

Kolkata AFT

SEE RULE 102 (1)

ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOLKATA

APPLICATION : O.A. 178 of 2018 & MA 11 of 2019

DATED : THIS *Eight* DAY OF MARCH, 2019

CORAM

HON'BLE DR. (MRS.) JUSTICE INDIRA SHAH, MEMBER (JUDICIAL)

HON'BLE LT GEN GAUTAM MOORTHY, PVSM, AVSM, VSM, ADC, MEMBER (ADMINISTRATIVE)

APPLICANT (S) : WS-01062M
Maj Gargi Priyadarshini Saikia
HQ Eastern Command
GS (Edn) Branch
Fort William
Kolkata-700021

Versus

RESPONDENT (S) :- (1) The Union of India
Through Secretary
Ministry of Defence
South Block, D.HQ. P.O.
New Delhi-110011

(2) The Chief of the Army Staff
Through Adjutant General
Integrated HQ of MOD (Army)
South Block, D.HQ P.O.
New Delhi-110011

Counsel for the applicant (s) : Mr. SK Choudhury, Ld. Adv.

Counsel for the Respondent (s) : Mr.S.Agarwal, Ld. Adv.

ORDER

{ Per Hon'ble Dr.(Mrs) Justice Indira Shah, Member (Judicial)}

1. The applicant herein was commissioned in Army Education Corps (AEC) on 19.3.2005. In her 5th year of service she gave application

for grant of five years of extension of service. Option for grant of Permanent Commission for women was then non-existent. The applicant was commissioned as Women Special Entry Scheme (Officers, WSES (O) under the 5+5+4 scheme. The applicant was granted 5 years of extension of service vide letter dated 26.11.2009. There was a policy decision to offer Permanent Commission in respect of Short Service Commission (SSC) Women Officers and it was communicated to the respondents on 27th Oct, 2010. As per the said letter all those SSC Women Officers recruited prior to 2006 were to be considered for grant of Permanent Commission in Nov, 2010. The applicant gave her option on 31st August, 2010 that she was not desirous of being considered for grant of Permanent Commission. Again in her eighth year of service, the applicant gave the option on 25th August, 2012 for being considered for grant of extension only and once again, she did not opt for Permanent Commission due to compelling domestic problems. As her domestic problems were sorted out to the great extent she then opted on 13th Oct, 2014 for grant of four years extension of service.

2. It is averred in her application that the applicant was misled by MS 7 B over telephone that she was not eligible for grant of Permanent Commission and therefore the applicant submitted revised option for grant of extension of service by 4 years vide the letter dated 13 Oct, 2014. Subsequently, after 3 years and 5 months, the applicant submitted an application before Army Head Quarter, MS branch on 5th March, 2018 which was followed up by further details on 12.5.2018 with prayer for grant of Permanent Commission due to marked improvement in domestic situation of the applicant. The Military Secretary Branch (MS 7B) vide letter dated 12.7.2018, declined to consider the case of the applicant for grant of Permanent Commission as she had not opted for

consideration for Permanent Commission on two previous occasions, i.e., in 5th and 8th year of service. The applicant submitted a statutory complaint on 15th Oct, 2018. Since there was no response against her statutory complaint, she filed this O.A. However, the statutory complaint was finally disposed off by the Central Government vide their order dated 07 Feb 2019 rejecting her complaint. The applicant is scheduled to be released from service on 19.3.2019, on completion of her present terms of engagement. In the OA she has prayed for quashing and setting aside IHQ MOD (Army) MS Branch letter No. 05537/RVC/No 5 SB/May 2018/MS-7B letter dt. 12 Jul 2018 whereby application of the applicant for grant of Permanent Commission has been rejected and to constitute a Special Selection Board No.5 for the applicant and if found suitable, grant her Permanent Commission. She has also prayed for an interim order to stay her release from service on 19 Mar 2019 till such time the matter is decided. Subsequently after receiving the letter rejecting her Statutory Complaint, she has filed M.A. 11 of 2019 challenging the rejection of and quashing of her Release Order.

3. The respondents, in their Counter Affidavit, have admitted that the applicant was commissioned on 19.3.2005 under the existing terms and conditions, i.e, 5 + 5+ 4. Before completion of 5 years she was considered by Selection Board in the month of Nov, 2009 for grant of extension as grant of Permanent Commission to Women Officers was not introduced at that time. The applicant opted for 5 years extension and same was granted. They have also admitted that in Nov, 2010 with the introduction of Permanent Commission for Women Officers in JAG and AEC exclusively, they called for options accordingly from all Women Officers. According to them, the applicant did not opt for Permanent Commission in spite call for the options. As per the terms and conditions

of Short Service Commission, WSES (O)-25 Course, the case of the applicant was once again considered by the Board in the month of Nov, 2012 for Permanent Commission before completion of 10 years of service, as she was governed by the old terms and conditions which she again did not opt for. The applicant subsequently approached respondents through a representation to reconsider and grant her Permanent Commission, which was rejected due to policy constraints. They have also averred that the statutory complaint filed by the applicant was disposed of by Govt. of India, Ministry of Defence, vide order dtd.07 Feb, 2019, wherein it has been stated that there is no provision to grant the officer another chance for opting the Permanent Commission. The case of the officer has been dealt with strictly as per the policy universally applicable to all similarly placed officers. Thus, no organizational injustice has been done to the officer on any account.

4. Heard Mr.S.K.Choudhury, learned Counsel appearing for the applicant and Mr. S.Agarwal, learned Counsel appearing on behalf of the respondents. Since the pleadings are complete and we have heard both sides at length, we propose to dispose of the OA & M.A. vide this order.

5. Learned counsel for the applicant has referred to the Army Order No.110 of 1981 which deals with the grant of Permanent Commission to the SSC Officers (Technical and Non Technical). Para 2 of the order speaks that *"the officers should use utmost discretion in exercising their options as options once exercised will be final and irrevocable. Request for change of option necessitated because of circumstances beyond control, if any, should be routed through the formation Commanders and Command Head Quarters will ensure that these are forwarded to Army Headquarter only under exceptional circumstances after scrutinizing the merit of the case"*. It is submitted by the learned Counsel that the aforesaid policy envisages

that option once exercised will be final and irrevocable subject to a request being made to change in option **provided such change is necessitated by circumstances beyond control**. Thus, it is not correct to say that option once exercised cannot be revoked. The only condition is that such change must be necessitated by circumstances beyond control and the Commanders in the chain must recommend it on merits. It is, therefore, evident that the Army Order allows for a change of mind.

6. In the cited case of JN Shrivastava Vs. Union of India and another, AIR 1999 SC 1571, the issue was whether the appellant was entitled to withdraw his voluntary retirement notice of 3 months submitted by him on 03.10.1989, which was to come into effect from 31.01.1990. This proposal was accepted by the authorities on 2.11.1989, but thereafter before 31 Jan, 1990, the appellant wrote a letter to withdraw his voluntary retirement proposal which was not accepted by the respondents. Hon'ble Supreme Court observed "*It is now well settled that even if the voluntary retirement notice is moved by an employee and gets accepted by the authority within the time fixed, before the date of retirement is reached, the employee has locus poen'tentiae to withdraw the proposal for voluntary retirement.*" Similarly, in the case of Balram Gupta Vs. Union of India and Another, 1987 AIR 2354, it was held that "*on the principle of general law, in the absence of a legal, contractual or constitutional bar, an intimation in writing sent to the appropriate authority by an incumbent, of his intension or proposal to resign his office/post from a future specified date, can be withdrawn by him at any time before it effects termination of the tenure of the office/post or employment.*"

7. The ratio laid down in the Balram Gupta Vs. Union of India (Supra) was reiterated in the case of Sambhu Murari Sinha Vs. Project and Development India Limited and Another in Appeal (Civil) 2639 of 2000.

8. In a similar case of Wing Cdr Pooja Thakur Vs. Union of India and Ors. OA 703 of 2016, the Principal Bench of Armed Forces Tribunal vide order dated 14.7.2017, it was observed in para 24, 25, 26 as under :--

"24. Coming to the facts of the present case, one contention of the Respondents has been that the Applicant in the year 2011-2012 had only sought extension and when she was called upon to explicitly state as to whether she would be opting for permanent commission, the answer furnished by her was in negative and that is the reason, she was given only extension for 5 years in Short Service Commission only which expired on 16.06.2016. It is to be seen that according to clause 10 of the policy, only such officers were required to give their consent immediately, who had ceased to be employees before furnishing the consent or were likely to superannuate in the near future. It is nowhere stated that the Applicant who was already granted extension for Short Service Commission, was also required to give her consent for the Permanent Commission when the tenure of the Applicant was to end on 16.06.2016, that is almost four years later. The aforesaid necessity of giving consent by the officers had arisen on account of the judgement of the Hon'ble Delhi High Court which had granted Permanent Commission to lady officers who had just finished their tenure or were likely to finish in the year 2012. The Applicant admittedly was not falling in that category at that point of time. Therefore, her exercise of the option at that point of time in only seeking extension cannot be held against her.

25. According to the policy, if her tenure was up to 16.06.2016, then according to the policy, her option was to be obtained one year prior to the date of demitting her office. This exercise was not carried out by the Respondents. On the contrary, the Respondents are relying upon the non exercise of option for grant of permanent commission by the Applicant in the year 2011-2012 with the request that in the year 2015, the Applicant had applied for premature release and therefore this clearly reflect her intention of not opting for permanent commission.

26. In our considered view, this contention of learned counsel for the Respondents is without any merit because request for premature release had been withdrawn by her before it was accepted. Further request for premature release could not be treated as substitute to the obligation which was to be discharged by the Respondents in seeking the option from the Applicant one year prior to her release as to whether she would like to be granted Permanent Commission. Similarly, the option given by her is for only extension in the year 2011-12 and not Permanent Commission was too distant in the

present time to control her release on 16.06.2016 and deprive her from consideration of grant of Permanent Commission by the Board in accordance with law."

9. In view of the aforesaid discussions and settled principles of law, we hold that the applicant was entitled to change her option which was necessiated to her due to change of circumstances and she is entitled to be considered for grant of Permanent Commission. Accordingly, we direct the respondents to consider the application of the applicant for Permanent Commission by holding a Special Selection Board No.5, benchmarking her profile with that of her batchmates and if found fit, to grant her Permanent Commission. Needless to say that if she is not found fit, she may be released from service.

10 In the interim, she shall not be released from service.

11. This O.A. & M.A. are allowed and accordingly disposed off.

12. No order as to cost.

(LT GEN GAUTAM MOORTHY)
MEMBER (ADMINISTRATIVE)

(JUSTICE INDIRA SHAH)
MEMBER (JUDICIAL)

gm