

Union of India

Vs

Captain Jagpal Singh

(CJI J.S. Verma, S.P. Kurdukar JJ)

29.07.1997

JUDGMENT

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S.P. KURDUKAR, J.

1. The Central Government vide its order dated 13th February, 1990 called upon the respondent to retire and on his refusal to do so, he be compulsorily retired from the service on payment of pension and gratuity as admissible to him. This order came to be challenged in a Writ Petition No. 2492 of 1990 before the High Court and the Learned Single Judge by his judgment and order dated May 18, 1992 dismissed the same. The respondent preferred special appeal No. 83 (S/B) before the Division Bench of Allahabad High Court, Lucknow Bench which came to be allowed vide order dated February 8, 1994, granting desired reliefs to the respondent. The appellants thereafter filed a Civil Misc. Application No. 2787 (W) of 1984 for further hearing in the matter, however, the same was rejected by the Division Bench vide its order dated 8th April, 1994. The appellants have filed these two appeals by Special Leave assailing the legality of both these orders.
2. The controversy in these appeals relates to the promotion of the respondent to the substantive rank of Captain in the following circumstances:-

The respondent after obtaining B.Sc. degree in Agriculture & Animal Husbandry in 1969 from the Punjab Agricultural University obtained M.Sc. degree (Agriculture) in Soil Science from Haryana Agricultural University. The respondent also claimed to his credit merit scholarship from 1965 to 1969 and Junior Fellowship from Punjab Agriculture University and Junior Fellowship from Indian Council of Agriculture Research from 1969 to 1971. He applied for the 35th Technical Graduate Course and was commissioned on 17th June, 1973 in the Army as a second Lieutenant in the Corps of Military Farms. It was the claim of the respondent that having obtained technical qualification, he was treated as a Technical Graduate and as such was granted permanent commission. According to him, the Army Officers have to pass promotional examination Part B, if applicable, for grant of substantive rank from the Lieutenant to captain. The promotion examination Part-B was abolished in he year 1971 and was re-introduced in 1976 vide Government of India, Ministry of Defence letter dated 21st August, 1976. It was his claim that the re-introduction of Part-B examination would be applicable prospectively and he being the officer commissioned after abolition of the said examination and before the introduction thereof in the year 1976 and he being a Technical Graduate was covered by the exempted category, he was not required to appear for Part-B examination.

3. The appellants disputed the assertion of the respondent that he belonged to the exempted category of Technical Graduate. It was admitted that the respondent was commissioned on 17th June, 1973 but he did not fall in the exempted category. He was, therefore, required to pass Advance Administrative Course (equivalent to BYO's Course) by 17th June, 1976. He was detailed on the said course in 1974 as well as in 1975 but he failed in one subject. He was again detailed on three consecutive chances till October, 1978, however, he did not attend the examination and instead applied for remarking of the marks obtained by him in the said paper. His request was rejected as he failed to deposit the remarking fee. After lapse of about three years, on 23rd October, 1978, he deposited the requisite fee. Board of Officers assembled on 1st April, 1980 and on re-checking of the said paper, he was declared fail. In the meantime, the respondent completed eight years of service without qualifying the said course. On December 28, 1979, he was served with a show cause notice in accordance with SAI 23/S/68 but instead of responding to the same, he filed a statutory complaint which was rejected by the Central Government. The Central Government vide its Order dated 23rd December, 1979 called upon the respondent to resign from his Commission and on his refusal to do so, it was ordered that he be removed from service on payment of pension or gratuity, if any, admissible to him. The respondent challenged this action of the Central Government by filing a writ petition in the Calcutta High Court in the year 1982 which was contrary to Army Rule 13A. In the meantime, the Board again re-assembled on 21st August, 1980 and on reconsideration of the result, the Board declared him having passed the BOY's course which was held in January, 1975. In view of this decision of the Board, the respondent withdrew his writ petition and was retained in the service with a rider that he was liable for all future liabilities like passing of promotion examinations for his promotion and retention in service.

4. It is common premise that the respondent did not pass promotion examination Part-B within six years of reckonable service i.e. by 17th June, 1979 for his promotion to the substantive rank of Captain. He did not qualify the same until completion of thirteen years reckonable service. It is in these circumstances that in terms of Army Rule 13A, a show cause notice was issued to him on January 2, 1986. The respondent filed his reply which was considered by the Chief of Army Staff who recommended his case as a special case to give him two more chances to appear and qualify Part-B of promotion examination beyond thirteen years of reckonable service by the end of 1989. This order was issued on August 24, 1984. The respondent did not appear for Part-B promotion examination and consequently a show cause notice under Army Rule 13A was issued to him on 19th of August, 1989. The Central Government after considering the recommendations of the Chief of Army Staff on 13th February, 1990 issued an order calling upon the respondent to retire from service and on his refusal to do so, he would stand retired compulsorily on payment of pension and gratuity, if any, admissible to him. It was this order which was challenged by the respondent in the writ petition.

5. The learned single judge on perusal of the pleadings of the parties as well as the relevant documents on record by his judgment and order dated 18th May, 1992 dismissed the writ petition. However, on Special Appeal preferred by the respondent to the Division Bench, it was allowed vide impugned judgment and order dated 8th February, 1994 and the Orders passed by the learned Single Judge as well as by the Central Government on 13th February, 1990 were set aside and respondent was ordered to be retained in service with all consequential reliefs. It is this order which is the subject matter or challenge in these appeals.

6. Dr. A.M. Singhvi, Addl. Solicitor General appearing in support of these appeals urged that the Division Bench of the High Court had totally made out a new case for the respondent relying upon the letter dated August 21, 1976/September 3, 1976 issued by Government of India, Ministry of

Defence which was first time produced before the Court. On liberty having been granted to the appellants, they filed Civil Misc. Application No. 2787 (W) of 1994 with detailed affidavit explaining the said letter. However, the Division Bench vide its order dated 9th April, 1994 rejected the said Misc. Application without considering the material in proper perspective. The reasons contained in the impugned order principally proceed on the interpretation of letter dated August 21, 1976/September 3, 1976. It was urged that on June 17, 1973 respondent along with a number of other officers were commissioned into the following branches of the Army under the provisions of Army Instruction 105 of 1961:-

- (a) Military Farms
- (b) Army Education Corps
- (c) Army Service Corps (Food Inspection Org.)

7. Along with the above category of officers, a number of Engineering Graduates were also commissioned into the following branches of the Army under the provisions of Special Army Instructions 4/8/67:-

- (a) Corps of Signals,
- (b) Corps of Electrical & Mechanical Engineers
- (c) Corps of Engineers.

8. Dr. Singhvi contended that although officers of both these categories passed out together from Indian Military Academy as Part of 35 Technical Course as their training period was the same i.e. one year, but Engineering Graduates commissioned under Special Army Instruction 4/8/67 were only Technical Graduates. It was also made clear in paragraph 19 of Army Instruction No. 4/5 New Delhi dated 6th October, 1967 (Annexure 'N'. Only the said category of Engineering Graduates was entitled to two years ante date of seniority for promotion in terms of para 61 of the Regulations for the Army (1962) and was thus entitled for immediate promotion to the rank of Lieutenant. This distinction had been clarified in pre-commissioning letter of Army Head Quarter dated June 13, 1973 and the Presidential Notification 24th July, 1973 [Annexure 'O' (colly)]. Officers commissioned under Army Instruction 105 of 1961, including the respondent herein, were neither classified as Technical Graduates nor they were granted any such ante date seniority. The respondent in these circumstances was, therefore, not exempted from passing Part-B examination. The other officers commissioned along with the respondent into Military Farms possessing similar qualifications as also the other officers from Army Education Corps commissioned under Army Instruction 105 of 1961 were not treated Technical Graduates and, therefore, a clarification on the said subject came to be issued. Thus, the respondent could not have been given a special treatment of grant of exemption from passing Part-B examination . In the facts and circumstances of the case, the Central Government was right in issuing the order dated February 13, 1990.

9. The respondent who appeared in person supported the impugned order and urged that he being the Technical Graduate, was entitled for exemption and the impugned order passed by the Central Government on February 13, 1990 was unsustainable.

10. There is no serious challenge to the fact that the respondent had served the Military for fifteen years as a Commissioned Officer and possessed a technical qualification (M.Sc. Agriculture). The

letter dated 3rd September, 1976 reads as under:

"I am directed to refer to this Ministry's letter No.67587/9/MT-2/1247-B/D(GS-II) dated the 23rd June, 1971 and to convey the sanction of the President to the re-introduction of promotion examination Part-B for promotion to the substantive rank of Captain from 1976. The officers shall have to qualify in the following two papers only:-

(a) administration;

(b) Military Law;

(c) Military History;

(d) Current Affairs and Science;

(2) Provisions of SAI 23/8/68 shall be deemed to be amended to the above extent,

(3) Officers commissioned from the dates as indicated below against each category of officers will be required to pass the promotion examination Part-B for attaining the substantive rank of Captain:-

(a) Regular Officer-Officers commissioned on or other than technical after Ist December, 1972) ex IMA.

(b) Technical Graduates-Officer commissioned ex-IMA after Ist December, 1974

(c)(i) SSC Officers Officers granted including short service Technical Commission including Graduated Technical Graduates on or after Ist March, 1970 on grant of permanent commission.

(ii)

11. As stated earlier, the respondent was commissioned in Military Farms on 17th June, 1973 and relying upon this date of being commissioned, it was contended on behalf of the respondent that in terms of Para 3 clause (a) of the said letter, he being the Technical Graduate and commissioned after Ist December, 1972 was exempted from passing the promotion examination Part-B. His further contention was that his case was covered by Clause (b) of Para 3 and, therefore, he was not required to pass the promotion examination Part-B. This submission at the first flush appears to be attractive but on perusal of various documents on record and as explained by the appellants, we are of the considered view that the respondent did not fall in the category of Technical Graduate who would be covered by Clauses (a) and (b) or paragraph 3. In this behalf, it would be necessary to find out as to whether respondent could be treated as Technical Graduate in terms of various Government instructions. Army Instruction No. 23/8/68 dated August 14, 1968 deals with the exemptions to the various categories of officers set out in Clauses (a) to (d). Para 17 read thus:-

"17. The following would be exempted from taking the promotion examination:-

(a) See A1 93/74.

(b) Officers who have been permanently transferred to the JAG's Department, or the Cantonment Department.

(c) Officers of the Army Medical Corps and Army Dental Corps.

(d) Nursing officers of the Military Nursing Service.

(e) Officers granted direct permanent commissions in the Corps of Electrical and Mechanical Engineers, on a special roster of Assistant Inspector Armourers." Paragraph 21 which has got some bearing upon the controversy in question reads thus:-

"21. Officers belonging to the Remount and Veterinary Corps, Military Farms and Army Education Corps, will be exempted from the 'Tactics' test, both practical and written of Parts B, C and D of the promotion examination."

12. As per Para 21, the respondent would belong to the Category of Military Farms which was exempted from the Tactics test both practical and written part B, C and D of the promotion examination. In the meantime, Special Army Instruction No. 1 dated June 28, 1985 (Annexure 'B') came to be issued and the first paragraph thereof sub-titled as instructions reads thus:

"1. Special Army Instruction supersedes Special Army Instruction 3/8/57 and 23/8/68 as amended from time to time. It will take effect from 31st July, 1984." Paragraph 2 deals with retention in service. Then follows & caption Retention in Service, General and paragraph 2 reads as under:-

"Retention of officers will be determined on the recommendations of their Commanding Officers in two consecutive Annual Confidential Reports within the initial three year of service, each covering a period of NOT less than six months. Such officers who have not been recommended for retention will be called upon to resign their commission and on their refusal to do so will be removed from the service as per provisions of Army Rule 15. This aspect will be monitored by Military Secretary's Branch (MS 4A)."

13. Paragraph 3 refers to Basic Young Officers (BYO) Course and details thereof. Paragraph 4 deals with exemption and it reads thus:-

"4. The following categories of officers are exempted from attending a BYO's course:-

(a) Special List Officers,

(b) Officers commissioned in JAG's Branch,

(c) Military Nursing Officers,

(d) Regimental Commissioned Officers."

Paragraph 6 deals with the aim of promotion examination. It states that the aim of the promotion examination is to ensure that officers have the requisite level of professional knowledge before they

are promoted to the next substantive rank.

Paragraph 7 reads as under:-

"7 The following examinations are mandatory and will be held once a year as ordered by the Military Training Directorate (MT 2), Army Headquarters.

(a) For promotion to substantive rank of Captain.

(i) Part-A - Practical, applicable to officers commissioned after 25th September 1982.

(ii) Part B - Written, Applicable to all officers.

(b) for promotion to Substantive Rank of Major:-

(i) Part C-Practical Applicable to (ii) Part D-Written all officers."

Paragraph 14 deals with the exemptions to certain categories of officers and it reads thus:-

"14 Officers from the under mentioned arm/service are exempted from taking promotion examinations as mentioned against each:-

Arm/Service Category of Exemption

(a) Engrs Officers Parts A, B, C Seconded to and Tactics and the Survey Special, to of India Corps Paper or Part D.

(b)AMC Medical Part A, B, C and ADC and Officers, DMNS Dental Officers and nursing Officers.

(c) RVC Graduate Parts A and B, Veterinary Test (a) of Part Officers. C and Tactics and Military history Paper of Part D. Remount Tactics paper Officers. of Part D.

(d) MF All officers Test (a) of Parts A and C and Tactics paper of Part D."

Para 15 refers to a consequence where officers fail to qualify in the specified promotion examination and issuance of show Cause Notice for termination as provided in army Rule 13A:-

"15. The services of an officer, who fails to qualify in the specified promotion examination will be terminated under the provisions contained in Army Rule 13A after serving him with a Show Cause Notice as follow:- (a) Promotion Examination Part A or B.

(i) Show Cause Notice. - Show Cause Notice will be served to officers who fail to qualify in these examination on completion of 13 years reckonable service for officers commissioned before 31st July, 1984 and 9 years reckonable service in case of officers commissioned on or after 31st July, 1984.

(ii) Termination of Service, service of all officers, who fail to qualify in the above

examination on completion of 13 years reckonable service for officers commissioned before 31st July, 1984 and 11 years reckonable service in case of officers commissioned on or after 31st July, 1984 will be terminated as per provisions contained in Army Rule 13A."

14. A combined reading of all these instructions would unmistakably show that the respondent in order to be eligible for promotion to the rank of Captain was required to pass Part-B examination. Consistent with this interpretation on 2nd June, 1986, a show cause notice was issued to the respondent to appear and pass the Part-B examination. The respondent, however, did not comply with the said show cause notice. The Govt. of India, Ministry of Defence, however, vide its letter dated August 24, 1987 (Annexure 'G') communicated to the Chief of Army Staff that the respondent be conveyed the sanction of the President to the grant of extension of time beyond eighteen years of reckonable service upto 1989 for qualifying promotion examination Part-B with loss of seniority. This concession was granted to him as a special case. It was further conveyed that the remaining promotion examinations will have to be cleared before completion of twenty years of service. Copy of this letter was forwarded to the respondent. It is a common ground that the respondent did not pass the said promotion examination Part-B until a show cause notice dated August 9, 1989 (Ex.H) under Army Rule 13A was served upon him. The respondent filed his reply to the said show cause notice. On 23rd August, 1989, the respondent filed another statutory complaint. The Central Government on 13th February, 1990 took a decision in terms of Army Rule 13A to call upon the respondent to either resign his commission or on his refusal to do so, he be compulsorily retired from service. This decision was taken after considering the statutory complaint. The respondent, thereafter filed the writ petition before the Lucknow Bench at Allahabad High Court which was dismissed by the Learned Single Judge but on Special Appeal to the Division Bench, the same was allowed by the impugned order.

15. It is needless to set out provisions contained in Rule 13A since it cannot be disputed that such a power can be exercised by the Authority in the present case.

16. The respondent who appeared in person, however, strongly relied upon the letter dated 3rd September, 1976 and contended that he having been commissioned after 1st December, 1972 as a Technical Graduate is exempted from appearing the promotion examination Part B and, therefore, the show cause notice dated August 9, 1989 (Ex.H) was rightly held to be unsustainable. We, however, do not see any substance in this contention. In view of above discussion as regards the interoretation of various Army Instructions, we are of the considered view that the contention raised on behalf of the respondent seeking exemption from passing promotion examination Part-B has no substance. It was pointed out on behalf of the appellants that similarly situated officers like the respondent were also required to pass promotion examination Part-B and, therefore, there was no question of granting any exemption to the respondent.

17. After going through the pleadings of the parties, documents on record and the written submissions filed on behalf of the respondent, we are of the considered view that the Division Bench of the High Court had misread the various Army Instructions issued from time to time and had totally misconstrued and misinterpreted the letter dated 3rd September, 1976 (Annexure 'L'). The impugned orders are thus unsustainable.

18. In the result, the appeals are allowed. The impugned orders dated 8th February, 1994 and 8th April, 1994 passed in Special Appeal No. 83 (S/B) of 1992 and Civil Misc. application No. 2787 (W) of 1994 respectively by the Division Bench are quashed and set aside and the order passed by

the Learned Single Judge on 18th May, 1992 in writ petition No.2492 of 1990 is restored. In the circumstances, parties are directed to bear their own costs.