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

+ W.P.(C) 7302/2016

MAJOR KAPIL SAWHNEY

..... Petitioner

Through Dr. L.S. Chaudhary, Mr. Viresh Chaudhary, Mr. Ajay Chaudhary, Ms. Reema Bholà and Mr. Parambir Singh, Advocates.

versus

UNION OF INDIA & ORS

..... Respondents

Through Ms. Amrita Prakash, Advocate.

CORAM:

HON'BLE MS. JUSTICE INDIRA BANERJEE

HON'BLE MR. JUSTICE ANIL KUMAR CHAWLA

ORDER

% **09.02.2017**

1. The short question involved in this writ petition is, whether a Short Service Commissioned Officer of the Indian Army, who is granted extension but resigns during the period of his extended service, can be denied the benefit of recognition as an Ex-serviceman.
2. The petitioner apparently joined the Indian Army as a Short Service Commissioned Officer on 01.09.2001 and was initially posted in the 7 SIKH (INF) Unit. The petitioner was commissioned for a specific period of five years.
3. After completion of five years of service as a Short Service Commissioned Officer, the petitioner sought extension of his service, as per

the norms for such extension. The petitioner was granted extension for a further period of five years. However, while on extension, the petitioner sought release and he was duly released w.e.f. 15.09.2007. In other words, the petitioner was released after rendering service for about six years.

4. The petitioner was granted the retiral / terminal benefits to which he was entitled, upon acceptance of his resignation and release from service w.e.f. 15.09.2007. An ex-serviceman Card No. 1002383 was issued to the petitioner on 06.03.2007.

5. Counsel appearing on behalf of the respondents submits that this card was issued by the Rajya Sainik Board which is not under the functional control of the Ministry of Defence and such card does not entitle the holder to any special benefit.

6. In exercise of powers conferred by the proviso to Article 309 of the Constitution, the Government of India made the Ex-servicemen (Re-employment in Civil Services and Posts) Rules 1979. The said Rules of 1979 provide for resettlement of ex-servicemen and reservation in inter alia Civil Posts for ex-servicemen.

7. On or about 08.09.2009, the respondent No. 1 framed "Guidelines and Norms for Selection of Resettlement Courses / Institutes - Allotment of Courses and Norms for selection of officers for 24 weeks' Management Course".

8. In terms of the aforesaid Guidelines and Norms, the petitioner was, along with the 20 other officers approved to undergo a Resettlement Course

known as the "Corporate and Industrial Security, Safety and Intelligence Management Course" which was conducted from 27.12.2010 to 06.03.2011. According to the petitioner, the petitioner paid 40% of the expenditure for the course, whereas, 60% was paid by the Government of India.

9. The petitioner claims that after completing the course, the petitioner applied to the respondent No. 3 for his registration under the Rehabilitation Scheme for Ex servicemen. The respondent No. 3, however, by his order dated 26.09.2011, refused to register the name of the petitioner for his rehabilitation under the Rehabilitation Scheme, on the purported ground that he was not covered under the Scheme, in view of the definition of 'ex-servicemen' in the Office Memorandum No.36034/4/85-Estt.(SCT) dated 14th April 1987 of the Government of India, which is set out hereinbelow:

"An ex-serviceman' means a person, who has served in any rank whether as a combatant or non-combatant in the Regular Army, Navy and Air Force of the Indian Union and

- (i) Who retired from such service after earning his/her pension; or
- (ii) who has been released from such service on medical grounds attributable to military service or circumstances beyond his control and awarded medical or other disability pension; or
- (iii) who has been released otherwise than on his own request, from such service as a result of reduction in establishment; or
- (iv) who has been released from such service after completing the specific period of engagements, otherwise than at his own

request or by way of dismissal or discharge on account of misconduct or inefficiency, and has been given a gratuity, and includes personnel of the Territorial Army of the following categories, namely :-

- (i) pension holders for continuous embodied service.
- (ii) persons with disability attributable to military service; and gallantry award winners.”

2. After careful consideration the Government have accepted the above definition recommended by the High Level Committee. However, it may be observed that in the new suggested definition certain categories of personnel which have served in the Armed Forces of the Union have been excluded for consideration as ex-Servicemen, whereas certain additional categories of Territorial Army Personnel have been added in the revised definition. The Notification containing the revised definition was issued on 27 Oct 1986 and published in the official Gazette on 15th Nov 1986. The Notification gives effect to the new definition from the date of its publication, but since some of the categories were excluded without adequate publicity, the effect of the earlier notification of 27 Oct 1986 has been stayed by issuing another Notification dated 27 Mar 87 (copy enclosed) in which the date of effect has been indicated as 1.7.87. The net effect is that the following two categories of personnel, who were included in the pre-revised definition of ‘ex-Servicemen’ will now cease to be treated as ex-Servicemen w.e.f. 1.7.87 as will be seen from the following proviso, namely,

“Any person who has been released :-

- (a) at his own request after completing five years service in the Armed Forces of the Union; or
- (b) after serving for a continuous period of six

months after attestation otherwise that at his own request or by way of dismissal or discharge on account of mis-conduct or inefficiency or has been transferred to the reserve pending such release; shall also be deemed to be an ex-Servicemen for the purpose of this clause.”

3. The Territorial Army personnel will however be treated as ex-Servicemen w.e.f. 15.11.86.”

10. The petitioner inter alia challenged the Office Memorandum dated 14.04.1987 in this Court by filing a writ petition being W.P. (C) No. 2267/2014. While the said writ petition was pending, a Gazette Notification dated 04.10.2012 was issued notifying the Ex-Servicemen (Re-employment in Civil Services and Posts) Amendment Rules 2012, which amend inter alia the definition of Ex-service men in the said Rules of 1979. In view of the observation of the Court that the Gazette Notification dated 04.10.2012 should also be challenged, the petitioner withdrew W.P. (C) No. 2267/2014 with liberty to challenge the Gazette Notification dated 04.10.2012 as well as the order impugned in WP(C) No.2267/2014. Another writ petition being W.P.(C) No. 1197/2015 filed by the petitioner was also withdrawn with liberty to file a fresh writ petition.

11. The definition of Ex-serviceman in Clause (c) of Rule 2 of the said Rules of 1979, as amended by the Amendment Rules of 2012 is as follows;

“(c) An ‘ex-serviceman’ means a person;

(i) who had served in any rank whether as a combatant or non-combatant in the Regular Army, Navy and Air Force of the Indian Union, and

(a) who either has been retired or relieved or

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discharged from such service whether at his own request or being relieved by the employer after earning his or her pension;

or

(b) who has been relieved from such service on medical grounds attributable to military service or circumstances beyond his control and awarded medical or other disability pension; or

(c) who has been released from such service as a result of reduction in establishment;

or

(ii) who has been released from such service after completing the specific period of engagement, otherwise than at his own request or by way of dismissal, or discharge on account of misconduct or inefficiency and has been given a gratuity; and includes personnel of the Territorial Army, namely, pension holders for continuous embodied service or broken spells of qualifying service;

or

(iii) personnel of the Army Postal Service who are part of Regular Army and retired from the Army Postal Service without reversion to their parent service with pension, or are released from the Army Postal Service on medical grounds attributable to or aggravated by military service or circumstance beyond their control and awarded medical or other disability pension;

or

(iv) Personnel, who were on deputation in Army Postal Service for more than six months prior to the 14th April, 1987;

or

(v) Gallantry award winners of the Armed forces including personnel of Territorial Army;

or

(vi) *Ex-recruits boarded out or relieved on medical ground and granted medical disability pension."*

12. Learned counsel appearing on behalf of the petitioner argued that all Short Service Commissioned Officers who complete the requisite period of service of five years are to be treated as a class and given the benefits or facilities of an Ex-serviceman including re-employment/future employment in the quota reserved for Ex-serviceman. Counsel appearing on behalf of the petitioner cited the judgments of the Supreme Court in *Sansar Chand Atri vs. State of Punjab* reported in AIR 2002 SUPREME COURT 1618 and in *Raj Pal Sharma and Ors. vs. State of Haryana and Ors.* reported in AIR 1985 SUPREME COURT 1263. In *Sansar Chand Atri (supra)*, the Supreme Court held as under:-

"It is relevant to note here that in the Certificate issued by the Ministry of Defence the appellant has been described as an ex-serviceman. The provision for reservation in the Service Rules is meant for the benefit of ex-servicemen. The purpose is to provide them with suitable jobs in civil services so that they may not face difficulty in adjusting themselves in civil society after leaving the defence service. In the context of the scheme of the provision the provisions in the Rule should be interpreted in a purposive and reasonable manner so that the intent and purpose of the provision is served. From the provisions in the rules it appears that a distinction has been made by persons who are released from the army on ground of medical disqualification or on ground of inefficiency or misconduct. Such distinction is reasonable keeping in view the purpose of reservation of posts made under the Rules. All the ex-defence service personnel are to be treated as a class separate from other candidates for the purpose of offer of jobs and no differentiation or discrimination can be made

amongst them unless such differences are real and substantial. Testing the provisions in this context we are of the view that a person in the army who has earned pension after putting in the requisite period of service before leaving the army whether at his own request or on being released by the employer on any ground should be treated as an ex-serviceman who has retired from the army. Such treatment is to be meted out to all such persons irrespective of whether the nomenclature used is 'relieved' or 'discharged' or 'retired'. If the contention raised on behalf of the Service Commission and the State Government that since the appellant has been discharged from the Army at his own request, he cannot be treated as an ex-serviceman, is accepted then it will create a class within a class without rational basis and, therefore, becomes arbitrary and discriminatory. It will also defeat the purpose for which the provision for reservation has been made.

11. The High Court, in our view, is not justified in placing reliance on sub-clause (iv) of the definition clause and excluding the writ petitioners from the eligible category on that basis. Sub-clause (iv) has no application in the instant case for the reason that it applies to such of those persons who are relieved from service after specific period of engagement and become entitled to get gratuity. If a person, who served in the armed forces, is released after being granted the benefit of pension, the case is taken out of purview of sub-clause (iv). The exclusionary words "otherwise than at his own request" occurring in sub-clause (iv) cannot, therefore, be relied upon to deny the benefit to the appellants. Then the question arises whether such person would fall under sub-clause (i)? True, according to the terminology used in the Service Rules governing the armed forces there is a distinction between retirement and release/discharge, as pointed out by the High Court. But, in the context of definition of ex-serviceman in Rule 2(c)(ii), broader meaning has to be given to the word 'retired' occurring in sub-clause (i). In principle and in the light of the considerations set out

above, there is no rational basis for excluding those discharged or released from service after earning pension. It is only after considerable period of satisfactory service a member of armed forces becomes entitled to pension. The mere fact that after such long period of service he voluntarily quit the service with the consent of the employer should not place him in a dis-advantageous position for claiming the benefit of reservation for ex-serviceman. Therefore, the expression 'retirement' should be given wider meaning in order to effectuate the objective behind the Rule."

13. The Supreme Court clearly held that in the context of the definition of Ex-serviceman, no distinction could be drawn between retirement and release/discharge. The broader meaning would have to be given to the word 'retired'.

14. In Raj Pal Sharma (supra), the Supreme Court held as under:-

"They have also been released from military service. All those persons released from military service constitute one class and it is not possible to single out certain persons of the same class for differential treatment. There appears to be no reasonable classification between the persons who were released on compassionate grounds and those who were released on other grounds and in this respect the petitioners have been deprived of the equal opportunity. The amendment, therefore, is violative of Articles 14 and 16 of the Constitution and, therefore, bad.

7. The grounds on which they were released are not material. If once they are held to be ex-military servicemen they are entitled to the benefits of Rule 4.

8. The earlier two amendments, viz. the first and the second amendments brought in 1976 have already been held to be bad and ultra vires the Constitution in K.C. Arora's case (1984 Lab IC 1015) (supra) and the principles laid down in

that decision are equally applicable to the amendment whereby proviso to Rule 4 was added with retrospective effect, The proviso to Rule 4 in the view that we have taken cannot disentitle the petitioners to get the benefit of Rule 4."

15. Under Rule 2(c) of the Ex-serviceman (Re-employment in Central Civil Services and Posts)/ Amendment Rules 2012, an 'ex-serviceman' has been defined to mean a person who has served in any rank in the Indian Army, whether as a combatant or non-combatant, and has been retired or relieved or discharged from such service, whether at his own request or being relieved by the employer, after earning his or her pension.

16. There can be no discrimination between those who retire or are discharged or relieved at the instance of the employer and those who are released at their own request.

17. For the benefit of being treated ex-serviceman, the minimum requisite service is five years. The definition of an Ex-serviceman in sub-paragraph 3 of the Office Memorandum dated 14.04.1987 that an 'ex-serviceman' means a person who has served in any rank whether as a combatant or non combatant in the Regular army who has been released otherwise than on his own request, is thus to be interpreted to exclude only officers who are released on request before completion of the period of five years and/or in course of their regular service before completion of the term for which they were appointed, and not those who are released on request during the period of their extension.

18. The writ petition is thus allowed. The petitioner shall be treated as an 'ex-serviceman'. The order dated 25.09.2011 declining to register the name

of the petitioner under the Rehabilitation Scheme is set aside. The petitioner shall be granted all the benefits of an ex-serviceman including the registration of his name under the Rehabilitation Scheme and the benefits of resettlement and reservation of jobs for 'ex-serviceman'.


INDIRA BANERJEE, J


ANIL KUMAR CHAWLA, J

FEBRUARY 09, 2017

RS