

Hari Kumar Vs. Union of India and Others

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Court : Delhi

Decided On : Apr-30-2012

Judge : Anil Kumar & Sudershan Kumar Misra

Appeal No. : W.P.(C) No. 1703 of 2012

Appellant : Hari Kumar

Respondent : Union of India and Others

Judgement :

Anil Kumar, J.

CM No.3739/2012

This is an application by the petitioner seeking the condonation of 26 days delay in re-filing the writ petition.

For the reasons stated in the application, it is allowed and delay of 26 days in re-filing the writ petition is condoned.

W.P.(C) No.1703/2012

1. The petitioner has sought the quashing of order dated 28th January, 2011 passed by the Principal Bench, Armed Forces Tribunal in O.A No.43/2011 titled as „Hari Kumar v. Union of India and Ors?and has also sought direction to the respondents to select the petitioner into the SCO?s current running course or in

the next batch.

2. Relevant pleas and contentions raised by the petitioner in support of his petition are that petitioner joined the Indian Army as a Gunner (General Duty) in the corps of Artillery on 25th April, 1996. The petitioner contended that when he was enlisted in the Army, he was medically fit and was placed in the category of Shape I.

3. The petitioner was, thereafter, promoted to the post of Lance Nayak on 30th July, 2001. He averred that he was also examined medically during the annual medical check up on 9th July, 2003 and he was found to be medically fit and was consequently certified to be in the category of Shape I.

4. The petitioner was further promoted to the post of Naik on 5th December, 2003 and thereafter to the rank of Lance Hawaldar on 1st December, 2009. The petitioner has contended that after his promotion to the rank of Hawaldar on 12th May, 2011, he is still serving on the same rank and post. According to the petitioner, during his entire service of 16 years in the Army he has remained in the medical category of Shape I. The petitioner further disclosed that though he had been placed in Shape I, however, since he was exposed to violent noises and heavy sounds of artillery guns, it may have caused hearing loss or impairment in the hearing of the petitioner. The petitioner asserted that despite the rigorous demands of service, he studied during night and obtained a degree of B.A (History) from the University of Calicut.

5. The petitioner had, thereafter, applied for selection to the post of Special Commissioned Officer, for which he was called by the Service Selection Board. According to the petitioner, under the Army policy, the Special Commissioned Officer is a special cadre created in which entry is given to all ranks (JCO/NCO/Lance Naik/Sepoy) of all the Corps except Army Medical Corps/Army Dental Corps/Army Postal Service, Territorial Army and Religious Teachers.

6. As per the eligibility conditions for enlistment as a Special Commissioned Officer, the candidates are required to have the medical category of Shape-I and they should have completed five years service on the last date of submission of their application to their unit, besides having passed Class XII or any other

recognized technical examination/certificate/diploma of one year or more than one year duration. The eligibility for the said cadre also contemplated that the candidates should have been graded above average in the last ACR and the candidates should have been recommended for the said commission by a superior authority.

7. The petitioner disclosed that on account of fulfilling all the eligibility conditions and criteria prescribed for the post of SCO, and on being duly recommended by the Commanding Officer of the rank of Colonel, Commander of the rank of Brigadier and the General Officer Commanding in the rank of Major General, the petitioner applied for the Service Selection Board interview. Meanwhile, as far as the medical fitness of the petitioner was concerned, during the annual medical examination which consider the weight, chest measurement, waist, blood pressure and disability, the petitioner had been placed in the medical category of Shape-I on 13th May, 2010.

8. In pursuance of the application made by the petitioner, the SSB issued a call letter dated 13th June, 2010 directing the petitioner to attend the interview for the selection for the SCO's 27th Course held from 24th July, 2010 to 28th July, 2010 at Bangalore. According to the petitioner, in compliance with the criterion laid down and the various stages of selection, he was successful in clearing the same and he also was declared as passed by the SSB, Bangalore on 28th July, 2010.

9. After the petitioner was declared successful, the petitioner was subjected to a thorough medical checkup by the Special Medical Board (SMB) at the Air Force Command Hospital, Bangalore. After the thorough medical checkup which was carried out from 29th July to 3rd August, 2010, the petitioner was, however, found to be unfit on account of "sub-standard hearing".

10. After being declared as `unfit` for the selection on account of "sub-standard hearing", the petitioner contended that he went for an unofficial medical checkup in the Army Hospital (RandR) Delhi Cantt on 11th August, 2010. According to the petitioner, the medical examination revealed that the hearing of the petitioner was normal in his right ear, however, there is loss of hearing in the left ear.

11. After obtaining the report from the Army Hospital (RandR), the petitioner challenged the decision of the Special Medical Board (SMB) and sought for an Appeal Medical Board (AMB). The Appeal Medical Board examined the petitioner on 20th August, 2010 at the base hospital, Delhi Cantonment. The Appeal Medical Board also confirmed that the petitioner has "Sensory Neural Hearing Loss (Left Ear)". The petitioner was communicated the findings of the Appeal Medical Board and was also given the opportunity to challenge the same before the Review Medical Board.

12. Consequently, the petitioner challenged the findings of the Appeal Medical Board before the Review Medical Board. The Review Medical Board of the petitioner was conducted at the Army Research and the Referral Hospital (RandR Hospital), which also confirmed on 24th September, 2010 the result of the Appeal Medical Board that the petitioner is suffering from "Sensory Neural Hearing Loss (Left Ear)".

13. The petitioner asserted that he has been discriminated, as all the candidates of the SCO 27th course were declared successful except the petitioner and in the circumstances the petitioner has been discriminated and victimized. Aggrieved by the decision of the respondents in not selecting the petitioner to the post of Special Commissioned Officer, the petitioner filed an original application dated 25th January, 2011 before the Armed Forces Tribunal, Principal Bench. The Principal Bench of the Armed Forces Tribunal, however, dismissed the original application of the petitioner in O.A No.43/2011 on the ground that the petitioner is medically unfit.

14. The petitioner has challenged this decision of the Principal Bench, Armed Forces Tribunal, on the ground that the eligibility conditions do not contemplate a medical checkup for those candidates who are declared successful. According to the petitioner, since in the annual regular medical checkup for the Army, he has been placed in Shape I, the findings of the Special Medical Board, the Appeal Medical Board and the Review Medical Board for the SCO cannot be relied on and it cannot be held that the petitioner is not in category Shape I and that he is not medically fit and eligible for the post of Special Commissioned Officer.

15. The petitioner has also relied on Capt. Virendra Kumar vs. Union of India (UOI), (1981) 1 SCC 485 in order to emphasize the relevance of the medical category Shape I in the Indian Army. In the circumstances, it is contended that as the petitioner has always been in Shape I since the time he joined the Army way back in 1996 till date, therefore, the petitioner could not be denied the selection to the post of the Special Commissioned Officer on account of having "Sensory Neural Hearing Loss (Left Ear)" which was developed during the course of his duty.

16. The petitioner also contended that the function of a Special Commissioned Officer is more mental in nature, unlike a jawan whose duty is more or less a physical one, and in the circumstances, since the petitioner was placed in Shape I in the regular Army medical checkup for the last 16 years of his service, solely on account of the fact that the medical checkup carried out by the selection board for the selection to the post of Special Commissioned Officer had declared the petitioner to be unfit on account of a negligible impairment of "Sensory Neural Hearing Loss (Left Ear)", cannot deny him the selection to the post of SCO.

17. The petitioner also relied on certain Army personnel who received disabilities in previous wars, including some foreigners who were retained in the Armed Forces despite their physical infirmities and in the circumstances it is contended that "Sensory Neural Hearing Loss (Left Ear)" does not make the petitioner unfit and ineligible for the said post.

18. Mr. Ankur Chhibber, Advocate who has appeared on advance notice, has contended that there is no rule that stipulates that the medical categories prescribed pursuant to the annual medical examination record of a candidate has to be accepted for enlistment to the post of Special Commissioned Officer and that the respondents are debarred from carrying out any medical checkup after the recommendations of the Service Selection Board (SSB). He also contended that there was no ground for singling out the petitioner. No *malafide* or bias has even been attributed by the petitioner against any of the officials of the Service Selection Board or the other officials of the different Medical Boards. The learned counsel further contended that the petitioner himself has admitted that on account

of the Corps to which he belongs, there may have been hearing loss or impairment of hearing in his left ear. It is submitted that once the petitioner admits that there is an impairment in his left ear, which has also been confirmed by the Medical Board, Appeal Medical Board and Review Medical Board, the petitioner cannot claim that he is medically fit for appointment to the post of Special Commissioned Officer.

19. This Court has heard the learned counsel for the parties and has also perused the writ petition and the documents produced along with the writ petition and the record produced by the learned counsel for the respondents. This is not disputed that the Armed Forces Tribunal, Principal Bench found the petitioner medically unfit and declined to interfere in his petition seeking appointment as a Special Commissioned Officer. The petitioner's counsel has also not denied that the petitioner has "Sensory Neural Hearing Loss (Left Ear)". In any case, the findings of the Medical Board, Appeal Medical Board and the Review Medical Board are consistent in holding that the petitioner suffers from "Sensory Neural Hearing Loss (Left Ear)". If that be so and in case of no *mala fides* being attributed against the respondents, if it has been held by the respondents that the petitioner is not fit to be appointed to the post of Special Commissioned Officer, the petitioner cannot allege that he has been discriminated on the ground that all other persons who were in the selection process for 27th SCO have been selected except for the petitioner. From the averments made by the petitioner, it is apparent that no allegation has been made by the petitioner that any of the candidates who have been selected for the post of SCO, their medical category in the Army and not the Special Medical Board assessment had been taken into consideration. There are no allegations by the petitioner that those who have been selected had any other defect or shortcoming which would have disentitled those candidates for selection to the post of Special Commissioned Officer.

20. In the circumstances, if the petitioner has "Sensory Neural Hearing Loss (Left Ear)" he cannot compare himself to others and allege that he has been discriminated against.

21. The learned counsel for the petitioner has also not been able to point out any rule, procedure or practice under which the annual medical category given by the

Army to the Non Commissioned Officer has to be accepted by the respondents for the purpose of considering the eligibility and fitness of a candidate for appointment to the post of Special Commissioned Officer. If that be so, the petitioner cannot insist that since as a Non Commissioned Officer on annual medical checkups he has been placed in category Shape I, therefore, that categorization of the medical category of the petitioner as Shape I has to be necessarily accepted by the Special Selection Board for selection to the post of Special Commissioned Officer. Another factor which emerges from the perusal of the annual medical examination record of the Non Commissioned Officer is that it is based only on the consideration of the weight, chest, waist, blood pressure and disability for placing a Non Commissioned Officer in the medical category. While admittedly, for ascertaining the medical category for the post of Special Commissioned Officer, the parameters are different and more elaborate and even the disability of "Sensory Neural Hearing Loss (Left Ear)", which might not be construed to be a major disability for a non commissioned officer, might be an important requirement for the post of SCO. Regardless, in the absence of any *malafides* being imputed on the part of respondents, the petitioner cannot contend that he has not been selected on account of arbitrary or illegal reasons.

22. In the totality of the facts and circumstances there are no grounds to interfere with the decisions of the respondents and the order of the Tribunal holding that the petitioner is medically unfit on account of "Sensory Neural Hearing Loss (Left Ear)" for appointment to the post of Special Commissioned Officer so as to require any interference by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India. The writ petition is, therefore, dismissed. It is, however, clarified that on account of the petitioner suffering from "Sensory Neural Hearing Loss (Left Ear)", the respondents shall be entitled to review his medical category as a Non Commissioned Officer. With these observations the writ petition is dismissed.