

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

% *Judgment Reserved on : January 29, 2015*
Judgment Delivered on : February 05, 2015

+ **W.P.(C) 7882/2014**

RAJESH YADAV & ORS. Petitioners

Represented by: Col.S.R.Kalkal, Advocate

versus

UNION OF INDIA & ORS Respondents

Represented by: Mr.Vivek Goyal, CGSC with
Mr.M.Tapan Sharma, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J.

1. The policy for posting Junior Commissioned Officers of the Indian Army to HQ Indian Military Training Team (HQ IMTRAT) is governed by AEC ROI 06/2006 and Integrated Headquarters of Ministry of Defence/SD/3 (UN & TT) Service Note No.83079/QR/SD-3 (UN & TT) dated April 12, 1999.

2. As per the policy, the Junior Commissioned Officers must have successfully completed a Map Craft Instructor Course Serial No.-155 and should have undergone Dzongkha Language Course Ser-32. Concededly the petitioners have successfully completed the two courses. Posting to HZ IMTRAT is concededly based on seniority, evidenced by a circular ROI 06/2006 which reads as under:-

“Para (iii). The select panel of AEC PBOR will be prepared strictly as per Dzongkha Language Course-cum-Corps

Seniority in accordance with Integrated HQ of MOD letter No.A/79004/GS/MT-14 dated 19th March, 2001.

Para (iv)(a) Names of all available AER PBOR who have obtained 'A' grading in Dzongkha Language Course and have not yet been posted to IMTRAT will be considered."

3. Aforesaid facts not being in dispute, we state the issue of contention between the parties. It arises out of para 2(a) of (X) of Appendix 'A' of the Integrated Headquarters of Ministry of Defence/SD-3 (UN & TT) Service Note No.83079/SD-3 (UN & TT) dated April 12, 1999 which reads:-

"A. The candidate should not be due for any course/cadre during tenure with IMTRAT."

4. The four writ petitioners were enrolled in the Army Education Corps (AEC) by direct appointment as Education Havaldars; all of them possess post graduate degrees. As Education Havaldars of the Army the petitioners performed duties as Education Instructors and teach various subjects to the army personnel. All of them have qualified the MAP Craft Instructors Course and Dzongkha Language Course with 'AX' grading. Their seniority entitles them for a posting to HQ IMTRAT, which would be lucrative for the reason this will entitle them to a foreign posting; the foreign allowance paid in dollars being the incentive.

5. Pertaining to posting at Bhutan, the petitioners submitted their willingness for posting to HQ IMTRAT and along therewith submitted 'ADVERSE CAREER-UNWILLINGNESS CERTIFICATE', containing an undertaking that since they would not be attending the course/cadre course, successful clearance whereof would entitle them to be promoted as Naib Subedar, they would not request for premature reversion. We note one such certificate dated October 25, 2014 given by the first petitioner : Havaldar Rajesh Yadav, which reads as under:-

“I No.9513008F Hav.Rajesh Yadav of SSF Academy, HQ Est.No.22 is likely to be selected for posting to HQ IMTRAT as per seniority. I am willing to go on posting to HQ IMTRAT. I am well aware that during my tenure of posting with HQ IMTRAT, I will not be permitted to attend any cadre or course. I will also not request for premature reversion for the purpose of promotion.”

6. The grievance of the petitioners relates to a posting order dated November 09, 2014 as per which respondents No.4 to 7, who are junior to the petitioners have been posted to HQ IMTRAT.

7. Conceding to the fact that the petitioners are eligible as also qualified and that their seniority entitles them for a posting to HQ IMTRAT, the respondents justify posting persons junior to the petitioners in HQ IMTRAT by placing reliance upon para 2(a) of (X) of Appendix ‘A’ of the Integrated Headquarters of Ministry of Defence/SD-3 (UN & TT) Service Note No.83079/SD-3 (UN & TT) dated April 12, 1999, for the reason the petitioners are due for Havaldar to Naib Subedar Promotion Cadre Course in October, 2015. This would be a month within the two years of the posting at HQ IMTRAT.

8. Whereas the respondents would urge that the right for a posting in IMTRAT is not absolute and is hedged by the condition imposed by para 2(a) of (X) of Appendix ‘A’ of the Integrated Headquarters of Ministry of Defence/SD-3 (UN & TT) Service Note No.83079/SD-3 (UN & TT) dated April 12, 1999, the petitioners would urge that they would have a vested right to forego the benefit of a promotion to which they would be entitled to and thus once they have given the certificates to said effect, the department cannot predicate a claim under para 2(a).

9. In paragraph 5 of the writ petition, the petitioners have pleaded as under:-

“That all the petitioners submitted their willingness certificates along with the adverse career certificates to the respondent authorities through proper channel. Copies of willingness certificates along with the adverse career certificates in respect of all the petitioners are annexed herewith and marked as Annexure P-3 (Colly).”

10. In the counter affidavit filed, the response to the paragraph 5 of the writ petition is as under:-

“I say that there is no need to comments being factual statement.”

11. Now, the averments in paragraph 5 of the writ petition are not limited to a simple factual averment, they also relate to a matter of law : being the assertion by the petitioners that they have a right to overcome the bar of para 2(a) of (X) of Appendix ‘A’ of the Integrated Headquarters of Ministry of Defence/SD-3 (UN & TT) Service Note No.83079/SD-3 (UN & TT) dated April 12, 1999 by foregoing a right to be promoted. The respondents have apparently not controverted said assertion of law which has to be read in paragraph 5 of the pleadings in the writ petition. But, we find that while responding to grounds B and C in the writ petition, in which grounds the petitioners assert a right to be posted to HQ IMTRAT based on seniority once they have given their willingness to forego a promotion, in the counter affidavit the respondents have, inter alia, pleaded:-

“Further, the question of seeking adverse career only arises when posting to HQ IMTRAT has been issued and an individual is asked to submit ‘ADVERSE CAREER CERTIFICATE’. While in this instant case since the petitioners are due for ‘Havaldar to Naib Subedar Promotion Cadre’ as well as one of the mandatory course i.e. ADP (Fundamental) hence the petitioners were not considered for posting to HQ IMTRAT.”

12. The response filed by the respondents is an admission of a fact that a person would be entitled to forego promotion if the person is entitled to be posted to HQ IMTRAT as per seniority and eligibility.

13. We fail to see any rationale in the stand taken : a person qua whom a posting order to HQ IMTRAT has been issued, if due for promotion in the next two years, can forego the right to be promoted and hence be posted to HQ IMTRAT and a person to whom a posting order has not been issued but due for promotion in the next two years cannot forego the right to be promoted.

14. The rationale underlying para 2(a) of (X) of Appendix 'A' of the Integrated Headquarters of Ministry of Defence/SD-3 (UN & TT) Service Note No.83079/SD-3 (UN & TT) dated April 12, 1999 is that since posting in HQ IMTRAT is for a period of two years, a person who would be eligible for promotion within said two years' period would have a right to be deputed to the pre-promotional course and thus posting the person to HQ IMTRAT would defeat the right of the person to be promoted. But this would not mean that the person concerned cannot forego his right to be promoted and give a certificate to said effect so that he can avail his right to be posted to HQ IMTRAT. The doctrine of election guides us that where two options are available to a person he has a right to elect for any one of them.

15. The writ petition is accordingly allowed. A mandamus is issued to the respondents to accept the unwillingness certificates submitted by the petitioners, which would mean that the petitioners give up right to be considered for promotion as Naib Subedar and as a consequence the petitioners are directed to be posted to HQ IMTRAT. Annexure P-4 is quashed.

16. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

FEBRUARY 05, 2015
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