

SUPREME COURT OF INDIA

Dharam Pal Singh

Vs.

Union of India

C.A.No.2345 of 2003

(Y. K. Sabharwal and H. K. Sema JJ.)

13.03.2003

ORDER

1. Leave granted.

2. The appellants joined Indian Army in the year 1963. In 1967, he joined Defence Security Corps. He was promoted to the rank of Havaldar on 1st July, 1981. The appellant was given extension as Havaldar, the last extension being up to 31st May, 1988. He became entitled to be considered for promotion to the rank of Junior Commissioned Officer (JCO) having passed JCO promotion cadre on 4th December, 1985 and was considered for promotion to the said post in the years 1986 and 1987. In those selections, on the basis of his Annual Confidential Reports, he was not found fit for promotion. On 27th January, 1987, the appellant gave an unwillingness certificate for extension of service as Havaldar w.e.f. 31st May, 1988.

3. The appellant was admittedly considered by screening board for promotion to the rank of Naib Subedar (JCO) on 12th April, 1988 wherein he was found fit for promotion as he had earned one more 'above average report' during the year 1987. According to respondents as Havaldar had to earn two 'above average reports' out of three for promotion to the rank of Naib Subedar. The appellant was not informed that he had been found fit for promotion in the screening board as above noticed. On the contrary, in response to his telegram dated 20th April, 1988 sent expressing willingness to serve beyond 31st May, 1988 in case he was promoted as JCO, he was informed by the respondents on 24th April, 1988 that since he had already been proceeded on discharge from service on completion of terms of engagement the question of granting any further promotion to him does not arise. He was not even at this stage informed of having been selected for promotion as Naib Subedar. The result was that the appellant retired from service as Havaldar on 31st May, 1988.

4. The appellant challenged his non promotion in a statutory appeal. It seems that at this stage too he was not informed of the proceedings of the screening board dated 12th April, 1988. Having failed to get any relief in the statutory appeal, a writ petition was preferred by the appellant in the year 1990.

5. The appellant learnt about his having been selected for promotion as JCO only when counter-affidavit was filed in the writ petition. The writ petition was, however, dismissed holding that the option for unwillingness certificate once given cannot be changed and, therefore, it was not permissible for the appellant to change his option and that he was entitled to further extension only if he had exercised his option to continue beyond 31st May, 1988. The letters patent appeal filed by the appellant was also dismissed. The Division Bench in judgment under appeal has also noticed that while rejecting the statutory appeal of the appellant on 15th May, 1990 he was informed that neither he was considered nor selected for the DPC held in the year 1988.

6. It is not in dispute that if promoted as JCO the appellant could continue in service up to 30th June, 2002. Learned counsel for the appellant relies upon the decision of this Court in *Union of India and another v. Wing Commander T. Parthasarthy*¹ holding that a request of premature retirement which required the acceptance of the competent or appropriate authority will not be complete till accepted by such competent authority and the request could definitely be withdrawn before it became so complete. It is all the more so in a case where the request for premature retirement was made to take effect from a future date. Reliance has also been placed on *Shambhu Murari Sinha v. Project and Development India and another*² where this Court while referring to the earlier decision in the cases of *Balram Gupta v. UOI*³, *J. N. Srivastava v. UOI*⁴ and *Power Finance Corporation Ltd. v. Pramod Kumar Bhatia*⁵ reiterated that the resignation, in spite of its acceptance, can be withdrawn before the effective date. The contention of learned counsel is that the aforesaid principles are fully applicable to the present case.

7. Learned Additional Solicitor General, on the other hand, submits that the post of the Havaldar being a tenure post the decision in which question of resignation or voluntary resignation came up for consideration by this Court are not applicable as the test laid therein are different. We are unable to accept this submission. The facts of the present case show that the case of the appellant is rather on a strong footing than the aforesaid decisions by the learned counsel for the appellant. Even before the effective date, i.e., 31st May, 1988, the appellant had expressed his willingness and desire to continue if promoted as JCO. The term of the appellant as Havaldar unless further extended was to expire on 31st May, 1988. The unwillingness to continue as Havaldar was expressed more than a year earlier, i.e., on 27th January, 1987. It was a formal unwillingness in view of the rules. The unwillingness to continue as Havaldar beyond 31st May, 1988 does not imply unwillingness to be promoted or unwillingness to continue as JCO. The position was just opposite. In fact, even in response to his telegram the respondent by reply dated 24th April, 1988, instead of informing him about the proceedings of the screening board above referred, wrote to him that since he has already proceeded on discharge from service on completion of terms of engagement the question of granting any further promotion to him does not arise. Reference to the completion of terms of engagement in this letter was the post of Havaldar. The subject title of the letter dated 24th April, 1988 also is "Promotion....Havaldar to N. Subedar". Further even when statutory appeal was filed he was informed that he was neither considered nor selected by the DPC held in 1988. As above noticed, he learnt about his selection only when

the counter-affidavit was filed by the respondent in the writ petition. Under these circumstances, denying the relief of promotion, though a notional promotion at this stage - the appellant already having reached the age of superannuation, would be placing a premium on the wholly incorrect and contrary to record stand taken by the respondents. The appellant was not informed that although he had been selected to be promoted but he cannot be given promotion as he had given unwillingness for extension of the service as Havaldar. The fact that the appellant's papers for discharge as Havaldar with effect from 31st May, 1988 had been processed is of no consequence in so far as the appellant's entitlement to be promoted as JCO after his due selection by screening board. If informed of his selection as JCO, appellant would have been fully justified in withdrawing his unwillingness.

8. We are also unable to accept the contention of learned Additional Solicitor General that the appellant is not entitled to the relief for the reason that he had not been found fit in two earlier screening boards but was found fit only in the screening board held on 12-4-1988. The appellant, we assume, was entitled to be considered for promotion in the DPC which met in April, 1988 and was, therefore, so considered. It was nobody's case that after the appellant had given his unwillingness on 27th January, 1987 he was ineligible to be considered for promotion. Having regard to his ACRs he was found fit to be promoted. The fact that in earlier two boards he was not found fit, in our view, is wholly inconsequential and irrelevant.

9. In the aforesaid reasons, we set aside the impugned judgment of the High Court. Allowing the writ petition of the appellant, we direct the respondents to grant to him the consequential relief, i.e., the pensionary benefits with effect from May, 1988 treating the appellant to be in service as JCO. The arrears of the pensionary benefits calculated in this manner shall be paid to the appellant within three months. The appeal is accordingly allowed with costs.

Appeal allowed.

¹(2001) 1 SCC 158)

²(2000) 5 SCC 621)

³(1987 Supp SCC 228)

⁴(1998) (9) SCC 559)

⁵(1997) 4 SCC 280)