

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

% Date of Decision : 27.2.2008

+ **WP(C) No. 7447/2002**

Nb/Sub Ikbāl Singh Sehrawāt ... Petitioner

Versus

1. Union of India and others
Through Secretary
2. Chief of Army Staff
3. Commandant
Artillery Records ... Respondents

Advocates who appeared in this case :

For the petitioner : Ms. Jyoti Singh, Advocate.

For the respondents : Mr. Manoj Ohri, Adv.with Major S.S. Pandey

CORAM :

HON'BLE MR. JUSTICE A.K. SIKRI

HON'BLE MR. JUSTICE J.M. MALIK

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

A.K. SIKRI, J.(ORAL)

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1. The petitioner herein was enrolled in the Army as Soldier Clerk (General Duty) on 20th September, 1980. While on duty the petitioner sustained injury, viz. a fracture in Head of Radius (left) when he was playing football match on 25th July, 1996. He was given medical treatment. The medical board also examined him. Initially, he was put in low medical category CEE (Temporary) on 16th October, 1996. On 16th January, 1997 his medical category was upgraded to BEE (Temporary) and with effect from 16th July, 1997 he was placed in medical category BEE (Permanent).

2. On being placed in medical category BEE (Permanent) normally the petitioner was to be invalidated out of service. However, the Army is having a policy whereby an alternate appointment commensurating with the disability of such an official is given. This is contained in Army Order 46/80. The very first para which stipulates the aim of such a policy lays down that the purpose of this policy is to give sheltered appointment to such persons who are placed in permanent low medical category. It is applicable to JCOs/other ranks. The petitioner was accommodated and retained in service under this policy. In fact,

the Commanding Officer of the petitioner had given the suitability certificate dated 23rd October, 2001 certifying that the petitioner could be suitably employed in his present trade, that is, Clerk (General Duty) and this alternative employment was treated in public interest. Part II Serial no. 0/248/2001 dated 20th January, 2001 was also published to this effect.

3. While the petitioner was continuing in the sheltered appointment as aforesaid, the general instructions dated 6th February, 2002 were issued by the Army Head Quarters (Artillery) for discharge of such low medical category tradesmen whose strength is more than 98% under the provisions of Army Order 46/80. In view of these instructions, the discharge order dated 1st July, 2002 was passed in respect of persons whose names appeared in the appendix attached to the said discharge order. The name of the petitioner also found mentioned therein. This order, inter alia, stated that the retention of permanent low medical category Shape 2 or 3 personnel in service was governed by the Army Order 46/80 and as some of the trades/categories in the Regiment of Artillery had exceeded the sanctioned strength, the persons named in the appendix, who have been placed in

permanent low medical category Shape 2 or 3, were to be discharged with effect from 30th November, 2002 (AN). The specific reason assigned in this order dated 1st July, 2002 was in the following terms:

“On being placed and low medical category, further retention in service is not considered necessary as per AO 46/80 since the strength of their trades/categories has exceeded the sanctioned strength.”

4. The discharge was treated under Army Rule 13(3) as it was categorically mentioned in the said discharge order dated 1st July, 2002 that the cause of discharge would be recorded in the discharge roll as under:

“Discharge being placed in permit medical category lower than SHAPE 1 and not upto the prescribed military physical standard under Item I (III) of the table annexed to Army Rule 13(3)”

5. The petitioner on receipt of the said discharge order filed the present writ petition on 15th November, 2002 challenging this discharge as illegal on various grounds. The show cause notice was issued in this writ petition on 22nd November, 2002. The respondent was granted three days time to file the counter

affidavit as the petitioner was proposed to be discharged with effect from 30th November 2002. The matter again came up for hearing on 29th November, 2002. However, since the counter affidavit was not filed, the court granted the stay of operation of the impugned orders dated 1st July, 2002 and 2nd November, 2002 till the next date of hearing. This stay order was continued from time to time which is still under operation and because of the stay order the petitioner is still in service.

6. We may point out at this stage that as the petitioner was retained in service his case was considered for further promotion and he was given the rank of Naib Subedar with effect from 10th February, 1999. Normally, as Naib Subedar the tenure of incumbent is 26 years. There can be extension of service by two years in appropriate cases. Thus, as Naib Subedar the petitioner could continue in service upto 30th September, 2006. As the petitioner continued in service because of the stay order granted by this court, his name was considered for promotion to the next higher rank, namely, Subedar. As per the extant rules, before the date of retirement in the particular grade, the official is to be considered for promotion. Since the petitioner became eligible for

promotion to the post of Subedar in the year 2003, the promotion board considered his name and placed him in the select panel for the year 2003. However it is not given effect to as yet, in view of the pendency of this writ.

7. If the petitioner is granted promotion as Subedar he gets further tenure of two years and would continue, in normal course, till September, 2008. The petitioner had thus sought an amendment of the writ petition which was allowed, allowing the petitioner to agitate the issue about his next promotion.

8. Having regard to the aforesaid factual position, two issues arise for consideration, namely, (1) whether the discharge of the petitioner from service vide order dated 1st April, 2002 was proper and legal? (2) In case answer to the first issue is in the affirmative, whether the petitioner is entitled to promotion as Subedar, having regard to the medical category in which he is placed?

Issue No.1

9. The learned counsel for the petitioner has contended that there was deficiency of officials in the rank of the petitioner as admitted in the counter affidavit itself and, therefore, there was no occasion to discharge the petitioner from service. In this

behalf, she has referred to counter affidavit dated 5th March, 2003, wherein the respondents have stated that as on 1st March, 2001, the Regiment of Artillery was facing deficiency of 609 clerks and to make up that deficiency, the applications were invited from eligible volunteers from other trades to re-muster into clerk trade. It is further stated by the respondents in the counter affidavit that 32 individuals from other trades were qualified for re-mustering into clerk category and their training were conducted from 6th May, 2002 to 19th October, 2002 at Artillery Centre, Hyderabad. This averment is repeated in subsequent counter affidavit dated 21st November, 2005 filed to the amended petition.

10. It could not be disputed by learned counsel for the respondent that if there was no surplus staff in the category of the petitioner and rather there was deficiency of the officials in the said rank, the petitioner could not have been discharged. It is apparent inasmuch as Army Order 46/80 was pressed into service as per which if some of the trades/categories in the regiment of artillery had exceeded sanctioned strength, such of those personnel who are in permanent low medical SHAPE II or III could

be discharged. Thus the discharge order predicates on the surplus age whereas, as pointed out by learned counsel for the respondent that there was in fact deficiency of the personnel in the rank of the petitioner, as per the averments made in the counter affidavit itself.

11. Faced with this situation, learned counsel for the respondents, at this stage, tried to argue that there was no deficiency of manpower in the trade in which the petitioner was commissioned and in fact, there was surplus. However, we are not inclined to agree with this submission of learned counsel for the respondents in view of the specific averments made in the counter affidavit by the respondents themselves as noted above. We cannot lose sight of the fact that not only it is stated in the counter affidavit that there was deficiency of 609 officers, but also it is mentioned by the respondents that in order to cover up the said deficiency the exercise of re-mustering the employees of other trade to the clerk trade was also undertaken. Such steps would be taken if there is deficiency and not when there is surplus. It may also be mentioned that in the counter affidavit filed in November, 2005, the respondents after mentioning that

the applications were invited from eligible candidates of other trades for re-mustering into the clerk trade to make up the deficiency, have specifically stated the reasons because of which some trades/categories became surplus whereas in the clerk trade there was deficiency. We reproduce that portion of the counter affidavit :

“The action to remuster other personnel into clerk (General Duty) was taken well before when the strength clerk trade was deficient and other trades becoming surplus in the Regiment of Artillery. The main reason where some trades/categories became surplus are:

- a) Due to withholding of clerks due to automation of Artillery Records
- b) Further decrease in authorization of clerks in other establishments
- c) Lifting of suppression of manpower in the Army and release of additional recruitment demand which started materializing during 2001/02.”

12. We, therefore, cannot allow the respondents now to urge that there was surplus in clerk trade and would proceed on the aforesaid statement made by the respondents themselves in the counter affidavit, namely, there was deficiency of officials in the clerk trade.

13. It hardly needs to be emphasized when there was deficiency

in the trade to which the petitioner belongs, there was no occasion to discharge him from service having regard to his medical category which was only BEE (P2). The discharge order is set aside on this ground.

Issue No.2

14. The next question which arises for consideration is as to what would be the effect of putting the petitioner in the select panel for promotion to the post of Subedar in the year 2000. Since in normal course the petitioner would have completed his tenure as Naib Subedar in September, 2006, therefore, the issue before us is as to whether the petitioner would have been entitled to promotion as Subedar had there been no discharge order.

15. It is conceded by learned counsel for the respondents, on instructions, that when the petitioner was in the select list qua the rank of Subedar, he would have been granted the promotion to the said post in normal course irrespective of his medical category since he was in low medical category BEE (P2) and as the said medical category does not disentitle a person to get his promotion.

16. Under these circumstances, we make the rule absolute and

allow the writ petition with a direction to the respondents to give effect to the select list, wherein the name of the petitioner was placed for promotion to the post of Subedar, from the date he was otherwise entitled to such a promotion. As a consequence he should be allowed to continue in such post till September, 2008. The petitioner shall also be entitled to be considered for further promotions in accordance with law. Necessary order shall be passed in this regard within eight weeks from today.

A.K. SIKRI, J.

February 27, 2008
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J.M. MALIK, J.