

**(2007) 08 DEL CK 0185**

**In the Delhi High Court**

**Case No : Writ Petition (C) 18935 of 2006**

Air Comdr. Randhir Pratap

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

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**Date of Decision : 24-08-2007**

**Acts Referred:**

Air Force Act, 1950 — Section 27

**Citation : (2007) 08 DEL CK 0185**

**Hon'ble Judges : T.S. Thakur, J;S.N. Aggarwal, J**

**Bench : Division Bench**

**Advocate : Paramjit Singh Patwalia and A.P.S. Rahi, Sushant Kumar and Rahul, for the Appellant; Rajeeve Mehra and Jagjeet Singh Bhalla, for the Respondent**

**Final Decision : Dismissed**

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## **Judgement**

T.S. Thakur, J.—In this petition for a writ of mandamus the petitioner prays for a direction to the respondents to promote him to the rank of Air Vice Marshal with effect from 1st March, 2006 with consequential benefits of grant of seniority vis-a-vis other officers similarly promoted. A writ of certiorari quashing order dated 29th May, 2006 whereby the petitioner's statutory complaint u/s 27 of the Air Force Act, 1950 has been rejected with a mandamus directing the respondents to declare the vacancies has also been prayed for.

2. The petitioner is serving as an Air Commodore in the Indian Air Force. He is, on that account, eligible for promotion to the next higher rank of Air Vice Marshal. Selection process for promotion to the said rank started in the year 2004 with the issue of a notification enlisting the names of the officers eligible for consideration. The petitioner's name figured at Serial No. 12 in the said list. It is common ground that apart from preparing a list of officers found fit for promotion against the available vacancies; the Promotion Board had prepared a reserve list, in which officers found fit for promotion against any vacancy that might subsequently arise during the relevant promotion year were shown. The petitioner's case is that for the promotion year 2005-06 there were only five

vacancies in the beginning. The same rose to seven by the time the Board completed its proceedings. These two additional vacancies had, according to the petitioner, arisen on account of two Air Vice Marshals retiring after the completion of proceedings of the Promotion Board. The petitioner draws support for that assertion from the Main List containing the name of seven officers found fit for promotion against said vacancies. He was not, however, one of those recommended for promotion against the said vacancies, having been placed at Serial No. 2 in the Reserve List. According to the petitioner, the following seven officers were promoted to the rank of Air Vice Marshall from the rank of Air Commodore against the seven vacancies referred to above:

- 1) Air Commodore N.V. Tyagi who figured at the Top of the List approved by the promotion board.
- 2) Air Commodore D. Kukreja who figured at the second place in the List approved by the promotion board.
- 3) Air Commodore A. Singh who figured at the fourth place the List approved by the promotion board.
- 4) Air Commodore D.N. Ganesh who figured at the fifth place in the List approved by the promotion board.
- 5) Air Commodore B.C. Nangappa who figured at the sixth place in the List approved by the promotion board.
- 6) Air Commodore V.K. Yajurvedi, who figured at the seventh place in the List approved by the promotion board.
- 7) Air Commodore R.C. Baruah who figured as No. 1 in the Reserve List approved by the promotion board.

3. The petitioner's case is that since Air Commodore S.K. Jayswal, who figured at Serial No. 3 of the list approved by the Promotion Board had proceeded on premature retirement, the resultant vacancy was filled by promoting Air Commodore R.C. Baruah who figured at Serial No. 1 in the Reserve List. As a result, Therefore, the petitioner got shifted to No. 1 position in the Reserve List. His grievance now is that even when he was at No. 1 in the reserve list and even when a vacancy in the rank of Air Vice Marshall was available and continues to be so available, he has not been promoted against the same.

4. The petitioner's case in the writ petition and even at the hearing before us was that apart from the vacancies that have already been filled up by the respondents, the post of Assistant Chief of the Air Staff (Education) is lying vacant since 1st March, 2006 against which the petitioner can be promoted. The petitioner argues that Air Vice Marshall P.S. Bhangu of the Flying Branch was moved to the post of Assistant Chief of Air Staff (Education) and the resultant vacancy in the Flying Branch filled up by the Air Commodore D.N. Singh, who was posted as Assistant Chief of Air Staff (Personnel, Airmen and Civilian). Three

months after the said promotion, Air Vice Marshall P.S. Bhangu was again shifted to the post of Assistant Chief of Air Staff (Personnel Officer) with effect from 1st March, 2006, ever since when, the post of Assistant Chief of Air Staff (Education) is lying vacant. The writ petition goes on to state that the petitioner had filed a statutory complaint dated 17th March, 2006, followed by a supplementary complaint dated 24th March, 2006 pointing out that vacancies in the rank of Air Vice Marshall were available against which the petitioner could be considered for promotion. These complaints were disposed off by an order dated 29th May, 2006 in which the respondents clarified the position of the vacancies and took a stand that no vacancy existed against which the petitioner could be promoted. The order, inter alia, stated that seven vacancies of Air Vice Marshall had occurred in the Flying Branch against which seven officers placed above the petitioner were promoted. The vacancy caused by the premature retirement of Air Commodore S.K. Jayswal was, according to the order utilized for promoting Air Commodore R.C. Baruah who was at Serial No. 1 of the Reserve List. Insofar as the post of Assistant Chief of Air Staff (Education) was concerned, the same was utilized for a short period by posting officers holding the rank of Air Vice Marshall and not for promoting any Air Commodore. The petitioner who belongs to Flying Branch could not, according to the respondents, be promoted against the said vacancy. Aggrieved, the petitioner has filed the present writ petition in which the short question that falls for consideration is whether there exists a vacancy in the "Flying Branch" against which he may be promoted. Needless to say that if a vacancy is found to exist, the same can be filled-up by appointing the petitioner who was the next person to be promoted out of the Reserve List after Air Commodore R.C. Baruah.

5. We have heard learned Counsel for the parties and perused the record. Appearing for the petitioner, Mr. Paramjit Singh Patwalia strenuously argued that the post of Air Vice Marshall in Education Branch could and ought to be utilized for promoting Flying Branch officers particularly when no Education Branch officer was eligible for being promoted against the same. A two fold submission was made by Mr. Patwalia in this regard. Firstly, he contended that Air Vice Marshall Bhangu had been shifted to the post of Assistant Chief of Air Staff (Education), no matter for a period of three months, which according to the learned Counsel established that the said post could be held by an Air Vice Marshall belonging to a branch other than Education. If that be so, the utilization of the post by temporary transfer thereof to the Flying Branch could not have been limited to three months only having regard to the policy of the Government that such utilization should be at least for a period of one year. Mr. Patwalia argued that if Air Vice Marshall Bhangu had not been moved back from the post of Assistant Chief of Air Staff (Education) after a period of three months, the petitioner could have been promoted in his own branch. It was only because Air Marshall Bhangu was brought back to the Flying Branch to a post held by a Flying Branch officer that the petitioner's chances of promotion got scuttled.

6. Alternatively, it was submitted by Mr. Patwalia that keeping the post of

Assistant Chief of Air Staff (Education) vacant since 1996 does not serve any public purpose especially when the vacancy would continue to remain unfilled even till at least 1st April, 2008 when an Education Branch officer may become eligible for consideration against the same. Mr. Patwalia contended that the manner in which the respondents had promoted Air Commodore D.N. Ganesh and declined a similar treatment to the petitioner showed bias against the petitioner. He urged that since the respondents were keen to promote Air Commodore Ganesh as Air Vice Marshal, they moved Air Vice Marshal Bhangu, earlier holding the post of Director General, Air Force Naval Housing Board, to the post of Assistant Chief of the Air Staff (Education) in stead of posting him as Assistant Chief of Air Staff (Personnel Airman and Civilian) vacated by Air Vice Marshall P. Kumar who was, in turn, posted as Assistant Director General (NCC). Instead of doing so, if the respondents had moved Air Vice Marshall Bhangu to the post of Assistant Chief of Air Staff (Personnel, Airmen and Civilian), he would have blocked the promotional avenue of Air Commodore D.N. Ganesh. This, according to the learned Counsel, showed that the respondents had posted AVM Bhangu against the post of Assistant Chief of Air Staff (Education) to make room for the promotion of Air Commodore Ganesh. The reversion of AVM Bhangu to the post of Assistant Chief of Air Staff (Personnel, Airmen and Civilian) however blocked the promotional avenue of the petitioner, and was indicative not only of legal malice but denial of a legitimate expectation of the petitioner. There was, according to the learned Counsel, no reason for moving Air Vice Marshall Bhangu only for a brief period of three months.

7. On behalf of the respondents it was, on the other hand, argued by Mr. Rajeeve Mehra that the Air Force comprised of various branches, viz., Flying, Aeronautical Engineering, Administrative, Logistic, Accounts, Education and Meteorological. Promotion of officers in the force is, according to the learned Counsel, branch-wise which implies that each post/vacancy is designated/identified in a branch and promotion against the same is effected from among officers of the Branch to which the vacancy belongs. Reliance was placed by Mr. Mehra upon Policy Letter No. Air HQ/22030/48/PO-2(D) dated 15th March, 2002 issued by the Air Headquarters, copy enclosed as Annexure R-1 to the counter affidavit, to urge that officers are considered for promotion only in the branch to which they belong and that promotional opportunities for Air ranks have always been branch-specific.

8. Mr. Mehra further argued that since the petitioner belongs to Flying Branch he was and could be considered for promotion to the next higher rank only in that branch. He was placed at Serial No. 2 in the Reserve List to be promoted if any unforeseen vacancy arose. Six out of the seven officers enlisted for promotion having been promoted and the vacancy occurring by premature retirement of Air Commodore S.K. Jayswal having gone to Air Commodore R.C. Baruah, the petitioner could be considered for promotion only in case a vacancy arose on account of the retirement, death or promotion of any one of the officers holding the rank of Air Vice Marshall in the Flying Branch. No such vacancy had,

according to Mr. Mehra, arisen during the promotion year 2005-06 to entitle the petitioner to claim appointment against the same. His claim for promotion against the post of Air Vice Marshall in Education Branch was Therefore untenable as the petitioner was not eligible for consideration against the said post/vacancy. Mr. Mehra further argued that for the promotion year 2006-07 also, the petitioner was considered but was not placed in the merit list. He has, thus, been permanently passed over in terms of para 12 of the Revised Promotion Policy issued by the Air Headquarters. The fact that the petitioner had not challenged denial of promotion to him by the Promotion Boards held for the year 2004-05 or 2006-07 showed that his claim for promotion against the vacancy of Assistant Chief of Air Staff (Education) which existed even during those boards is an after thought hence untenable.

9. We have given our anxious consideration to the submissions made at the bar and perused the record. The material facts are not in dispute. That the petitioner belongs to the Flying Branch is not in dispute. That he was and could be considered for promotion only against vacancies arising in that branch is also not in dispute. Policies issued by the Air Headquarters, reliance whereupon has been placed by the respondents and the assertions made in the counter affidavit filed by them, in our view, make that position abundantly clear. It is also common ground that for the Promotion Year 2005-06 there were seven vacancies in all against which seven officers, all senior to the petitioner, were placed on the Main List. Air Commodore S.K. Jayaswal was also one such officer who took premature retirement on account of the Low Medical Category. The vacancy thus becoming available was utilized by promoting Air Commodore R.C. Baruah who was placed above the petitioner at Serial No. 1 in the Reserve List. It is not the case of the petitioner that any one of the seven officers has died, resigned or was dismissed resulting in a vacancy nor is it his case that any other vacancy in the Flying Branch has arisen during the year under consideration. All that was pointed out on behalf of the petitioner was that a post of Air Vice Marshall in the Education Branch has been lying vacant since the year 1996 against which the petitioner could either be considered for promotion or anyone from out of the Flying Branch Officers holding the rank of Air Vice Marshall shifted to that post to make room for the petitioner in the Flying Branch.

10. Insofar as the first limb of that contention is considered, we have no hesitation in straightaway rejecting the same. There is no question of promoting the petitioner against the post of Assistant Chief of Air Staff (Education). Since promotions in the Air Force are branch specific, it goes without saying that the post in Education Branch must go to an officer belonging to the Education Branch. The fact that the respondents have not been able to fill up the post suitably since the year 1996 on account of the non-availability of an officer eligible for promotion against that post does not, in our opinion, make any material difference insofar as the petitioner's claim for promotion against the same is concerned. The non-availability of an Education Branch officer does not mean that the post should be offered to an Air Commodore belonging to the

Flying Branch or to any other branch out of half a dozen other branches in the Air Force.

11. The only question that needs to be examined in the above backdrop is whether the petitioner could seek a direction against the respondents to shift a Flying Branch Officer holding the rank of Air Vice Marshall to the vacant post of Assistant Chief of Air Staff (Education) temporarily so that a vacancy becomes available in the Flying Branch against which the petitioner could be considered and promoted. The argument that the respondents ought to do so is based more on analogy than any juristic principle. It was contended that Air Vice Marshall Bhangu belonging to Flying Branch was adjusted against the post of Assistant Chief of Air Staff (Education) for a period of three months to make it possible for the Government to promote Air Commodore Ganesh. That position has been stoutly repudiated by the respondents, according to whom the vacancy of Assistant Chief of Air Staff (Education) has not been filled up on account of there being no induction of officers in the Education Branch of Indian Air Force from 1967 to 1975. The result is that suitable officers to fill up the senior posts in the Education Branch in subsequent years are not available ever since 1st November, 1996. The post has, all the same, been utilized temporarily on three occasions which the respondents have indicated. It was first utilized by posting AVM P. Kumar for a short duration from 23rd April, 2003 to 20th July, 2003 on account of service exigencies explained by the respondents in their counter affidavit and the additional affidavit filed in that regard. It was then utilized for posting Air Vice Marshall T.S. Chatwal from 1st October, 2003 to 31st December, 2004. The circumstances in which the officer was posted against the said vacancy have been explained by the respondents. In brief, the officer had filed a writ petition assailing denial of promotion to the rank of Air Marshall and refusal of extension of service by one year. This Court had, in that petition directed that the officer shall continue to be in service in his present rank as per requirements of the respondents till his case of extension of service was finally disposed of by the Court. Since the officer was to retire from service as Air Vice Marshall with effect from 31st December, 2003, he was transferred to hold the vacancy of Assistant Chief of Air Staff (Education). The only other occasion when the post was held by a Flying Branch officer is when Air Vice Marshall P.S. Bhangu was adjusted against the same from 1st December 2005 to 28th February, 2006 for a brief period of three months. What is important is that it was not a case of promoting Air Vice Marshall P.S. Bhangu against the post of Air Vice Marshall. He was already promoted as Air Vice Marshall with effect from 29th March, 2005 and was posted as Director General Air Force Naval Housing Board which post being an inter service rotational post had to be vacated by the Air Vice Marshall with effect from 1st December, 2005 for the Indian Navy. Air Vice Marshall P.S. Bhangu having already been earmarked for a posting as Assistant Chief of Air Staff (Personnel officers) vice Air Vice Marshall K.D. Singh who was proceeding on promotion with effect from 1st March, 2006, AVM P.S. Bhangu was adjusted again Assistant Chief of Air Staff (Education) for accounting purposes. Even that

was done only after obtaining specific sanction of the Central Government. The posting of AVM P.S. Bhangu to Assistant Chief of Air Staff (Education) did not, however, result in any additional vacancy of the rank of Air Vice Marshall. Since Air Commodore Ganesh was in the main list of the promotion year 2005-06, he was bound to be promoted against one of the seven vacancies available during the said year. Suffice it to say that the post of Assistant Chief of Air Staff (Education) has never been utilized for promoting an officer belonging to any other branch. In the exigencies of service, officers who did not belong to Education Branch were posted against that post but any such temporary utilization or adjustment was not made for any extraneous purpose, as was suggested on behalf of the petitioner. The compulsions for making such temporary utilization of the post have been satisfactorily explained by the respondents in their counter affidavit.

12. According to Mr. Patwalia, shifting of Air Vice Marshall Bhangu to the post of Assistant Chief of Air Staff (Education) implied a transfer of the said post for a period of one year in terms of Air Headquarters letter No. Air HQ/S 20613/449/Est-III dated 10th May, 2001. We do not think so. All told, the said letter only states a General Policy which does not, in itself, create any enforceable right in a member of the service much less a right to seek promotion to the next higher rank. According to the respondents, the policy letter deals with transfer of vacancies from one unit to the other and not from one branch to the other. Even assuming that the same authorizes inter branch transfers also, the fact remains that the Government had, in exercise of its powers under the policy authorized and sanctioned utilization of the post of Assistant Chief of Air Staff (Education) only for a period of three months between 1st December, 2005 to 28th February, 2006. It is, in our view, difficult to read the said sanction to be a case of inter branch transfer for a period of one year against which the respondents could be forced by a writ Court to retain AVM P.S. Bhangu for a period of one year. The Government have not filled up the vacancy of Assistant Chief of Air Staff (Education) for the past over 10 years not because no officer in the Flying Branch or other branches had coveted the said vacancy but because the post must go to a Education Branch officer only. According to Mr. Mehra, representations were received from officers belonging to other branches seeking promotion against the post of Assistant Chief of Air Staff (Education) which have been turned down by the respondents on the ground that the said post cannot be utilized for granting promotion to a non-Education Branch officer. That being so, there is no legal basis for the petitioner to claim and get what others similarly situated have been denied. Suffice it to say that so long as there is no clear vacancy against which the petitioner is entitled to be considered for promotion, a vacancy cannot be created by directing the respondents to shift an officer from Flying Branch to the post in the Education Branch only to create, no matter temporarily, room for promotion of another colleague of his own Branch. It is a different issue that the Government may, in exercise of its administrative powers, utilize the vacancy suitably in the exigencies of service but a writ Court would not

be justified in directing it to do so, in the absence of any legally enforceable right in the petitioner to demand such a direction.

13. In the result, this writ petition fails and is hereby dismissed but in the circumstances without any order as to costs.