

(1998) 06 SHI CK 0002
High Court of Himachal Pradesh
Case No: C.W.P. No. 400 of 1998

R.K. Mohan

APPELLANT

Vs

Union of India (UOI)
and Others

RESPONDENT

Date of Decision: June 26, 1998

Citation: (1999) 2 ShimLC 161

Hon'ble Judges: Kamlesh Sharma, Acting C.J.; Surinder Sarup, J

Bench: Division Bench

Advocate: Rama Kant Sharma, for the Appellant; Rahul Mahajan, Additional Central
Government Standing Counsel, for the Respondent

Final Decision: Allowed

Judgement

Kamlesh Sharma, A.C.J.

1. The Petitioner is a Colonel in the Indian Army. He is presently posted at Headquarters Army Training Command, Shimla. In pursuance to the letter dated 20.2.1998 (Annexure P-1), the Petitioner gave his undertaking on 16.3.1998 (Annexure P-2) which was counter-signed by his Controlling Officer on 20.3.1998. The undertaking was that on being selected to undergo any of the courses, namely, HC-27/LDMC-29/HACC-22/NHCC=11, he would continue to serve the Indian Army, if required to do so for a minimum period of five years, and, in the event of his obtaining release/premature retirement at his request, he would be liable to pay to the Government the proportionate cost of training in respect of the period for which he would fail to fulfil the undertaking. But on 21.5.1998, the Petitioner gave his unwillingness (Annexure R-2) which was forwarded by his Controlling Officer on the same day by his letter (Annexure P-3) stating that the earlier willingness of the Petitioner be treated as superseded.

2. Thereafter, Army signal dated 25.5.1998 (Annexure P-4) was received by the Army Training Command, Shimla, on 26.5.1998 which, in turn, informed the Petitioner on

28.5.1998 that he stood selected and detailed for LDMC-29 course at Secundrabad. On receipt of this information, the Petitioner gave fresh undertaking (Annexure P-5) which was counter-signed by his Controlling Officer and forwarded by the Deputy Military Secretary to Respondent No. 3 on the same day, i.e., 28.5.1998. Further, besides intimating Respondent No. 3 on telephone on 28.5.1998 that unwillingness of the Petitioner stood superseded by his willingness given on 28.5.1998, the Deputy Military Secretary also wrote letter (Annexure P-6) and sent military signal (Annexure P-8), on the same day, i.e., 28.5.1998, explaining the circumstances under which the Petitioner had given his unwillingness. The Petitioner also sent military signal on 29.5.1998 (Annexure P-7) informing that fresh undertaking was sent by him on 28.5.1998 in response to letter dated 25.5.1998.

3. Despite this, Respondent No. 3 sent signal on 29.5.1998 (Annexure P-9) informing that the Petitioner has been taken off from the LDMC-29 course being unwilling which was conveyed to the Petitioner on 30.5.1998. On receipt of this information, the Deputy Military Secretary sent his letter dated 30.5.1998 (Annexure P-10) contesting that it was not correct that the Petitioner being unwilling, was liable to be taken off the course. He also sent Military signal (Annexure P-11) on 6th June, 98 requesting Respondent No. 3 to give interview to the Petitioner. However, Respondent No. 3 instead of giving interview to the Petitioner himself delegated his powers to another officer who, according to the Petitioner, had earlier taken the impugned decision (Annexure P-9). When no positive result came out, the Petitioner made one representation dated 6.6.1998 (Annexure P-12) to Respondent No. 3 and another dated 9.6.1998 (Annexure P-13) to the Chief of Army Staff but of no avail. In this background, the Petitioner has approached this Court as a last resort with the prayer that the order dated 29.5.1998 (Annexure P-9) whereby the name of the Petitioner has been taken off from LDMC-29 course, being unwilling, may be set aside and directions may be issued to the Respondents to allow the Petitioner to undergo the said course being eligible and duly selected by the authorities on merit.

4. The Respondents have filed reply to the writ petition on the affidavit of Col. S.M. Dalai, presently posted in Station Headquarters, Shimla. Besides taking preliminary objection that the writ petition is not maintainable in view of his pending representation before the Chief of Army Staff, the Respondents have opposed the writ petition on merits. It has been admitted that the undertaking dated 16.3.1998 of the Petitioner given in response to letter dated 20.2.1998 was received by them on 25.3.1998 whereas the unwillingness dated 22.5.1998 was received by them on 27.5.1998. The case of the Respondents is that fresh willingness certificate asked for vide signal dated 25.5.1998 was to be given by the officers who were stepped up and detailed for courses other than those for which they had -already forwarded their willingness certificate and the Petitioner having already forwarded unwillingness certificate vide his letter dated 21.5.1998 for all the courses was, thus, not required to submit a fresh certificate. It is further stated by the Respondents in their reply that the second willingness certificate dated 28.5.1998 of the Petitioner

was faxed from Shimla on 29.5.1998 and was received by Respondent No. 3 on 1.6.1998. It is not denied that the Deputy Military Secretary had contacted Respondent No. 3 on 28.5.1998 intimating to him that the Petitioner had exercised fresh willingness superseding his earlier unwillingness but the stand of the Respondents is that the Deputy Military Secretary was apprised that as per the policy/rules, the name of the Petitioner was required to be taken off the course due to his unwillingness. It is further stated that interview was given to the Petitioner by the Additional Military Secretary of the rank of Major General, who had taken decision in the matter with the approval of the Military Secretary.

5. After hearing the learned Counsel for the parties and going through the record, we are of the view that the case of the Petitioner was not considered by the competent authority in the right perspective. No doubt, the Petitioner had given his unwillingness on 21.5.1998 in supersession of his earlier willingness dated 16.3.1998, which was received by the Respondents on 27.5.1998, yet the impugned order could not be passed in view of the fact that on receipt of information on 28.5.1998 by Army signal dated 25.5.1998 (Annexure P-4) that he was selected on merit and nominated for LDMC-29 Course, the Petitioner immediately gave his fresh undertaking/willingness which was conveyed to Respondent No. 3 by the Deputy Military Secretary on telephone on the same day i.e. 28.5.1998, though the letter and the military signal also sent on the same day, i.e. 28.5.1998 by the Deputy Military Secretary explaining the circumstances under which the Petitioner had given his unwillingness was received on 1.6.1998, as stated by the Respondents. The unwillingness received by the Respondents on 27.5.1998 might have been under consideration but before final order could be passed on 29.5.1998 taking off the Petitioner from the course, the Respondent No. 3 had already received information that the Petitioner has given his willingness/undertaking afresh in supersession on his willingness which was not considered by Respondent No. 3 by taking technical and pedantic view. The Respondents are not right that once the Petitioner had given his unwillingness, he was debarred from undertaking the course despite his giving fresh undertaking/willingness immediately on receipt of information that he was selected on merit and was nominated for the course, in view of clause eleventhly in the letter dated 25.5.1998 (Annexure P-4) that "fwd fresh undertaking as per AO 17/95 imdt". OA 17/95 is included in the Special Army order (Annexure P-14) and is reproduced at Page 51 of the Paper Book. Its clause 2 is relevant. It is:

2. The form of undertaking is given in Appendix B. It will be signed by the officer in the presence of his commanding officer, who will forward the undertaking to the controlling MS sections in the Military Secretary's Branch as well as MS 4 CR, Army Headquarters, within 10 days of the receipt of intimation of the officer's selection for the course.

6. In view of this clause, the Petitioner was within his right to give fresh undertaking/willingness within a period of ten days from the receipt of intimation of

his selection for the course. It is clear that by issuing letter dated 20.2.1998 (Annexure P-1) earlier OA 17/95 was not superseded and a joint reading of both these documents makes it further clear that fresh undertaking could be given by the Petitioner on receipt of intimation of his selection for the course. The order dated 20.2.1998 (Annexure P-1) has supplemented OA 17/95 and it was issued, obviously, for the reason that if undertaking of officers is received in advance it would facilitate their nomination/detailment for the courses at a short notice. But this does not take away their right to give fresh willingness within a period of ten days from the date of receipt of information of their nomination/detailment. It is another matter that on the basis of existing unwillingness, an officer is debarred from consideration for selecting/nominating him for the course which is not the case in the matter in hand. Further, we do not find any substance in the stand taken by the Respondents that fresh willingness certificate under clause eleventhly in the letter dated 25.5.1998 (Annexure P-4) was called for from the officers who were stepped up and detailed on courses other than those for which they had already given their willingness certificate as it is nowhere stated in the said letter.

7. From the perusal of the representation of the Petitioner, we are satisfied that he had given his unwillingness under great stress and strain of his family circumstances and children's education factor. No doubt, expeditious action was required to be taken by the Respondents on receipt of unwillingness of the Petitioner who stood selected on merit and detailed for the course in order to avoid wastage of one seat in the training college but in the present case the impugned order dated 29.5.1998 could not be passed as the Petitioner had already given his willingness afresh on 28.5.1998, that is, a day earlier, and had withdrawn his earlier unwillingness. We find that in their reply affidavit filed a day before on 24.6.1998, the Respondents have not stated whether any other officer has been selected on merit and nominated in place of the Petitioner. On the other hand, the Petitioner, during the course of his submissions, has stated that on his request that his writ petition is under consideration before this Court, one seat has been kept vacant for him in the training college against which he can be accommodated, which submission has not been controverted by the learned Counsel for the Respondents. However, without going into this controversy, we are of the view that if any other officer is selected and nominated in place of the Petitioner, he will not be called back and the Petitioner will also be accommodated in view of our findings that the impugned order taking off the Petitioner from the course in question on the ground of his unwillingness is not sustainable in law. For the reasons given hereinabove, the impugned order is arbitrary and not in consonance with OA 17/95 read with letter dated 25.5.1998 (Annexure P-4). Therefore, the writ petition is accepted and the impugned order dated 29.5.1998 (Annexure P-9) whereby the Petitioner is taken off the course due to his unwillingness is set aside and the Respondents are directed to allow the Petitioner to undergo LDMC-29 course at Secundrabad.

8. In the end, we may observe that we have passed this judgment in the peculiar facts and circumstances of this case and it may not be considered as a precedent for other cases in which the officers are debarred for consideration for selection/nomination for the reason that they have exercised their unwillingness for the course.

There is no order as to costs.