

CASE NO.:
Appeal (civil) 5750 of 2005

PETITIONER:
Union of India & Ors

RESPONDENT:
Brahma Dutt Tripathi

DATE OF JUDGMENT: 18/09/2006

BENCH:
H. K. SEMA & D.K. JAIN

JUDGMENT:
JUDGMENT

H.K.SEMA,J

The challenge in this appeal is to the order dated 19th February 2003 passed by the Division Bench of the High Court of Judicature at Allahabad in Civil Misc. Writ Petition No. 21805 of 2003, affirming the judgment and order of 14th July, 1997 passed in T.A. No. 551 of 1987 by the Central Administrative Tribunal, whereby the order of 30th November, 1979 declining further extension of service of the respondent beyond 10th December, 1979 was set aside. The Tribunal further directed that the respondent be accorded the benefit by treating the age of superannuation at 45 years with all other consequential benefits. Aggrieved thereby, this appeal is filed by the Union of India.

The respondent, Brahma Dutt Tripathi, was a Short Service Commission Officer commissioned as a 2nd Lieutenant during the Chinese Aggression in 1963. He was released from the Indian Army with effect from 31.3.1969. He applied for Commission in National Cadet Corps (NCC). He was appointed under the Scheme floated by the Government of India for rehabilitation of Short Service Commission Officers in the Army and he joined the NCC on 11.12.1969. The Scheme of 21.12.1963 was issued under proviso (iii) to Rule 16 of NCC Rules, 1948. The Scheme under which the respondent was appointed was a composite Scheme. We will deal with the Scheme at an appropriate time.

Be that as it may, he challenged the impugned order of 30.11.1979 passed by the Union of India declining to grant extension of his service beyond 10.12.1979 before the High Court of Judicature at Allahabad which was transferred to the Tribunal and was re-numbered as T.A. No. 551 of 1987. As already noticed, he was granted Commission in the NCC on 11.12.1969 as 2nd Lieutenant and as Lieutenant from 12.1.1968.

It appears the principal contention raised before the Tribunal was that the respondent was appointed under the provisions of NCC Rules, 1948 (hereinafter 'the Rules') which laid down the period of service upto the age of 45 years and since there is no provision under the Rules for granting permission for fixed tenure, the Union of India is under an obligation to allow him to work upto the age of 45 years and therefore, the order declining to extend the service of the respondent prior to the completion of 45 years is violative of Article 311 of the Constitution. It is further contended that the executive order issued by the Government of India by its letter dated 21.12.1963 could not over-ride the statutory

Rules, and the administrative instructions, to the extent inconsistent with the Rules, are ultra vires the Constitution being violative of Articles 14 and 16 of the Constitution.

The short question which arises for our consideration is, as to whether the appointment of the respondent to the NCC Commission was in accordance with the NCC Act and Rules or under a composite Scheme formulated by the Government of India in exercise of its powers under proviso (iii) to Rule 16 of the Rules?

To answer the aforesaid question, it is essential to make a quick survey of a few Sections of the Act namely the National Cadets Corps Act, 1948 (Act 31 of 1948) (in short 'the Act') and the Rules framed thereunder. Section 2 deals with the definition of Corps. It says "corps" means the National Cadet Corps constituted under this Act. Section 3 deals with the "Constitution of the National Cadet Corps". Section 4 deals with the "Constitution and disbandment of units" and provides: "The Central Government may constitute in any [State] one or more units of the Corps members of which shall be recruited from amongst the students of any university or school, and may disband or reconstitute any unit so constituted."

Section 9 deals with the "Appointment of officers." It reads, "The Central Government may provide for the appointment of officers in or for any unit of the Corps either from amongst members of the staff of any university or school or otherwise and may prescribe the duties, powers and functions of such officers."

At this stage, we may dispose of the principal contention of Mr. G.D. Gupta, learned senior counsel appearing for the respondent. He strenuously urged that Section 9 of the Act deals with the source of appointment of the officers. It is his contention that the appointment of the respondent to the NCC streams from the source of Section 9 and it cannot be said that the appointment of the respondent is made under the executive order in exercise of proviso (iii) to Rule 16 of the Rules. This contention deserves to be rejected for more than one reason. Firstly, the respondent accepted the appointment under the memorandum issued by the Government of India and the Scheme framed thereunder with its terms and conditions categorically laid down thereunder, without any demur. Secondly, it was never the case of the respondent that he was appointed under the Act, more particularly under Section 9 of the Act. Thirdly, Section 9 provides for appointment of officers in or any unit of the corps either from amongst the members of the staff of any university or school or otherwise. Mr. G.D. Gupta, learned counsel appearing for the respondent strenuously urged that the words, 'or otherwise' is relatable to the appointment from outside other than staff of any university or school. This is a misreading of the Section. The Scheme of the Act would go to show that the appointment of officers as provided under Section 9 of the Act is from amongst the members of the corps. Section 9, thus read with the scheme of the Act, would mean that the word 'otherwise' employed in Section 9 of the Act is relatable to any members of the corps other than staff of any university or school. Even a student who is a member of the corps could be appointed. In the present case, it is not disputed that the respondent was not a member of the corps. It is also clear that his appointment was not made in terms of the provision of Section 9 of the Act. Fourthly, the Office Memorandum and the Scheme, under which the respondent was appointed was never challenged by him. Fifthly, the respondent has accepted the appointment under the Scheme with the terms and conditions without any demur and it does not lie in his

mouth to say that he was not appointed under Scheme but under the Act.

The Scheme under which the respondent was appointed was a composite Scheme laying down the terms and conditions of the Scheme and the conditions of service. The composite Scheme was framed under proviso (iii) to Rule 16 of the Rules, by the Government of India, Ministry of Defence letter of 21.12.1963. Appendix 'A' deals, amongst others, with the age of the applicant. It reads:

"(iii) Age on date of application should not be less than 21 and not more than 51 years."

Clause 4 of the Appendix A reads:

"4. Officers will ordinarily hold commission until reaching an age of 55 years. An officer may be discharged earlier if his/her services are not required."

Appendix 'B' appended to the Government order deals with the terms and conditions of officers granted NCC Commission. Clause 4 of Appendix 'B' deals with 'Tenure'. It reads:

"4. The normal tenure of appointment for those officers who are retained beyond the probationary period will be three years extendable by three years at a time for so long as their services are required but not beyond the age of 55 years. Their services may be terminated at any time before the 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."

In terms of the aforesaid Scheme, the application form was also annexed as annexure to Appendix 'A'. The title reads: "Application for appointment as an officer under proviso (iii) to Rule 16 of NCC Rules." Amongst others, the application was to be filled up giving particulars regarding No., Rank, Name in full, Arm/Service and Unit, stating formation and command under which serving and Date of Commission etc. The application form was issued under proviso (iii) to Rule 16 of the Rules. The respondent, knowing the terms and conditions stipulated therein, had filled up the application form.

Another unimpeachable document is the letter dated 19.9.1969 under the heading "Grant of NCC Commission" addressed to the respondent. The said letter also referred to the order dated 21.12.1963 and the Scheme framed thereunder under proviso (iii) to Rule 16 of the Rules. The letter has referred to the terms and conditions laid down in Annexure 'A'. Para 5 of the letter reads:

"Please intimate your acceptance of the terms and conditions of service as mentioned above earliest. If no reply is received from you by 10 Oct. 69, it will be assumed that you are not interested in the grant of NCC Commission and your case will be treated as closed."

The offer letter of 19.9.1969 with the terms and

conditions was accepted by the respondent by its letter dated 13.10.1969. The letter reads:

"From Capt. B.D. Tripathi

GROUP CENTRE

Central Reserve Police
AVADI-MADRAS-SS
13 October 1969

To

The Director General
NCC, New Delhi

SUB: GRANT OF NCC COMMISSION

Ref: Your No. 5431/EC-57159/83/NCC/
COORD(o) dated 08 October 1969

Sir,

With due respect I beg to inform you that the terms and conditions of NCC Commission are accepted as asked for, under para 5 of your letter of even No. dated 19 September 1969.

You are further requested to send to me offer of appointment alongwith the R/W at the above address and give me sufficient time to join as I have to submit one month notice to CRP before joining NCC.

Thanking you

Yours faithfully,
(B.D. Tripathi)"

In somewhat similar case in Union of India and Another v. Lt. Col. Komal Charan and Ors. 1992 Supp (3) SCC 186, this Court held the respondents having exercised their option and were accordingly granted whole time NCC Commission, they now cannot repudiate the same and claim any additional benefit. This is what this Court say at SCC page 189 :-

"7. In view of our conclusion above we do not consider it necessary to refer to the other provisions of the N.C.C. Act relied upon by Mr. Mukhoty, and we do not consider it either necessary or relevant to examine the question whether the Army Act applies to the respondents or not. In support of these appeals the Additional Solicitor General has not placed any reliance on the Army Act and his contention has been that the provisions of the National Cadet Corps Act, 1948, the rules framed thereunder and the letter dated 23.05.80 in pursuance of which the respondents were granted permanent commission, settled the question. The Corps has been established under Section 3 of the N.C.C. Act. Section 9 of the Act authorises the Central Government to provide for the appointment of officers from amongst the members of the staff and university or school or otherwise. Section 13 of the Act authorises the Central Government to make rules to carry out the objects of the Act and without prejudice to the generality of this power to lay down the manner in which and the conditions subject to which a person or class of persons may be enrolled under the Act. Accordingly the Rules described as National Cadet Corps Rules, 1948 were framed. Proviso (iii) in Rule 16 vests the authority concerned with very wide power in this regard. Except for

Fundamental Rule 56(a) relied upon in the impugned judgment, it has not been suggested on behalf of the respondents that they are entitled to continue in service upto the age of fifty-eight years on the strength of any other provision. The Central Government has, therefore, full authority to appoint persons on such terms and conditions as it may choose to prescribe. The question of grant of permanent commission to N.C.C. officers employed on whole-time basis was considered in all the relevant aspects and a decision was taken as mentioned in the afore-mentioned letter dated 23.05.80 and referred to in the letter of 24.05.80 sent under the signature of the Under Secretary to the Government of India to the Director General, N.C.C., New Delhi (Annexure P-4). It was considered desirable that before a person was granted N.C.C. permanent commission in terms of the above letter an opportunity should be given to him to consider the terms and conditions of the appointment and then indicate his choice by exercising his option in the form prescribed in Appendix B to the letter. The relevant order in clear terms lays down the age of superannuation at fifty-five years with a further provision of extension to the age of fifty-seven years. The respondents exercised their option and were accordingly granted whole-time N.C.C. commission. They cannot now repudiate the same and claim any additional benefit which they are not entitled to under any rule or law."

National Cadet Corps Rules 1963 (in short 'the Rules') were framed by the Central Government in exercise of powers conferred by Section 13 of the NCC of the Act.

Part IV of the Rules deals with the "Appointment of Officers." Rule 16 of the Rules under Part IV deals with the "Qualifications for appointments". Proviso (iii) to Rule 16, which empowers the Government of India for appointment of any person who is not qualified for appointment under the Rules reads:

"(iii) the Ministry of Defence, Government of India, may authorise the appointment of any person who is not qualified for appointment under the rule."

It, therefore, clearly appears that proviso (iii) to Rule 16 is carved out from the Rules authorizing the Ministry of Defence, Government of India for appointment of any person who is not qualified for appointment under the Rules. It must be grasped that throughout the NCC Act and Rules, there is absolutely no provision for appointment of discharged Short Commission Officer as an officer of the NCC. It is only to rehabilitate the Short Commission Officers, who had been discharged after the hostility ended, that a provision had been made in proviso (iii) of Rule 16 empowering the Government for such appointment who were not otherwise qualified for the appointment under the Rules. As noticed earlier, the Government Order dated 21.12.1963 was in exercise of the powers under proviso (iii) to Rule 16. The respondent has not challenged the Government Circular dated 21.12.1963.

The contention of the learned counsel for the respondent that the respondent was appointed under the NCC Act and Rules and he would be entitled to continue in the post till he

attained the age of 45 years is mis-conceived. It was to the knowledge of the respondent himself that he was appointed under the composite Scheme framed in exercise of the power under proviso (iii) to Rule 16. Under the Scheme, the appointment was a tenure appointment and the service was for three years extendable by another three years at a time, subject to the requirement of the service but not beyond the age of 55 years. His service might also be terminated at any time before the completion of the initial or extended tenure at the discretion of the Government of India in terms of Clause 4 of Appendix B of the Scheme.

Further, it needs to be noticed that the service of the respondent was extended from time to time. The service of the respondent was extended by an order dated 19.10.1971 along with other officers mentioned in Appendix 'A'. The name of Lt. B.D. Tripathi appears at Sl. No. 70 and his service was extended from 11.12.1971 to 10.12.1972. The last extension was granted by an order dated 15.12.1978. At Sl. No. 87, service of Capt. B.D. Tripathi is shown to have been extended from 11.12.1978 to 10.12.1979.

These unimpeachable documents on record will clearly show that it was to the knowledge of the respondent himself that his appointment was a tenure appointment, extendable from time to time. He has not raised any grievance against this before any authority.

The facts as adumbrated above will clearly show that the appointment of the respondent was a tenure appointment pursuant to the Scheme devised under proviso (iii) to Rule 16 of the Rules. There is no provision under the NCC Rules and Act providing for appointment of discharged Short Service Commission Officer as an officer in the NCC, save and except, as provided by the Scheme floated under proviso (iii) to Rule 16.

For the reasons aforesaid, the impugned order of the High Court dated 19th February 2003 and the order dated 14th July, 1997 passed by the Tribunal are set aside. The T.A. No. 551 of 1987, filed by the respondent, stands dismissed. The appeal is allowed. No costs.