulation 126 and 160. While there is no ambiguity of the application of No. 31/2006 and regulation 126, the regulation 160, even if not applicable to the specific case of the applicant, still contemplates the same withdrawal/discharge from service in view of failure of Electrical Specialisation Course. Whether the delegated powers fulfil the requirement to supersede the Navy Act (Section 15(1) and (2) reproduced below, remain an issue to be firmed in by the Court:-

Extract of Navy Act,19

15. ***Tenure of service of officers and sailors***

(1) *Every officer and sailor shall hold office during the pleasure of the President.*

(2) *Subject to the provisions of this Act and the regulations made there under:-*

(a) *the Central Government may dismiss or discharge or retire from the Naval service any officer or*

sailor“

(b) *the Chief of the Naval Staff or any prescribed officer may dismiss or discharge from the naval service any sailor.*

21. In furtherance of this it would be pertinent to revisit some constitutional aspects. Under Article 310 of the Constitution the aspect of the doctrine of pleasure appointment has relevance. The doctrine of pleasure appointment received constitutional sanction under Article 310 of the Constitution but unlike the United Kingdom, in India it is not subject to any law made by Parliament but is subject to only whatever is expressly provided by the Constitution. Therefore, the distinction has to be borne in mind, the doctrine of pleasure as it existed in feudal set-up and in the democratic set-up. Every appointment made by the Central Govt. is in the name of the President but by that it does not mean that the appointments are pleasure appointments de-hors the Constitution or statutory rules bearing on the subject. Once the regulations have been framed and detailed procedure laid down therein, then in that case if the services of an incumbent are required to be terminated then that can only be done in the manner provided and none else”.

(UOI vs. Shardinu (2007) 6 SCC 276, 285-87).

22. **Related to whether the pleasure has to be exercised personally;** it is now settled that the pleasure under Article 310(1) need not be exercised by the President or the Governor personally. It may be exercised-

(a) By the President or the Governor acting on the advise of the Council of Ministers (because it is an executive power“ within the meaning of Article 53(1) 74(1); 77(1);154(1); 163(1), 166(1) or

(b) By the authority specified in the Acts made under Article 309 or the Rules made there under who is competent to dismiss such person serving under the Union or a State, as the case may be. (Union of India Vs. Tulsiram Patel, AIR 1985 SC 1416; Shyam Lal Sharma Vs. Union of India, AIR 1987 SC 1137.

23. When reviewing the scope of non-statutory rules and orders (Article 309 of the Constitution); it is clear that where a rule or order is merely administrative, having no force of law, there is no cause of action for breach thereof, unless such breach constitutes a violation of some statutory or constitutional provision.” (Kallotimath RS Vs. State of Mysore , AIR 1977 SC 1980).

24. A perusal of the various statutory legal and administrative provisions, has made it amply evident that while a naval order or administrative instructions such as No. 31/2006 or Regulation 126 may indeed view that non qualification would be resultant for termination, we remain of the view that termination of officer would

indeed has to be in accordance with law. In the production of delegated instructions originated by the MoD, in favour of Chief of Personnel of the Navy, it is not evident to the court whether the provisions specified in Section 15 of the Navy Act have subsequently, been superseded by the letter on delegated powers, based on the procedure and provisions given in section 184 of the Navy Act. This raises a focused question of law. While the services under the Ministry may have been given delegated provisions laid down in administrative instructions, do these administrative instructions which extend to the termination of services of officers, indeed fulfil the requirement of Section 184 of the Navy Act. A perusal of Section 15 of the Navy Act as well as Regulation 160 would reveal that the termination of an officer can only be undertaken by the Central Government. There is no doubt that applicant was commissioned officer. As such the court cannot hold his termination by the Chief of Personnel of the Navy under delegated administrative powers as is legally sustainable, in the light of the fact that Section 15 of the Navy Act has unambiguously classified that the termination of officers, can only be done by the Central Government.

25. In light of the preceding, it clearly emerges, that while the Central Government, vide its administrative order, has indeed delegated the powers of withdrawal of under trainee officers, to the

Chief of Personnel of the Navy, this action, has not been in accordance with the procedure envisaged in the Navy Act 1957, section 184. Further there is no ambiguity in the fact, that the applicant was commissioned officers. Consequently the provisions of the Navy Act 1957, section 15, would need to be fulfilled, in terms of termination of service by the Central Government. The delegated authority (COP) does not have the competence to order the termination, since in light of the statutory provisions, Navy Act 1957, a delegated administrative power, not following the procedure laid down in section 184 of the Navy Act, could not exist in relation to the case of a commissioned officer, when the provisions of Navy Act 1957, section 15 remain pre-eminent.

26. The court in arriving at its decision, must also consider the Constitutional Bench judgment of the Hon^{ble} Supreme Court, in the case of Managing Director, ECIL, Hyderabad and others vs. B. Karunarkar and others (1993) 4 SCC 727 (By a 5 Members Bench). In deliberation on the issue of Natural Justice, the judgment states:

“In Chairman, Board of Mining Examination v. Ramjee the Court has observed that natural justice is not an unruly horse, no lurking land mine, nor a judicial cure-all. If fairness is shown by the decision-maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to

the administrative realities and other facts of a given case, can be exasperating. The Courts cannot look at law in the abstract or natural justice as a mere artifact. Nor can they fit into a rigid mould the concept of reasonable opportunity. If the totality of circumstances satisfies the Court that the party visited with adverse order has not suffered from denial of reasonable opportunity, the Court will decline to be punctilious or fanatical as if the rules of natural justice were sacred scriptures.”

27. When examining the issue of actions by the Court related to the retrospective issues of a applicant the following is relevant:-

“When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non-furnishing of the report may have prejudices him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back-wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical and exasperating limits. It amounts to an “unnatural expansion of natural justice” which in itself is antithetical to justice”.

28. In the instant case the issue is of a termination simpliciter, devoid of any disciplinary dimensions. The circumstances leading to the termination of the applicant, in no way alter due to exercise of actual powers of termination by a delegated authority in place of a Statutory Authority.

29. Selected cadets imparted training in the INA should not only have physical ability, but mental fitness to withstand stress and strain and, if not, at time of war and stressful situations they will turn out to be causality. A cadet being part of the Armed Forces is to be physically fit and mentally stable. Furthermore, as he is the back bone of the Armed Forces, no relaxation over his mental and physical fitness is permissible relying upon the decision of the Apex Court in **S.R. Tewari v. Union of India & anr. (2013) 6 SCC 602**, it is submitted that the Courts should refrain from substituting its own views and findings on detailed appreciation of evidence on record. Scope of interference of Courts in a case of this nature is very limited and restricted to exceptional cases. We do not find any merit in the challenge so canvassed by the applicant.

30. A cadet undergoing training in the academy is chiselled out to face any stressful situation and if he is shown to be vulnerable to stress and strain his continuance in service has to

be seriously examined. On completion of training in the INA these cadets form the back bone of the Naval Force and in time of war and other stressful situations over and above their physical fitness their mental fitness will play a pivotal role in the efficiency of the Force. When that be so, on an overall assessment of the facts and circumstances presented in the case, there cannot be any doubt that the conclusion formed by the respondent in dismissal of service of the applicant cannot be found fault with. We do not find any merit in the applicant submitted by the applicant.

31. In the case under consideration, the applicant was terminated due to inability to clear his mandatory tests, and court finds no reason to fault his termination being of competency of the authority ordering the termination. Consequent to this consideration, and having perused all documents on record we are of the view that applicant is not entitled for reinstatement in service.

32. In view of the aforesaid reasons and discussions, we do not find any substance in the present O.A. which deserves to be dismissed. It is, accordingly **dismissed**.

33. There will be no order as to costs.

(Maj Gen Sanjay Singh)
Member (A)

Dated : 23 March, 2023

UKT/-

(Justice Ravindra Nath Kakkar)
Member (J)