

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

% **Date of decision: 1st December, 2020.**

+ **W.P.(C) 520/2020 & CMs No.1398/2020 (for interim stay) & 30737/2020 (of respondents for condonation of 2 days delay in filing counter affidavit)**

MUKESH KUMAR

..... Petitioner

Through: Mr. Ankur Chhibber, Mr. Himanshu Shekhar Tiwari, Mr. Anshuman Mehrotra, Mr. Harsh Dhankar and Mr. Nikunj Arora, Advs.

Versus

UNION OF INDIA AND ORS.

..... Respondents

Through: Mr. Jitesh Vikram Srivastava, Adv. for R-1,2,5&6 with Deputy Commandant Vinod Kumar, Law Officer, BSF.
Mr. Naresh Kaushik and Mr. Vardhman Kaushik, Advs. for R-3&4/UPSC.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

HON'BLE MS. JUSTICE ASHA MENON

[VIA VIDEO CONFERENCING]

RAJIV SAHAI ENDLAW, J.

1. The petitioner, a candidate for recruitment as Assistant Commandant in the Central Armed Police Forces (CAPFs), in the ex-serviceman category, pursuant to the advertisement dated 25th April, 2018 published by the respondents No.3 and 4 Union Public Service Commission (UPSC), has filed this petition impugning the order dated 23rd December, 2019 of cancellation of his candidature on the ground of not being an ex-serviceman

and seeks direction for consideration of the case of the petitioner for appointment in the Border Security Force (BSF) as Assistant Commandant in the ex-serviceman quota and for restoration of offer of appointment, along with all consequential benefits.

2. The petition came up first before this Court on 15th January, 2020, when while issuing notice thereof, it was ordered that one vacancy in the ex-serviceman quota of Assistant Commandants be kept unfilled. However, thereafter the proceedings were being adjourned from time to time owing to the prevalent pandemic. CM No.26748/2020 of the respondents No.1, 2, 5 and 6 Union of India, for condonation of delay in filing counter affidavit came up before this Court for hearing via video conferencing on 20th October, 2020, when finding the petition to be concerning recruitment and an interim order of stay in operation, the petition was listed for virtual hearing for today, after giving opportunity to the petitioner to file rejoinder. No rejoinder has been filed.

3. It is the case of the petitioner, (i) that the petitioner joined the Indian Army, on 5th November, 2003, as a Sepoy; (ii) that while the petitioner was serving in the Indian Army, the respondents No.3 and 4 UPSC, on 25th April, 2018 issued advertisement for filling up the posts of Assistant Commandant in CAPFs; (iii) that the petitioner being eligible, applied for the same under the ex-serviceman quota; (iv) that the petitioner appeared for the written examination on 12th August, 2018 and in the result thereof declared on 10th January, 2019, was successful and was required to submit a detailed application form, between 14th January, 2019 and 28th January, 2019; (v) that the petitioner, while filling up the detailed application form,

mentioned his date of retirement as 5th December, 2019, though his 15 years in service were already completed on 5th December, 2018, meaning that the petitioner could have sought his release any time after 5th December, 2018; (vi) that since the petitioner, at the time of filling up the application form was required to obtain 'No Objection Certificate' (NOC) from the Indian Army, the petitioner so applied and was issued NOC dated 15th January, 2019; (vii) that the petitioner, on 9th March, 2019, on submission of the detailed application form, was called for Physical Standard Test (PST)/Physical Efficiency Test (PET) and Medical Standard Test; (viii) that on being successful in the PST/PET/Medical Standard Test, the petitioner, on 24th July, 2019, was called for interview and submission/verification of documents; (ix) that the petitioner submitted the documents along with serving certificate of the Indian Army and was eligible for the ex-serviceman quota; (x) that on 24th July, 2019 the respondents raised objections with respect to (a) original BA degree; (b) fresh OBC Certificate with proforma of Central Government; and, (c) affidavit for name difference in father's name in Serving Certificate, and due to the said deficiencies, the candidature of the petitioner was kept provisional; (xi) that in the result declared on 2nd August, 2019, the name of the petitioner found mention in those provisionally selected; (xii) that the petitioner, on 9th August, 2019, made up the deficiencies aforesaid; (xiii) that subsequently the respondents, vide letter dated 14th August, 2019, asked for another document i.e. Proforma VI-B (Form Certificate of Serving Personnel), which was not asked earlier; (xiv) that the petitioner, under cover of letter dated 23rd October, 2019, submitted the document asked for; (xv) that since appointment/joining of the petitioner as Assistant Commandant in CAPF

was imminent, the petitioner requested for his early release from the Indian Army and which was granted and the date of retirement of the petitioner from Indian Army was changed from 5th December, 2019, to 31st October, 2019; (xvi) that the petitioner, vide SMS dated 25th October, 2019 was informed that he had been selected for the post of Assistant Commandant (General Duty (GD)) in the respondent BSF, subject to verification of character and antecedents and educational documents; and, (xvii) however vide impugned letter/order dated 23rd December, 2019, the candidature of the petitioner was cancelled, without issuance of show cause notice.

4. Contending, (a) that no opportunity of hearing was given to the petitioner before cancellation of his candidature; (b) that Rule 5(c)(i) of the Ex-servicemen (Re-employment in Central Civil Services and Posts) Rules, 1979 as amended by the Ex-servicemen (Re-employment in Central Civil Services and Posts) Amendment Rules, 2012 notified by the Department of Personnel and Training (DoPT) Office Memorandum (OM) dated 4th October, 2012, relied upon by the respondents has no application; (c) that the petitioner, on completion of 15 years in the Indian Army on 5th December, 2018, could have sought release at any time thereafter; however since it were the respondents who were delaying the appointment of the petitioner, the petitioner in the detailed application form, mentioned his date of retirement to be 5th December, 2019, which was subsequently preponed to 31st October, 2019; (d) that amended Rule 2(c)(i)(a) of the Ex-servicemen (Re-employment in Central Civil Services and Posts) Rules defines 'ex-serviceman' as a person who has served in any rank, whether as combatant or non-combatant in the Regular Army, Navy and Air Force, who either 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; and, (e) that the respondents were always aware of the release date of the petitioner and by cancellation of the candidature of the petitioner have dealt a double jeopardy to the petitioner who has been left jobless, this petition has been filed.

5. The respondents No.3 and 4 UPSC, in its counter affidavit has pleaded, (i) that the petitioner, as per his own admission, on the last date of 21st May, 2018, as per the advertisement dated 25th April, 2018, for submission of the application, was serving in the Indian Army and was not an ex-serviceman and became an ex-serviceman only on 31st October, 2019; (ii) that thus the order dated 23rd December, 2019 cancelling the candidature of the petitioner on the basis of Rule 5(c) of the Ex-servicemen (Re-employment in Central Civil Services and Posts) Amendment Rules, cannot be faulted with; (iii) that the petitioner, while applying as ex-serviceman, had claimed age relaxation; (iv) that the petitioner, while filling up the detailed application form, after more than 7 months from the date of his first application, against the column "Are you an ex-serviceman", stated "Yes" and also claimed age relaxation in the category of OBC as well as ex-serviceman; (v) that the petitioner was fully aware that as per the Notification dated 4th October, 2012, he was required to be discharged from service, for being considered as ex-serviceman, latest by 20th May, 2019 i.e. one year from the last date of submission of applications for participating in the recruitment; (vi) that as per the instructions on the letter for personality test/interview, the admission to the stage of personality test was purely provisional and subject to satisfying the prescribed eligibility conditions; (vii) that the petitioner, while appearing for the interview, though required

to, had not brought the Proforma IV-B (Form of Certificate for Serving Personnel) (incorrectly mentioned in the petition as Proforma VI-B) but was still allowed to appear for the interview and asked to submit the certificate later, keeping his candidature provisional; (viii) that

"Shri R. Sundaram, Brigadier, Headquarters Army Training Command, informed vide his letter dated 26th September, 2019 that the petitioner is serving in Indian Army since November, 2003 (Unit - 17 Horse) and presently posted with Headquarter Army Training Command, Shimla. It has further been stated that the individual has qualified the CAPF (ACs) Examination, 2018 also enclosing a list of finally qualified candidates in this regard. With regard to Proforma IV-B (form of Certificate for Serving Personnel), the Commission was informed that Shri Mukesh Kumar has already requested to release from Army Service and connected documents have been forwarded to Record Office for issue of discharge date. It was further informed that he is likely to be released from Army during first quarter of 2020. The exact date was to be intimated to the Commission by the Army Training Command as soon as confirmation was received from the Record Office";

(ix) that as per the examination notice dated 25th April, 2018, for being treated as an ex-serviceman, the petitioner had to be released/retired on completion of his assignment, on or before 20th May, 2018; (x) that as per the certificate furnished by the petitioner on 23rd October, 2019, he was due to release/retirement on completion of his specific period of assignment on 31st October, 2019; and, (xi) hence, the petitioner could not be treated as an ex-serviceman and his candidature was cancelled.

6. Though the respondents No.1, 2, 5 and 6 Union of India/BSF also has filed a counter affidavit but the need to refer thereto is not felt.

7. The counsels for the parties have been heard.

8. The counsel for the petitioner, at the outset sought to contend that the respondents, vide letter dated 24th July, 2019 having sought clarifications from the petitioner on three aspects only, as mentioned above, and which did not include the factum of the petitioner being an ex-serviceman, could not have subsequently disqualified the petitioner on the said ground. However on our informing the counsel for the petitioner that in view of the Rules governing the appointment and the terms and conditions of the advertisements and the communications inviting the petitioner for interview, the question of applicability of the principles of estoppel does not arise, the counsel for the petitioner did not press this argument further.

9. The counsel for the petitioner next urged that no show cause notice was issued to the petitioner before cancellation of his candidature.

10. We are unable to agree with the contention that the petitioner should have been issued a show cause notice before cancellation of his candidature. If before finalizing the recruitment process, notices to show cause were to be issued to those found not eligible, giving them opportunity to explain, the recruitment process would lengthen for unduly long time and recruitments get delayed indefinitely. The principles of natural justice cannot be stretched to the extent sought to be stretched, defeating the very purpose of the act to which they are being applied. It cannot also be lost sight of that the petitioner had no right of appointment and had only a right to be considered for appointment on the terms and conditions specified, and while rejecting the candidature of the petitioner on the ground of not meeting the prescribed criteria, in our view, no notice to show cause is required to be

served. Moreover, the option of approaching the Courts/foras for remedies against cancellation of candidature, as is already being availed of by the petitioner, are always available and the right, if any of the petitioner against illegal cancellation of his candidature can always be protected, as has already been done in the present case by the interim order granted in favour of the petitioner.

11. The counsel for the petitioner next drew our attention to the advertisement dated 25th April, 2018, pursuant to which the petitioner had applied and which provides "The term Ex-Servicemen will apply to the persons who are defined as Ex-Servicemen in the Ex-Servicemen (Re-employment in Civil Services and Posts) Rules, 1979, as amended from time to time".

12. The counsel for the petitioner, in the petition has referred to and has drawn our attention to the OM dated 4th October, 2012 supra amending the Ex-servicemen (Re-employment in Central Civil Services and Posts) Rules, 1979 and to the following part of the definition of 'Ex-serviceman' therein as under:

"An 'ex-serviceman' means a person-

(i) 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

(a) who either 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; 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."

and has contended that the petitioner qualifies thereunder.

13. We are unable to agree. The aforesaid Rule only defines an 'ex-serviceman' for the purposes of Ex-servicemen (Re-employment in Central Civil Services and Posts) Rules but does not provide the date on which the applicant should qualify as an ex-serviceman. The counsel for the petitioner has not controverted the plea and contention of the counsel for the respondents UPSC, of the cut-off date in the present case being of one year from 21st May, 2018. The petitioner was thus required to be an ex-serviceman within one year of 21st May, 2018. The contention of the petitioner in this regard is, that since he was to complete 15 years of service within one year of 21st May, 2018 and whereafter he could have sought release from the India Army at any time, he so qualified. However the Rule aforesaid relied upon by the counsel for the petitioner, does not provide so.

14. The real bone of contention is the interpretation to be given to Rule 5(c) of the Ex-servicemen (Re-employment in Central Civil Services and Posts) Rules, which is as under:

"(5)(c) For appointment to any vacancy in Group-A and Group-B services or posts filled by direct recruitment on the results of an All India Competitive Examination, the ex-servicemen and Commissioned Officers including Emergency commissioned Officers or Short Service Commissioned Officers who have rendered at least five years military services and have been released-

(i) on completion of assignment (including those whose assignment is due to be completed within one year) otherwise than by way of dismissal or discharge on account of misconduct or inefficiency.

(ii) on account of physical disability attributable to military service or on invalidment, shall be allowed maximum relaxation of five years in the upper age limit..."

15. It is the aforesaid Rule which provides for those, who though not an ex-serviceman on the date of applying and those still in service, but whose assignment is due to be completed within one year, to also apply as an ex-serviceman.

16. However the petitioner has neither placed before us, the letter of his appointment, disclosing the terms and conditions of his appointment, or the Rules governing his appointment, wherefrom we could have known, whether the appointment of the petitioner was by way of an "assignment" within the meaning of Rule 5(c) aforesaid and which assignment was due to be completed within one year of 21st May, 2018 i.e. on 5th December, 2018 and whereafter the petitioner would have been automatically released from the Indian Army. Not only so, it is not disputed that the petitioner, in the detailed application form filled up by him after 5th December, 2018, in January, 2019, while giving the details of his employment, (a) gave his designation/position as Sepoy and against the column "Whether permanent/temporary/ad-hoc" had written "permanent"; (b) filled the period of his permanent employment from 5th November, 2003 to 5th December, 2019; and, (c) against the column "Name of Employer / Organisation / Firm / Individual" filled "Army". The petitioner in the said application form did not mention that his assignment was over on 5th December, 2018 and that he was in a position to be discharged at any time. On the contrary, he gave his period of permanent employment, till 5th December, 2019 and as per which, he did not qualify to be considered.

17. The counsel for the petitioner has drawn our attention to the NOC issued by the Indian Army, claimed to have been submitted by the petitioner with the respondents and which is as under:

"1. This is certify that No.15492724P Sow Mukesh Kumar of 17 HORSE is serving in the Army since 05 Nov 2003 and presently serving with 17 HORSE, B Sqn., C/o 56 APO on 8th March, 2005. His date of birth as per service record is 12 Oct 1986. He is willing to undergo civil service.

2. It is also certified that individual has not applied for Reemployment at any other place.

3. Home address as the individual is as under-

Shri Mukesh Kumar, S/o Shri Gokul Chand

Vill - Bagriyawasi

Post - -do-

Teh - Shrimadhopur

Police Stn - Shrimadhopur

Dist - Sikar

State - Rajasthan

Pin - 332715

4. Official address of the individual is as under:-

B SQN

17 HORSE

PIN-912617

C/o 56 APO

5. This organization has no objection for individual joining the civil Service in Center Police Force (Assistant Commandant). The individual will be released from Army

before joining the civil service. The undersigned is duly authorized to sig this No objection certificate."

18. We are afraid, the aforesaid NOC also does not certify that the period of assignment of the petitioner was to be completed within one year of the cut-off date of 21st May, 2018 aforesaid. Merely because the NOC certifies that the petitioner will be released before joining the civil service, does not satisfy the requirement of the Rule reproduced hereinabove. It is significant that the said Rules do not qualify personnel who furnish such an NOC, as ex-serviceman but qualifies only those as ex-serviceman who have either already been discharged or those whose assignment with the Indian Army was to be completed within one year of the cut-off date.

19. The petitioner, as aforesaid, though relying upon the aforesaid clause, has neither filed any document to show that he was on assignment with the Indian Army nor a document to show that his assignment was to be completed within one year of the cut-off date aforesaid.

20. Per contra, the counsel for the respondents No.3 and 4 UPSC has argued that the petitioner, inspite of opportunity has not filed rejoinder and thus is deemed to have admitted all the averments in the counter affidavit (as recorded by us hereinabove).

21. After hearing the counsels, granting opportunity to the petitioner to file documents to show that the petitioner was on assignment with the Indian Army and for a period of 15 years and to show the basis on which, on completion of assignment, extensions are granted, we deferred dictating the order in open Court, till evening.

22. The counsel for the petitioner has emailed to us, a document titled "Procedure and Criteria for Screening of Personnel Below Officer Rank (PBOR) for grant of extension of service by two years" dated 20th September, 2010 and a document titled "Procedure and Criteria for Screening for JCO/OR for grant of extension in service by two years" dated 11th December, 2017, but which do not satisfy the requirement aforesaid. The same neither show that the permanent employment of the petitioner as a Sepoy with the Indian Army was for a period of 15 years only with effect from 5th November, 2003, the date mentioned in the NOC, or that the same was by way of assignment. The same also do not show the terms on which the petitioner sought extension after completion of two years. It only provides the procedure for such extension and that too for two years. Accepting the pleas of the petitioner also, once after filling up the application for appointment as Assistant Commandant in CAPFs, he sought extension for two years, he would be disqualified for consideration as an ex-serviceman. The fact that the petitioner has shied away from filing/producing his documents of employment with the Indian Army even at this stage, makes us suspicious, of the petitioner not having made clean breast of affairs in the petition filed.

23. We are thus unable to find any fault in the rejection by the respondents of the candidature of the petitioner.

24. Resultantly, the petition is dismissed.

25. We may however record that we had during the hearing asked the counsel for the respondents No.3 and 4 UPSC as well as the counsel for the respondents No.1, 2,5 and 6 Union of India/BSF, to consider a change in Rules, to enable those personnel of the defence services who, though still in

service and entitled to continue in service and/or entitled to extensions, to with NOC of the defence services, to apply. It is felt that servicemen who are in a position to furnish NOC before the stipulated date, of their being permitted to leave the employment of their respective defence service on securing an appointment in Central Civil Services and Posts, should be allowed to compete and participate in the recruitment process. The requirement as existing today, of having already been retired/discharged from the service, works injustice to those still in service but whom the defence services are willing to let go, on securing appointment in Central Civil Services and Posts. The requirement, of having already been discharged, may result in servicemen, on the one hand leaving the defence service in which they are already employed and have a reasonable chance of remaining employed in future, having to, before participating in the recruitment process leave their service and end up with having lost the job in hand and on the other hand having not been able to secure the job applied for.

26. We thus, while dismissing the petition, direct the respondents No.3 and 4 UPSC to, within two months of today, commence action for considering the aforesaid change and take a reasoned decision thereon in consultation with all concerned.

27. The petition is disposed of.

RAJIV SAHAI ENDLAW, J.

ASHA MENON, J.

DECEMBER 1, 2020/‘bs’