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Delhi High Court

Case No: Writ Petition (C) 2619 of 2001

Sub. Maj. R.S. Rana and Others		APPELLANT
	Vs	
Union of India (UOI) and Others		RESPONDENT

Date of Decision: Sept. 23, 2008

Acts Referred:

- Constitution of India, 1950 - Article 12, 14, 16, 21, 22
- Defence Service Army Regulations, 1987 - Regulation 150, 163

Hon'ble Judges: Sanjay Kishan Kaul, J; Mool Chand Garg, J

Bench: Division Bench

Advocate: Bahar U. Barqi, for the Appellant; Sanjay Katyal, for the Respondent

Final Decision: Dismissed

Judgement

Sanjay Kishan Kaul, J.
The petitioners were inducted directly as Junior Commissioned Officers (for short "direct entry JCOs") in the Military Engineering Service (for short "MES") of the Army as is permissible under para 150 of the Defence Service Regulations of the Army (for short "the Regulations") after a decision was taken by the Central Government in 1963 due to the shortage of qualified personnel after the Chinese aggression. The induction started after the Ministry of Defence, Government of India issued a letter dated 19th October, 1963 prescribing terms and conditions of such recruitment. However the retirement of the direct entry JCO"s is governed vide Clause 163 of the Regulations, which reads as under:

163. Retirement.-JCOs-(a) Retirement of JCOs of all Arms of the Services, who opted for revised terms operative from 01 Dec 76 is compulsory on completion of the following service, tenure or age limits:

(i) Nb Ris/Nb Sub ... 26 years pensionable service or 50 years of age, whichever is earlier.

(ii) Ris/Sub ... 28 years pensionable service or 50 years of age, whichever is earlier.

(iii) Ris Maj/Sub Maj ... 32 years pensionable service, 4 years tenure or 52 years of age, whichever is earliest.

2. The petitioners are aggrieved by the stipulation of four years tenure on attaining the rank of Subeder Major, which it is stated results in their Compulsory Retirement. It is stated that this is happening because the Ministry of Defence has not made specific terms and conditions of service for direct entry of such JCO"s. It is submitted that on account of existing policy the direct entry JCOs are also not getting pension equivalent to their counterparts who also retire as Subedar Major but gets full pension due to longer tenure.

3. The petitioners by way of the present writ petition have made a challenge to the constitutional validity of the relevant clause in Regulation 163 as also to the policy instructions No. 1(6)/98D/Pension/Services dated 03.02.1998 annexed with the petition as Annexure P-III insofar as the said provision stipulates about the extent of pension admissible to them after the revision of pay scales. It is submitted that those conditions are unfair, unreasonable, discriminatory and ultra vires of the Constitution. They have also stated that various representations made by them have also not been considered by the respondents. Hence they have filed the present writ petition seeking following directions to be issued to the respondents by invoking Article 226 of the Constitution of India inter alia:

i) to issue appropriate writ, order or direction to strike down Clause 163 of Defence Service Regulations for the Army for retirement of Direct Entry JCOs on completion of tenure of four years on attaining the rank of Sub Major as discriminatory, unreasonable and violative of Articles 14 & 21 of Constitution of India.

ii) to quash the order dated 25 June 2001 of respondent No. 1 (Annexure P-6) being unreasonable, arbitrary, discriminatory and violative of Articles 14 and 16 of the Constitution of India.

iii) to issue a writ of Mandamus directing the respondents to immediately formulate fair and reasonable terms and conditions of service of the petitioners in connection with their age of superannuation by way of compulsory retirement, keeping in view the existing policy on the subject as applicable to the other similarly placed employees of the Government of India wherein they are allowed to continue in service up to the age of 60 years, and to exercise its powers and statutory obligations laid down under Clause 150 of the Defence Service Regulations.

iv) to issue appropriate writ order or direction to quash the Government of India, Ministry of Defence Policy Instruction No. 1(6)/98D(Pension Services) dated 3 February 1998, in so far the said provisions stipulates the extent of pension admissible to the petitioners, which is not the full amount of pension admissible for the respective JCO rank and declare the same to be unfair, unreasonable, discriminatory and ULTRA-VIRES the Constitution of India.

v) to issue a writ of mandamus to the respondents to allow the petitioners the full amount of pension connected with the respective JCO ranks, in the event of their being compelled to accept compulsory retirement of completion of lesser number of years of service, compared to other Government employees of the Union of India.

vi) Also to issue appropriate writ, order or direction to the respondents to make the retirement of the petitioners which may take place during the pendency of proceedings, subject to the outcome of this writ petition.

4. The respondents contested the petition by filing a counter affidavit. According to them, the petitioners are direct entry JCOs in the MES who have been appointed in terms of Clause 150 of the Regulations. They are governed by the policy of the Government as laid down by the Ministry of Defence letter dated 19th October, 1963. It is submitted that the intention of the Ministry while making such recruitment was very clear. They offered only a short term employment pursuant to emergent requirement in the post 1962 situation. The letter clearly stipulates that the engagement of JCOs was for a period of 5 years extendable by 2 years at a time. Para 9 and 10 lays down that for the purpose of the rank, seniority, promotion, pay and allowances and other concessions the Direct Entry JCO will be equated at group "X" category of JCOs in the Indian Army and their retirement would be as per Clause 163 of the Regulations. It is further submitted that the Direct Entry JCOs forms a class by itself and they cannot be compared with the regular wing of the Army. The service conditions of the regular and direct entry JCO makes it clear that they enjoy different class of facilities. A direct entry JCO joins the service as Naib Subedar and picks up the rank of Subedar Major within a period of 12 years approximately, whereas others are recruited as Sepoy and undergo various selection processes before they become a Naik Havildar, Naib Subedar and Subedar etc. By this time the regular recruit spends more than 12 years. Moreover the regular army personnel is required to serve various places under harsh and severe conditions before he reaches the rank of Naib Subedar. However a direct recruit without undergoing any of these difficulties directly picks up the above rank at the entry itself. The petitioners having enjoyed the benefit of holding the rank of Naib Subedar directly cannot say at this stage that their service conditions are harsh. Unlike other combatant JCOs, direct Entry JCOs also get opportunity for deputation cum re-employment opportunities whereby they can serve till the age of 60 years as the civilian do in MES on exercising such an option. The respondents thus submitted that it would not be justified to compare the various entries which have different terms of engagement based on the requirement of the organization. It is submitted that if the pension benefit of short term JCOs and other regular JCOs is

amended as desired by the petitioners at direct entry JCOs, it will have wide ramifications against the service interest of regular long term employees. Moreover the regular long term employees are exposed to rigour of extended service under different conditions, consequently retirement benefits given to them would have to be necessarily better than those who have been exposed for lesser number of years. It is also submitted that the government never gave any undertaking or any indication that those recruited through such policy shall remain on long-term regular employment and shall be entitled for benefits given to the regular employees. The Direct Entry JCOs were fully aware of the specific terms and conditions of the service prior to their induction. Even after retirement, the Direct Entry JCOs can apply for Special Commissioned Officer/Special List Commission/Army Cadet Corps and are free to be absorbed in the officer cadre where they can rise upto full Colonel''s level. The Government of India vide letter No. 76878/E1A/1669-S/D (Works-II) dated 29th December, 1969 has also given option for grant of regular junior commission to such direct entry JCOs who are willing and found suitable. It is also stated that the recruitment of Direct Entry JCOs was necessitated only in a particular period. Today no direct entry JCO is recruited which shows that the recruitment at the relevant time was for fulfilling a particular need. In fact no Direct Entry JCOs has been inducted since 1994 since the department has not felt the need for the same. It is submitted that Clause 163 of the Regulations which provides the terms and conditions of their retirement is fair, just and reasonable and is in consonance with cardinal principles of Constitution of India. It is prayed that the writ petition be dismissed in view of the aforesaid.

5. We have heard the submissions from both the sides. During the course of arguments, the respondents have also brought to our notice a Division Bench Judgment of High Court of Uttaranchal delivered in Writ Petition No. 94/2005 dealing with exactly similar issues raised before us in this case. The petitioners who filed the petition before Uttaranchal High Court were also appointed as direct JCOs in accordance with para 150 of the Regulations. They also picked up the rank of Subedar Major for a limited tenure by way of a short commission and had to retire as per para 163 of the Regulations and retired after the completion of their tenure by which time they had also not attained the age of 40 years. There also the aggrieved petitioners raised similar issues and made similar prayers as aforesaid. The stand of the Government and other respondents was exactly similar as submitted before us. However, the said petition was dismissed by the Division Bench by making the following observations:

5. The claim of the petitioner in all these cases is contested by the respondents by filing counter affidavit stating therein that prior to 1995 Diploma Holder in JE (Civil) and JE (E & M) were recruited in the Military Engineering Service (MES) as Naib Subedar as per Govt. of India, Ministry of Defence Letter No. 78878/E/1A/1155-S/D (works II) dated 19.10.1963, contained in Annexure No. 1 to the counter affidavit filed in Writ Petition No. 93 of 2005. According to said letter, the civilians with requisite technical qualification were recruited in regular Army (MES Militarised Cadre) as Naib Subedar, as Direct Entry Junior

Commissioned Officer (DEJ) for five years under the provision of Para 150 of the Defence Services Regulations for the Army, 1987. They were asked to submit their option for further extension of the service and accordingly they were brought on regular engagement by the same term and condition as applicable for the non-MES combatant JCO of the Army. The petitioners have also given their willingness to come under regular Army. It is not disputed that the petitioners were enrolled as direct entry JCO as Naib Subedar (MES Militarised Cadre) on fulfilling the criteria and have been promoted to the rank of Subedar Major. The petitioners; contention that the discharge certificates were issued to them by misapplication of Regulation 163 of Defence Services Regulations-1987 were denied by the respondents. It is stated that the petitioners have already given their willingness to come under regular Army. It is also contended by the respondents that the commission of direct entry JCOs are granted under specific orders and the terms and conditions of their services, i.e. upto five years of service. Once they complete five years" service, willingness is asked from them to continue in the service. This willingness means that they are willing to accept the regular engagement and also willing to accept the same terms and conditions applicable for the other JCOs of the Army. In view of paragraphs 3 & 6 of letter of Govt. of India, Ministry of Defence dated 29.12.1969 (Annexure 2 to the counter affidavit in Writ Petition No. 93 of 2005), the plea for having a separate set of rule for Direct Entry Junior Commissioned Officer (DEG) is not tenable.

6-11. xxxx

It was held:

12. It is evident that it is a case of contract, wherein the promise if alters his position, the Government would be bound by the promise. Here in the instant case by framing the Regulation 150 of the DSR, which was revised in 1987, it cannot be said to be a promise as is evident from the language. Regulation does not require the petitioners to alter their position. However, the doctrine of promissory estoppels is attracted in case of Government contract and it cannot be a ground to issue writ of mandamus as it is settled law that no mandamus can be issued to enforce a statutory duty cast upon the State.

13. It is settled law that a writ of mandamus cannot be issued to the legislature to enact a particular legislation. It is equally settled that no mandamus can be issued to the Government to frame Rule under Article 309 of the Constitution of India as held by Hon"ble the Supreme Court in the case of State of Jammu and Kashmir Vs. A.R. Zakki and others,

14. In case of A.K. Roy and Others Vs. Union of India (UOI) and Others, , the Constitution Bench of Hon"ble Supreme Court has stated that no direction can be issued to the Government to issue notification for enforcement of the amendment made in Article 22 of the Constitution of India.

15. Regulations sought to be amended are statutory in nature or law within the meaning of Article 12 of the Constitution of India laying down the terms and conditions relating to tenure of the service. Therefore, in view of the aforesaid settled legal position, no mandamus can be issued to the respondents.

16. So far as third prayer is concerned, the petitioners were discharged on account of completion of their tenure as their appointment is of tenure appointment. Hence it cannot be said to be arbitrary or illegal. Therefore, the prayer No. 3 is also refused.

With the aforesaid observations the petition was dismissed.

6. The facts of this case are no different. As observed earlier here also the petitioners were inducted as direct entry JCOs pursuant to the decision taken by the Government of India, Ministry of Defence letter dated 19.10.1963 on the terms and conditions of service as detailed in Annexure P-1 in accordance with Regulation 150 which reads as under:

150. Direct Commissions as JCOs- In very exceptional cases, direct commissions as JCOs may be granted under the specific orders of the Government on terms and conditions of service to be laid down specifically for them.

7. Their retirement was governed by Clause 163 of the Regulations (supra). In view of the aforesaid, once the petitioners recruited as JCOs who joined the service as Naib Subedar were liable to retire either after completing four years tenure as Subedar Major or on attaining 52 years of age whichever was earlier. Thereafter, they also had an option to continue in service, of course, may be at a lower rank to serve up to the age of sixty years if they so wanted or to draw pension as admissible to them in accordance with the terms and conditions of their service as direct recruits JCOs. It has been fairly conceded by learned Counsel for the petitioners that such an option was given to them but has not been exercised by them. In these circumstances, merely because the petitioners retired in or around the age of 40 years after completing their tenure as Subedar Major or having attained the age of 52 years, whichever was earlier cannot have any grievance.

8. As far as the challenge made to the validity of Clause 163 of the Regulation is concerned, it was rejected by the predecessor Bench of this Court vide orders dated 21st September, 2003 which has not been challenged and has become final. Under these circumstances, the petitioners are not entitled to any relief, inasmuch as, their appointment was of a contractual nature which came to an end when they completed their tenure as Subedar Major or attained the age of superannuation as per Regulation 163. As decided by the Division Bench of Uttranchal High Court and rightly so no mandamus can be issued to the legislature for the amendment of the Regulations which are statutory Regulations. In the facts of this case, it also cannot be said that the petitioners have been discriminated against, as they form a class by themselves.

9. Even otherwise the prayer made by them to issue a mandamus to the Government to amend the Rules so as to make their pension equivalent to their counterparts is

misconceived on account of the difference in their service conditions and the years put up by them in service. The option made available to them to seek continuance in service has not been accepted by them.

10. We do not find any merit in the petition which is dismissed leaving parties to bear their own costs.