

Capt. Virendra Kumar

Vs

Union of India

Civil Appeal No. 475 of 1976

(V. R. Krishna Iyer, O. chinnappa Reddy JJ)

22.04.1980

JUDGMENT

V. R. KRISHNA IYER, J. –

1. The appellant Capt. Virendra Kumar appeared in person and argued his case with refreshing clarity and merciful brevity. The judgment of the High Court, which went against him, sets out the facts in detail and so we do not have to go over the grounds again except to highlight the decisive facts and the relevant law. The appellant's writ petition before the High Court was dismissed and he was secured special leave for this appeal.

2. Captain Virendra Kumar was an Emergency Commissioned Officer who joined the army way back in 1964. Apparently, he was fighting in the front line and sustained a spinal injury while in action. From the materials on record, we notice that he had been a brilliant and courageous officer, but bullets do not discriminate between the brave and the pusillanimous, between the splendid and the stupid. Any way, the appellant's continuance after having sustained the injury became an issue for the army authorities to decide, and he was released by the Chief with the offer of a pension of a pittance. It was represented to us that Rs. 51.50 per month was the amount of pension preferred. What a magnificent sum for one who had fought on the warfront and exposed his life to extinguishment so that the security of the nation might be defended ! Indeed, if such be the parsimony with which the army prices patriotism, the morale of the defence services may be adversely affected. We are disturbed by this unimaginative attitude which may have long range impact on our Jawans who deserve special solicitude having regard to the supreme sacrifice they are sometimes called upon to make.

3. Going back to the facts, constitutive of the grievance of the appellant, we may state that the Army Act and the rules and regulations and instructions thereunder govern the fate of commissioned officers including those on emergency commissions like the appellant. When an Emergency Commissioned Officer has to be released on grounds which are provided for, Army Instruction 9/S/62 dated November 24, 1962 applies. This instruction, according to the appellant, does not have statutory status and, therefore, does not bind him. We do not agree. On the other hand, the technical gloss put by the appellant is legalistic and does not appeal to us and we concur with the High Court in the view taken that the said instruction governs Emergency Commissioned Officers. Sections 21, 22, 27, and 191 to 193 together with the residuary executive power cannot be does (sic) by technical truncation of the sense and sweep of the rules. That, indeed, is the submission made by Shri Francies, appearing for the Union of India and we accept it. On that footing, paragraph 15 of the said instructions is attracted.

4. It is common ground that the appellant was released or discharged on account of physical disability. This is also vouched for by the communication from the President's Secretariat to the appellant dated April 13/23. 1971 extracted in the paper book. Once we assume that the termination of the emergency commission of the appellant was on the basis of medical unfitness or physical disability, the procedure to be followed in releasing the officer becomes important. In Service Jurisprudence, procedure safeguards are of prime significance.

5. Paragraph 17 of the Army Instruction aforesaid runs thus :

General - All other terms and conditions of service, where not at variance with the above provisions, will be the same as for regular officers.

6. So much so, for emergency commissions the conditions of service of regular commission will apply except where it is separately provided.

7. On February 14, 1965 the appellant was granted emergency commission into the Regular Army under A.I. 9/S/62.

8. In accordance with the intention expressed in para 15(c) of the A.I. 9/S/62 that an officer granted emergency commission, if eligible and suitable in all respects may be considered at the appropriate time for permanent regular commission in the Regular Army, Army Instruction 13/S/65 was issued. The relevant paras are reproduced below :

1. Serving Emergency Commissioned Officers granted Commission under A.I. 9/S/62 will be eligible for the grant of permanent commissions under the terms and conditions of service as given in the succeeding paragraphs.

2. Eligibility

#(a) * * * *(b) * * * *###

(c) Must be in medical category AYE one (A-1). Those who have been placed in medical category 'A-2' 'B-1' and 'B-2' as a result of enemy action may also be considered on merits of each individual case.

9. In accordance with the Army Instruction 13/S/65, the screening of the Emergency Commissioned Officers for grant of permanent commission commenced. The Emergency Commissioned Officers, who were not found fit for the grant of permanent commission were to be released in accordance with the phased programme issued by the Army Headquarters in memorandum No, A/11579/II/Org. 2(MP)(a). Copy of the memorandum admitted to be correct is reproduced. As in records of the case, only extracts have been given.

10. It necessarily follows that the conditions of service including termination of service which govern Emergency Commissioned Officers must largely be equated with those that relate to Regular Commissioned Officers. This conclusion, implicit in paragraph 17 quoted above, take us to the next step of the conditions of service vis-a-vis released of Regular Commissioned Officers. They are set out in Rules 15 and 15-A of the Army Rules, 1964. At this stage, we may reproduce those two rules to the extent relevant :

15. Termination of service by the Central Government on grounds other than

misconduct - (1) When the Chief of the Army Staff is satisfied that an officer is unfit to be retained in the service due to inefficiency or physical disability, the officer -

(a) shall be so informed;

(b) shall be furnished with the particulars of all matters adverse to him; and

(c) shall be called upon to urge any reasons he may wish to put forward in favour of his retention in the service :

Provided that clauses (a), (b) and (c), shall not apply if the Central Government is satisfied that for reasons to be recorded by it in writing, it is not expedient or reasonably practicable to comply with the provisions thereof;

Provided further that the Chief of the Army Staff may not furnish to the officer any matter adverse to him, if, in his opinion, it is not in the interest of the security of the State to do so.

(2) In the event of the explanation being considered by the Chief of the Army Staff unsatisfactory, the matter shall be submitted to the Central Government for orders, together with the officer's explanation and the recommendation of the Chief of the Army Staff as to whether the officer should be -

(a) called upon to retire; or

(b) called upon to resign.

(3) The Central Government after considering the reports, the explanation, if any, of the officer and the recommendation of the Chief of the Army Staff, may call upon the officer to retire or resign, and on his refusing to do so, the officer may be compulsorily retired or removed from the service on pension or gratuity, if any, admissible to him.

15-A. Release on medical grounds - (1) An officer who is found by a Medical Board to be permanently unfit for any form of military service may be released from the service in accordance with the procedure laid down in this rule.

(2) The President of the Medical Board shall, immediately after the Medical Board has come to the conclusion that the officer is permanently unfit for any form of military service, issue a notice specifying the nature of the disease or disability he is suffering from and the finding of the Medical Board and also intimating him that in view of the finding he may be released from the service; every such notice shall also specify that the officer may, within fifteen days of the date of receipt of the notice, prefer a petition against the finding of the Medical Board to the Chief of the Army Staff through the President of the Medical Board :

Provided that where in the opinion of the Medical Board the officer is suffering from a mental disease and it is either unsafe to communicate the nature of the disease or disability to the officer or the officer is unfit to look after his interests, the nature of the disease or disability shall be communicate to the officer's next of kin who shall

have the like right to petition.

(3) If no petition is preferred within the time specified in sub-rule (2), the officer may be released from the service by an order to that effect by the Chief of the Army Staff.

(4) If a petition is preferred within the time specified in sub-rule (2), it shall be forwarded to the Central Government together with the records thereof and the recommendation of the Chief of the Army Staff - The Central Government may, after considering the petition and the recommendation of the Chief of the Army Staff, pass such order as it deems fit.

11. These two rules, so far as we are able to see, lay down the procedural basis for termination of service of Regular Commissioned Officers on account of physical disability or medical unfitness. If Rule 15 applies to Emergency Commissioned Officers, as it does, it prescribed a certain procedure which much be followed. The Chief of the Army Staff must be satisfied that the officer is unfit to be retained in the service due to physical disability. By the way there are sedentary posts in the Army. This satisfaction is not purely subjective and only on its formation the Chief of the Army Staff shall proceed further. He may, therefore, inform the officer concerned about the ground for release from service. Natural justice comes in at this stage. Once the Chief of the Army Staff holds that the officer's physical disability justifies termination of service, there is another opportunity given by the rule [Rule 15(2) for the affected officer to make an explanatory representation to the Central Government. The orders of the Central Government, after considering the reports and the explanations, and the recommendation of the Chief of the Army Staff, will be made under Rule 15(3). This finishes the exercise under Rule 15. If Rule 15-A is to be invoked in the case of the commissioned officer, the Army Chief has to make up his mind and the procedure to be followed is set out therein. A Medical Board has to examine the officer. Other procedures in keeping with natural justice are also set out. But nothing has been brought to our notice indicating that the fair procedure under Rule 15 of 15-A has been fairly or at all followed. Mere injury in action does not automatically end the officer's service. The consequence is that the order of termination of service is invalid for failure to adhere to basic procedure. Even the top brass must act according to law as lawlessness in the Defence Force is a grave risk, be it a four-star general or foot infantry Jawan.

12. The inevitable result of the invalidation of the termination of service is that the officer comes back into service and, therefore, the salary due to him from the time of his formal release or termination down-to-date will have to be paid. We direct that this be done within three months from today.

13. The fact that the order of release or termination is invalid for non-compliance with the procedural requirements does not make the officer a Permanent or Regular Commissioned Officer. His service are still liable to be terminated, but the correct procedure has to be followed. It looks as if the appellant has suffered a physical disability in action and the Chief of the Army Staff has full power to act and may either resort to Rule 15 or 15-A and deal with him on that footing. Or may allot to him some sedentary position consistent with his physical condition and his otherwise proven talent.

14. We are sure that the defence personnel are dear to the country and to the Defence Department and so a considerate disposition will be brought to bear in dealing with the appellant Virendra Kumar. Human resources are the real wealth of a nation.

15. Subject to the above directions, we allow the appeal, hopeful that a just adjustment of the human situation in which the appellant finds himself will be made by the Union of India. In the circumstances of the case, we direct that the appellant be paid costs quantified at Rs. 5000.

</html