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IN THE CENTRAL ADMINISTRATIVE TRIBUNAL, ALLAHABAD
ADDITIONAL BENCH AT ALLAHABAD

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Allahabad : Dated this 14th day of July, 1997
T. A.
Original Application No. 551 of 1987

CORAM:-

Hon'ble Mr. S. Das Gupta, A.M.

Hon'ble Mr. T. L. Verma, J.M.

Captain Brahma Dutt Tripathi,
Son of Shri V.N. Tripathi,
Administrative Officer,
21st Battalion, National Cadet Corps,
Bareilly (U.P.)
(By Shri Sudhir Agarwal, Advocate)

.... Applicant

Versus

1. Government of India, Ministry of
Defence through the Secretary Ministry
of Defence, New Delhi

2. Director General, National Cadet Corps,
Ministry of Defence, West Block IV,
R. K. Puram, 21st Battalion, Bareilly.

(By Shri NB Singh, Advocate)

.... Respondents

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ORDER

By Hon'ble Mr. S. Das Gupta, A.M.

1. Capt. Brahma Dutt Tripathi, who was an officer of the National Cadet Corps (NCC for short), filed a writ petition before the High Court of Judicature at Allahabad challenging an order dated 30-11-1979 passed by the Union of India by which he was not granted extension of his service beyond 10-12-1979. He sought quashing of the aforesaid order and a direction to the respondents not to give effect to the aforesaid order and to allow him to continue in service till he attained the age of discharge/superannuation. This writ petition was later transferred to this Tribunal and was renumbered as TA No. 551/1987.

2. The facts of the case are that on being released from the Regular Indian Army, the applicant was posted as Administrative Officer in the rank of Lieutenant in the NCC. He was granted Commission in the NCC on 11-12-1969 and the seniority was fixed as 2nd Lieutenant from 12-1-1965 and as Lieutenant from 12-1-1968. As such the seniority was assigned to him by giving credit for his service in the Indian Army. While he was posted as NCC Officer in 1st West Bengal Bn, Calcutta in November, 1975, he received information to the effect that he had been promoted on the substantive post as a Captain in NCC. A true copy of the said communication is at Annexure-2. The date of the substantive appointment as Captain was indicated as 12-1-1973. Later he was transferred to Chhapra in February, 1976.

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and posted to 16 Bn NCC, Siwan. At this station he got into certain problems with his superior officers. He was chargesheeted and after inquiry certain penalty was also imposed on him. The applicant alleges that this was due to the biased attitude on the part of his superior officers. On 31-8-1976 an order was served on the applicant asking him to report with immediate effect at Darbhanga. He requested for cancellation of the order of transfer on account of illness of his wife. He, however, joined his post at Darbhanga on 1-9-1976. He made a representation to the Secretary Ministry of Defence, Government of India on 12-6-1976 regarding the manner in which he was harassed and he also applied for leave on 1-11-1976 on account of his wife's sickness. Subsequently, he left for Delhi to get his wife admitted in Wellington Hospital, after giving an intimation to the Director General NCC and other concerned authorities. Later, while he was serving at Darbhanga, a show cause notice dated 1-3-1978 under the signature of the Under Secretary to the Government of India was served on him. In this show cause notice, certain charges against him were mentioned and he was asked to explain why disciplinary action should not be initiated against him. The applicant submitted a detailed reply to the show cause notice on 20-9-1978. The applicant had meanwhile been transferred to Orai, where he received a communication from the Union of India, Ministry of Defence on 15-10-1978 to the effect that his services had been extended upto 10-12-1979. On 2-6-1979, the Government of India imposed on the applicant the penalty of forfeiture of one year's service for the purposes of promotion. Thereafter, a telegraphic communication dated 30-11-1979 was received by him by which he was informed that he would not be granted extension of service beyond 10-12-1979. This ^{its} order which is under ~~which~~ challenge in this OA.

3. The main ground of challenge as taken in the original writ petition was that the impugned order was passed in contravention of the provision contained in Article 311 of the Constitution of India and that his services have been terminated without giving him any opportunity of being heard. He also took a plea that Rule 28(2)(c) of the NCC Rules under which his services were brought to an end confers arbitrary and unguided power on the Government of India and thus offends Articles 14 and 16 of the Constitution of India. The grounds of challenge were further amplified during the course of argument to which we will refer later.

4. The respondents have contested the case by filing a counter affidavit. It has been stated therein that the applicant was actually posted to 33 BIHAR NCC, Chhapra and not at Siwan but he was being sent to Siwan on official duty from Chhapra. A Court of Inquiry was held in August, 1976 at Siwan and the applicant was alleged to have formed ^a clique with Subedar Major B.K. Singh against the Officer Commanding Major S.N. Kaushik. A Court of Inquiry was held to ^{also} investigate into the matter. The applicant had made certain allegations against his superiors and these allegations on being investigated were found to be baseless. The respondents contend that the applicant did not behave in an officer-like manner. However, to defuse the situation the NCC authorities attached the applicant to 2 Med Unit at Darbhanga. He was granted leave on account of illness of his wife but he was asked to stay in town so that he may be available to the Court of Inquiry. However, he went to Delhi without any permission of his superior

authorities.

5. The respondents have further submitted that a screening board at the Headquarters in New Delhi scrutinised the performance of the officers of NCC for grant of extension from time to time. The applicant's performance was also scrutinised by this board ~~on~~ 28-9-1979 and the applicant was found not suitable for being granted further extension and, therefore, his services beyond 10-12-1979 were not extended. In this connection they have made reference to the Ministry of Defence letter dated 21-12-1963. It is stated that that as per Appendix 'B' to the said letter, no notice was required to be given to the applicant before his services were brought to an end. The order regarding refusal to grant further extension beyond 10-12-1979 was passed in terms of Rule 28(2)(c) of the NCC Act, and Rules 1948. The respondents have further averred that a NCC ~~whole~~ times officer, which the applicant was, was being appointed on purely extension/contractual basis and extension from time to time was at the discretion of the Government of India. It is stated that in terms of the Government of India letter dated 21-12-1963, such officers will have normal tenure of 3 years extendable by 3 years at a time ~~or~~ so long as their services are required and not beyond the age of 55 years. Also, the services of such officers may be terminated at any time before completion of the initial or extended tenure at the discretion of the Government of India in terms of the NCC Act and Rules framed thereunder from time to time.

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The applicant, it is stated, was thus a temporary employee, who was appointed as NCC wholetimes officer and was not a regular officer.

6. The applicant has filed a rejoinder affidavit in which he has reiterated his contention in the OA and controverted the contrary averments in the counter affidavit. He has further emphasised that having been appointed substantively, his appointment could not have been treated as on tenure basis on the authority of an executive order ignoring statutory rules which did not provide for any tenure for the NCC wholetimes officers.

7. We have heard learned counsel for both the parties and perused the pleadings carefully.

8. During the course of ~~an~~ argument, Shri Sudhir Agarwal, learned counsel for the applicant took several pleas in challenging the impugned order by which the applicant was not granted extension beyond 10-12-1979. In the first place he argued that the services of the applicant were brought to a close ~~and~~ without any opportunity to him. He pointed out that while in the written statement the respondents had mentioned that the impugned order was passed in terms of Rule 28(2)(c) of the NCC Rules, 1948, it was also mentioned that this was in accordance with para 4 of the Appendix 'B' to Government of India order dated 21-12-1963. He further argued that Rule 22 of NCC Rules laid down the period of service upto the age of 45 years and there is no provision under these Rules for granting Commission for a fixed tenure. Treating the

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applicant's Commission in NCC as time bound, therefore, ~~was~~ ultra vires the Rules. He argued that the executive orders issued by the Government of India under the letter dated 21-12-1963 could not override the statutory Rules and to the extent ~~that this~~, such administrative instructions were inconsistent with Rules, they were ultra vires.

9. ~~that~~ The learned counsel for the applicant further argued that Rule 28(2) (c) itself is unconstitutional as it confers arbitrary powers on the Government to terminate even substantive Commissioned Officers of the NCC at any time. He also took a plea that the impugned order was also violative of the Fundamental Right of right to life as enunciated in Olga Tellis case and followed in subsequent decisions of the Hon'ble Supreme Court.

10. We have given our careful consideration to various pleas advanced by the learned counsel for the applicant. Two of the please appear to us ^{as} ~~are~~ of substantive nature and, therefore, we deal with these please in detail in the following paragraphs.

11. The first plea is with regard to the fact that the NCC Rules do not talk of any fixed tenure of the ~~whole time~~ officers of the NCC whereas the executive instructions contained in the Ministry of Defence letter dated 21-12-1976 specifies a fixed tenure. The learned counsel for the applicant sought reliance on several decisions to contend that the executive instructions being inconsistent with the statutory Rules viz Rule 22 of the NCC Rules, ~~as such~~, the executive orders are

ultra vires. These decisions are as follow :-

- (i) S.L. Sachdeva vs. UOI & Ors, AIR 1981 SC 411.
- (ii) Paluru Ramakrishnayak vs. UOI & Ors, AIR 1990, SC 166.
- (iii) Comptroller & Auditor General of India vs. Mohan Lal Mehrotra, 1992 (1) SCC 20.

12. In the case of SL Sachdeva, the Hon'ble Supreme Court set aside the executive instructions contained in the letter issued by the Director General of Post & Telegraph inter alia on the ground that these were contrary to Rules framed under Article 309. It observed that any executive directive which goes beyond the terms of the recruitment Rules and superimposes a new criterion on the Rule will be bad in law.

13. The same proposition of law was also enunciated in Paluru Ramakrishnayak's case in which the Hon'ble Supreme Court inter alia held that the executive instructions cannot override the provisions of Rules framed under Article 309 of the Constitution of India. The same view was also taken in the case of Mohan Lal Mehrotra in which the Hon'ble Supreme Court inter alia held that administrative orders cannot be issued in contravention of the Statutory Rules but can be issued to supplement them. It is now settled position of law that an executive order cannot supplant a Statutory Rule, it can only supplement it. Any executive instruction, which is inconsistent with a Statutory Rule has to be held ultra vires. Let us now examine whether the executive instructions contained

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in the Ministry of Defence letter dated 21-12-1963 are in any manner inconsistent with the provisions contained in the Statutory Rules vis-a-vis NCC Rules. Copies of the Rules were made available to us by the learned counsel for the applicant. These Rules are NCC Rules, 1948. Rule 22 which deals with period of appointment, reads as follows:-

" Subject to the provisions of Part VII of these rules, a person, commissioned in the National Cadet Corps shall hold that commission as an Officer in that Corps for a period from the date of his commission until he reaches 45 years of age, when he shall be discharged from the Corps:;

Provided that if in the opinion of the authority granting the Commission such persons continued to be physically fit after he has reached the age of 45 years such authority may extend the period of the commission upto a date not later than the date when such person reaches the age of 50 years.

Provided further an Officer commissioned, after getting his discharge from the University Corps of the Indian Territorial Force, shall be permitted to serve for such longer period as may be authorised by the Military of Defence, Government of India. "

14. It is clear from the text of the Rule quoted above that an officer who is commissioned in the NCC would normally continue till the age of 45 years which could be extended further depending on the physical fitness of the incumbent until he reached the age of 50 years. It is also clear that this Rule does not envisage any fixed term or tenure of an officer, who has been commissioned in

the NCC.

15. As against above, the letter dated 21-12-1963 states that the normal tenure of appointment of these officers, who are retained beyond probationary period will be three years extendable by three years at a time so long as their services are required and not beyond the age of 55 years. Their services may be terminated at any time before the completion of initial or extended tenure at the discretion of Government of India in terms of NCC Act and Rules framed thereunder from time to time.

16. It would thus be seen that the aforesaid letter dated 21-12-1963 introduces a ^{concept of} ~~special~~ tenure or a fixed term of service of the officers commissioned in NCC. The question is whether this provision is inconsistent with the provisions contained in Rule 22 of NCC Rules, 1948 or not?

17. We have given our anxious considerations to this matter. Rule 22 gives no indication that a whole time officer of NCC shall have a fixed tenure of three years which may or ~~may~~ ^{not} be extended at the discretion of the Government of India. The Rules would indicate that in the normal course such an officer would continue till he attains the age of 45 years, though there is a provision under Rule 28(2)(c) which provides for discharge of such officers ^{at} any time ~~if~~ his services are no longer required. Learned counsel for the applicant has taken a plea that the provision contained in

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Rule 22(c) itself is unconstitutional as this gives unbridled power to the authorities to bring the services of even substantive officers to a close. We, however, are not getting into discussion into it at this stage. Sufficient to state that we do not read in the provisions of Rule 22 of the NCC Rules 1948 any indication of a fixed term or tenure of such officers and, therefore, the executive instructions contained in this regard in the Ministry of Defence letter dated 21-12-1963 are inconsistent with the provisions of Rule 22. We, ~~therefore~~, hold that this provision is ultra vires Rule 22 of NCC Rules and, therefore, ~~must~~ be set aside.

18. We have also considered ~~such~~ plea which is considered as substantive. This plea is that the services of a substantive officer cannot be terminated in the manner it was done ^{in India} _{in the case of the applicant.} The learned counsel for the applicant relied upon several decisions in this regard. These are :-

- (i) NSK Nair vs. UOI, 1991(6) J.T. 525.
- (ii) Rajendra Mohan Bhatnagar vs. State of UP, 1992(21), ATC 699.
- (iii) UOI vs. Harish Chandra Bharti, 1995 (1) J.T. 233.

19. In the case of NSK Nair, the appellants were promoted to senior time scale of the Telegraph Engineering Service on ad hoc basis and had continued on the said post from 10-20 years. Denial of the right of regularisation of such officers was held arbitrary and violation of Article 16 of the Constitution of India.

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20. In the case of Rajendra Mohan Bhatnagar, the applicant was in service of 15 years and was promoted thrice during this period. His services were terminated as if, he was ~~xxack~~ a temporary employee. The Hon'ble ^{Supreme} Court held that an officer, who had rendered such a long period of service cannot be termed as temporary and his services could not have been terminated treating him as temporary.

21. In the case of Harish Bhat, the Hon'ble Supreme Court held that an officiating appointment for ~~over~~ ^{over} a decade cannot be treated a fleeting appointment without any service benefit being given. Termination of services of such officers was held void.

22. From the aforesaid case law, it would be evident that an officer, who has been appointed on substantive basis could not be discharged, treating the officer as a temporary officer. The various documents annexed by the applicant regarding his commission in the NCC very clearly indicate that he was appointed on substantive basis. He was also promoted from Lieutenant to Captain during the service period. He had put in nearly a decade of service before his services were brought to an end. We are, therefore, of the view that his services could not have been terminated in the manner it was done, which was wholly arbitrary and violative of the principles laid down by the Hon'ble Supreme Court with regard to termination of the services of the employees who have rendered a long period of service. The impugned order is bad in law even with regard to this aspect of the matter also.

23. In the case of Moti Lal Deka Versus North Eastern Frontier Railway A.I.R 1964 SC 600, the Hon'ble Supreme Court interalia held that a servant who substantively holds permanent post is entitled to hold the post to which he is substantively appointed and that it means that the permanent servant has a right to hold the post until he reaches the age of superannuation or is compulsorily retired under the relevant rules. If for any other reason, he is asked to leave his service, termination of his services would be in the nature of penalty and would amount to removal. Similarly in the case of West Bengal Electricity Board versus Desh Bandhu Ghosh AIR 1985 SC 722, the Hon'ble Supreme court held that regulation 34 in the West Bengal Electricity Board's regulations enabling the Board to terminate the services of a permanent employee by giving 3 months notice or salary in lieu was totally arbitrary.

24. Keeping inview of the foregoing case laws we have no hesitation in holding that the manner in which the services of the applicant, who was a substantive Officer of the N.C.C. was brought to an end was wholly arbitrary.

25. Since we have come to the conclusion that the impugned order is bad in law on the basis of two of the substantive pleas taken by the applicant, we do not feel to call upon to discuss the other pleas taken. We would, however, like to observe that rule 28(2)(c) which confers on the Executive the power to discharge even Substantive Officer of the NCC on the ground that the services are no longer required would, as the learned counsel for the applicant

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argued appear to confer arbitrary and unguided powers on the authorities concerned. In the case of M. K. Agrawal Versus Gurgaon Gramin Bank A.I.R 1988 SC 286, the Hon'ble Supreme court struck down the similar proviso in the Gurgaon Gramin Bank (Staff service regulations) 1980 which conferred on the bank a similar arbitrary and unguided power as conferred by 28(c) of NCC rules, as unconstitutional. While we refrain from striking down the same rule 28(c)(2) of NCC rules, we would advise the authorities concerned to take close look at the provision and examine whether such a provision should remain as it is in the Statute.

26. In view of the foregoing, we quash the impugned order dated 30.11.1979. As the applicant has already crossed the age of 45 years, the question of his reinstatement in service would not arise, ~~in this regard~~. By way of consequential relief, we, therefore, provide that the applicant would be deemed to have continued in service till he had attained the age of 45 years and for the period from 10.12.1979 till he attained the age ~~of~~ 45 years, he shall be entitled to the salary and allowances which he would have received had he continued in service. If any ^{old} service benefit ~~should~~ have been available to him had he continued till the age of 45 years, the same shall also be granted to him.

27. Let the aforesaid direction be complied within a period of three months from the date of communication of this order.

28. The parties shall bear their own costs.

J. K. Verma
MEMBER (J)

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MEMBER (A)