

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ WP (C) No.67/2008

% Date of decision: May 22, 2008

COLONEL R. JAYAPRASAD ...PETITIONER
Through: Mr.Rajiv Manglik, Advocate.

Versus
UNION OF INIDA & ORS ...RESPONDENTS
Through: Ms. Maneesha Dhir, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE MOOL CHAND GARG

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|----|---|-----|
| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

SANJAY KISHAN KAUL, J. (ORAL)

1. Rule D.B.
2. At request of learned counsel for the parties, the petition is taken up for final disposal.
3. The petitioner was commissioned as a Second Lieutenant in the Army under the Technical graduate course scheme in August 1987 and was granted a permanent commission on 11.6.1988.

4. The petitioner attained his ranks of promotion and was serving as a Lt. Col. in the Army when an option was given to him to join the project team at Kazakhstan on deputation. The petitioner exercised the option and joined the project team on 26.11.2003. The petitioner returned from the foreign deputation on 6.4.2005 after about an year and a half service. The petitioner on his return was promoted a Colonel on 14.6.2005.

5. The petitioner applied for premature retirement on 9.4.2007 on account of family problems arising from his ageing and ailing parents and the requirement to take care of his property. The said application was however, rejected on 17.5.2007 on the ground that "the officer has service liability up to April 2010 due to foreign tenure". The petitioner made a representation against the same on 28.5.2007 stating that he never submitted any undertaking or bond in respect of his service liability before proceeding on deputation abroad and thus the reason for the rejection of his application was not borne out from the records. This representation was also rejected on 10.8.2007 by stating that a reference should be made to the policy decision of the Headquarters of the respondents contained in the letter dated 21.12.99. The further representation of the petitioner dated 21.8.2007 was also rejected on 19.10.2007.

6. The Engineer-in-chief, Head of the Corps of Engineers, addressed a letter dated 19.11.2007 to respondent no. 3, the Military Secretary, Integrated Headquarters, stating that in the

absence of any service liability certificate the case of the petitioner merited attention and once again forwarded the application dated 9.4.2007. This request was also not acceded to on 14.12.2007 on the ground that the service liability of an officer remains valid irrespective of whether the officer had submitted an undertaking or not. It was also stated that officers with foreign service liability were permitted to apply for pre-mature retirement only if non-empanelled or placed in permanent low medical category made them ineligible for further promotion. Since these two conditions did not apply to the petitioner, the petitioner was not eligible for premature retirement. The petitioner has thereafter been constrained to approach this Court under Article 226 of the Constitution of India.

7. Learned counsel for the petitioner has pleaded that at the stage of selection of the petitioner on deputation to the project team at Khazakistan neither was any option in respect of service liability brought to the notice of the petitioner nor was the petitioner asked to sign any such bond. The counter affidavit of the respondents as also the records produced show that such an undertaking or bond was, in fact, never taken from the petitioner. The reason for the same is stated to be an omission which arose at the concerned branch where the petitioner was working. The defence of the respondents is that even if such willingness certificate from the officer concerned had not been taken, the policy decision of 21.12.1999 would apply.

8. In order to appreciate the rival contentions, it is necessary to reproduce the policy decision which is as under:-

“FOREIGN ASSIGNMENT AND COURSES

1. Ref Army HQ letter of even No dated 21 Aug 91 as amended vide letter of even No dated 17 Sep 93.

2. As per para 7 of Army HQ letter of even No dated 21 Aug 91, offrs selected for foreign assignments/courses abroad will give a Written Undertaking to continue to service for a min period of five yrs after the termination of such assignments/courses. Provisions of AO 17/95 are equally applicable to them.

3. A doubt has arisen whether the service liability is applicability to offrs deputed to UN Msns alongwith top contingents. Offrs deputed to UN Msns alongwith tp contingents are screened by the MS Branch for suitability and thereafter approved for the deputation. A deputation to the UN Msns with tp contingent is also treated as a deputation abroad. Hence service liability clause is applicable to all offrs deputed abroad on foreign assignments and courses including the offrs proceeding with tp contingents.

4. All offrs deputed abroad on foreign assignments and courses, incl offrs proceeding abroad with tp contingent are required to submit Willingness Certificate and Undertaking. The relevant formats are as follows:-

(a) Foreign Assignments.

- | | | | |
|------|------------------|---|--------|
| (i) | Willingness Cert | - | Appx A |
| (ii) | Undertaking | - | Appx B |

(b) Courses Abroad

- | | | | |
|------|------------------|---|--------|
| (i) | Willingness Cert | - | Appx C |
| (ii) | Undertaking | - | Appx D |

5. The procedure for submission of the above docu is enumerated in succeeding paras.

6. Offrs called for interview for selection on foreign assignment/courses will bring the Willingness cert and Undertaking in duplicate duly signed by their Commanding Offrs for submission to Army HQ/MS Branch. MS 3D will fwd one copy for the willingness cert and Undertaking to MS 4CR for filing in CRD of the Offr. One copy of the Willingness cert and Undertaking will be fws to controlling MS section.

7. In some cases, offrs are selected for foreign assignments/courses without interview under the following circumstances:-

(a) Notice is short and adequate time is not available to hold interview.

(b) Offrs are selected by controlling MS secs for deputation abroad along with tp contingent.

(c) Offrs deputed for each tech trg of eqpt under procurement from abroad as part of the contract.

8. When offrs are nominated without interviews, they report at Delhi for pre-despatch formalities. Such offrs should submit Willingness Certificate and Undertaking in duplicate on arrival at Delhi to the Sponsoring Dtes. The sponsoring Dtes will dispose of the Willingness Cert and Undertaking as follows:-

(a) One copy of the Willingness Cert and Undertaking to be fwd to MS 4CR for filing in CRD of the offr.

(b) One copy of Willingness Cert and Undertaking to be fwd to controlling MS section.

9. In addition to the above, the offrs will be directed by the Sponsoring Dtes to report to the concerned MS Branch section for briefing and documentation immediately on arr at Delhi. The MS Branch section will confirm that the Willingness cert and Undertaking have been given by the offr. Offrs will report to the following MS sections:-

(a) Deputation with tp contingents – respective Controlling

MS section

(b) All other cases - MS 3D

10. May please be disseminated down to the units."

11.

(emphasis supplied)

9. If the aforesaid policy decision is analyzed, clause 2 of the same provides for a written undertaking to be taken from the concerned officer to continue in service for a minimum period of five years after the termination of such assignment. Undisputedly, this period of five years has not expired. However, it is also not in question that the willingness certificate and undertaking as provided in para 5 of the aforesaid decision was in fact never taken from the petitioner.

10. Learned counsel for the respondents has attempted to explain the omission by reference to para 7 of the policy as in the case of the petitioner the selection was without an interview in view of of sub-para (a) of para 7, i.e., notice was short and adequate time was not available for holding interviews. The matter, however, does not rest at this since in terms of clause 8 willingness certificate and undertaking in duplicate has to be taken on arrival at Delhi by the sponsoring directorates. Thus, the blame is sought to be put on the sponsoring directorate.

11. The aforesaid pleas of the respondents is not sustainable on account of para 9 of the policy decision which requires the M.S Branch section to confirm that the willingness certificate and undertaking have been given by the officer. Thus, it is only a

case of one department blaming the other without accepting the responsibility. The moot point is that the willingness certificate and undertaking was neither taken by the Directorate on arrival at Delhi nor verified by the MS Branch nor thereafter during this tenure, the petitioner was asked to submit the same. Not only that even on the petitioner re-joining in India no such certificates were sought and the matter did not even crop up till the petitioner applied for pre-mature retirement. Interestingly, the petitioner has never been asked to comply with this requirement either before or after the decision taken for rejection of the case of the petitioner.

12. Learned counsel for the petitioner has pointed out that the present case is really not even one of omission as it is only on 30.11.2005 that a circular was issued in respect of foreign assignments, screening of officers of Corps of engineer for engineering task forces and other engineering specific appointments abroad. It is, thus pleaded that at the stage when the petitioner joined the assignment, the policy decision was not even applicable to the cases like that of the petitioner and the clarity emerged only by the subsequent letter dated 30.11.2005.

13. A communication dated 19.11.2007 addressed by the Engineer-in-Chief (where the petitioner is working) is as under:-

“Dear General,

1. IC 48004 N Col Jayaprasad R was on deputation to Embassy of India, Dushanbe,

Tajikistan from 26 Nov 03 to 06 Apr 05 (fifteen months). This tenure was for an urgent assignment for a specific job and not as per the structured/reg vacs abroad, for which the offr are nominated, based on the selection process of the MS Branch. Since the offr did not go through a formal selection process, neither the service liability aspect was apprised nor a cert to this effect was obtained from him.

2. The offr submitted an application for PMr on Apr 07. This application was returned indicating his service liability up to Apr 10, due to his tenure abroad. The offr re-submitted his application on 28 May 07 (clearly indicating the reasons for non applicability of service liability) and again on 21 Aug 2007. These have been turned down citing the MS Branch policy letter No.33023/Gen/Engrs/MSPR dt 31 Dec 99.

3. I have examined the offr's case. His domestic compulsions coupled with the absence of service liability cert merits attn. I would therefore request you to reconsider and process his application for PMR, to enable him to get relief. I am also encl a copy of the offr's application dt 09 Apr 07."

(emphasis supplied)

14. The aforesaid shows that the present case is not one where the certificates were not taken but it was not even put to the petitioner that he would be bound by any such service liability. Thus the expression used is "neither the service liability aspect was apprised". The result is that the petitioner was not made aware of any such service liability restriction before he proceeded for the assignment.

15. A rejection letter dated 14.12.2007 of the respondent reads as under:-

"My dear General,

**PREMATURE RETIREMENT: IC-48004 COL
JAYAPRASAD R. ENGRS**

1. Reference your DO letter No. 90900/Posting/2045/E1A dt 19 Nov 2007 addsd to the MS regarding PMR application in r/o IC-48004 Col Jayaprasad R.

2. The case has been examined. The service liability of an offr remains valid irrespective of whether the offr has submitted an undertaking or not. This aspect has been amplified at Paras 4,7 and 8 of our letter No.04526/MS:Policy dt 21 Dec 1999 (copy encl for ref). Offrs with foreign service liability are permitted to apply for PMR only if non-empanelled or placed in Permt Low Med Cat ineligible for further promotion. In the instant case, the offr does not qualify in either of the categories. Under the circumstances, he is only eligible to apply for PMR on completion of the service liability."

(emphasis supplied)

16. The reading of the aforesaid letter also shows that the only impediment in the way of the petitioner being given pre-mature retirement is the service liability. The relaxations are permissible only in cases if the pre-mature retirement is of a non-empanelled officer or an officer placed in permanent low medical category but the pre-requisite is that the officer should have a foreign service liability. The aforesaid facts show that there can be no question of any such foreign service liability when it was never put to the petitioner nor was the petitioner asked to execute any document in that behalf.

17. We find force in the contention of learned counsel for the petitioner that the assignment was optional and thus it was for

the petitioner to have chosen to go for the assignment. If the petitioner would have known about the restriction of the foreign service liability, he may or may not have opted for the said assignment.

18. Learned counsel for the respondent has referred to the Division Bench judgment of this court in **Shkul Tyagi (Sqn. Ldr.) Vs. UOI & Ors.** 2006 1 AD Delhi 157 but we find the same would have no application to the facts of the present case. All that has been observed in the said Judgment is that the cases of premature retirement on compassionate grounds shall be determined in the circumstances of each case and the requirement of the officer for the service. The only reason of the rejection of the case of the petitioner of having a service liability is fallacious and not sustainable.

19. Lastly, learned counsel for the respondents also pleaded that the petitioner had an alternative remedy in the form of Defence Service Regulation where regulation 105(f) reads as under:-

"The applications for premature retirement / resignation will be examined by Army HQ and submitted for consideration and approval of the COAS, who may reject an application which is not based on adequate and justifiable reasons at his level without reference to the Government or recommend for acceptance by the Central Government. In case, the officer feels aggrieved by the decision of the COAS, he can, if he so chooses, file a statutory complaint addressed to the Central Government under the provisions of section 27 of the Army Act. The decision of the Central Government on application to retire premature/resign will be final."

(emphasis supplied)

20. Learned counsel for the petitioner on the other hand points out that a reading of the aforesaid provision shows that it is not a mandatory provision but only “if he so chooses”. Thus the petitioner should not be relegated to the alternative remedy in the present case more so when the Head of the Department where the petitioner is serving has in fact already re-commended the case of the petitioner by noticing in the letter dated 19.11.2007 that the case was a fit one for grant of relief to the officer concerned. In this behalf, learned counsel has also referred to the provision of Section 27 of the Army Act 1950 which reads as under:

“Remedy of aggrieved Officers.—Any officer who deems himself wronged by his commanding officer or any superior officer and who on due application made to his commanding officer does not receive the redress to which he considers himself entitled, may complain to the Central Government in such a manner as may from time to time be specified by the proper authority.”

21. Learned counsel submits that the remedy of making such representation and seeking redressal only arises if the Commanding Officer or a superior officer does not recommend the case of the petitioner which is not so in the present case.

22. Learned counsel for the petitioner has also pointed out that the undertaking obtained from the officer is not unconditional and there is an alternative remedy available for the release of the

officer subject to the liability to pay the government. The format of the undertaking is as under:-

**“UNDERTAKING TO BE GIVEN BY OFFICERS
SELECTED FOR DEPUTATION/ASSIGNMENT
ABROAD**

1. On being selected for an assignment abroad to _____ I hereby undertake to continue to serve in the Army if required to do so, for a minimum period of five years after completion of my tenure abroad.
2. In the event of my obtaining release/premature retirement at my request during this period, I shall be liable to pay to the Government that much as decided by the Government.

Signature: _____
IC No.: _____
Rank: _____
Name: _____
Arms/service/Regt _____

Dated:

SIGNED IN MY PRESENCE

Signature: _____
Rank: _____
Name: _____
Unit of the Commanding Officer _____

Dated:”

23. The question of however exercising the second option really does not arise in the present case because the undertaking was never taken from the petitioner. Learned counsel for the

petitioner also points out that a number of officers with similar qualifications have already been granted premature retirement at their request.

24. We are thus of the considered view that the decision taken by the respondents in rejecting the case of the petitioner for premature retirement on the ground of service liability cannot be sustained and is hereby quashed. The respondents are directed to communicate the release of the petitioner on the regular terms and conditions within the maximum period of four weeks from the receipt of this order.

25. The petition is allowed in the aforesaid terms, leaving the parties to bear their own costs.

SANJAY KISHAN KAUL, J.

MAY 22, 2008
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MOOL CHAND GARG, J.