
(1999) 10 DEL CK 0080
In the Delhi High Court
Case No : CW. No. 2791 of 1997

Air Commodore R.S. Sehgal (Retd.)

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 15-10-1999

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1999) 10 DEL CK 0080

Hon'ble Judges : K. Ramamoorthy, J

Bench : Single Bench

Advocate : Mr. M.N. Krishnamani and Mr.P.K.Aggarwal, for the Appellant; Ms. Rekha Palli, for the Respondent

Judgement

K. Ramamoorthy, J.—The petitioner, on the relevant date, was working as Air Commodore in the Indian Air Force. He was entitled to be considered for promotion as Air Vice-Marshal. On the ground he denied promotion to the rank of Air Vice-Marshal, he had filed the writ petition.

2. Earlier, the petitioner had filed a writ petition being CWP. 956/95. By order dated 21st of February, 1997, the Division Bench of this Court directed the respondents to consider the case of the petitioner. A Promotion Board was constituted and met on the 6th of March, 1997. The Promotion Board was consisted of Air Chief Marshal and 12 Air Marshals. Having regard to the service of the petitioner, apart from the grading he had secured, the Promotion Board found him unanimously not fit for promotion. On the 21st of April, 1997, the petitioner was informed that he was not promoted and the same was approved by the Ministry of defense. The letter reads as under:-

"1. Reference your letter dated 1.4.1997 for conveying the decision of Central Government.

2. As per the directions of Hon"ble High Court of Delhi, NO.1 PB (Misc) was held to consider your case for empanelment to the rank of AVM and the proceedings

of the Board was sent MOD for approval.

3. MOD after carefully examining the case have however approved the recommendations of Misc PB-I for your non-promotion to the rank of AVM. The decision of MOD has already been conveyed to the Hon"ble High Court of Delhi on 31.3.1997."

3. That is challenged in the writ petition by the writ petitioner. The petitioner has already superannuated in the cadre of Air Commodore.

4. The case of the petitioner is that by the report, for the period 1.6.1993 to 20.1.1994, his performance was down graded to "6" to "8", and as per the criteria laid down in the selection, this would not stand in the way of the petitioner, and, Therefore, he should have been promoted. In the written submissions submitted by the petitioner, it is stated:-

"As per the reply in the counter-affidavit at para 10, the three criteria for promotion are (1) laid down numerical criteria (2) Pen picture and (3) Employment. The numerical criteria is "Three reports with overall numerical grading of `7" and above in the last five years and no report below `6", with two (report of `7" or above) having been earned in the last three years, would be taken as a guide for clearing an officer for promotion. Greater emphasis should be placed on the officer"s potential to hold the responsibilities of the next rank as discerned from the reports on him in the various appropriate appointments held by him in the past". Since the Promotion Board held in 94, when the petitioner was placed at Serial No.11, the Promotion Board held in 1997 was to only consider the numerical criteria as the other two criteria had already been met by the petitioner."

5. It is further stated in the written submissions:-

"There were two ACRs before the Promotion Board in 1997 i.e. one for the period 1.10.92 to 31.5.93 and second for the period 1.6.93 to 20.1.94. The second report is alleged to show drop in performance. The original annual ACR i.e. for the period up to 31.5.93 is 7.5 and the other one for truncated period is 6.8. The other reports for the previous periods are 7 plus. Therefore, even if the average of both the reports for 12 months is taken, it works out to be 7.2. $(7.5 \times 8 + 6.8 \times 6 = 40.8 \text{ total of } 100.8 - 14 = 7.2)$. Therefore, it would be seen that even if the drop in performance is taken into account, an average of 7.2 for the year meets the laid down criteria. So far as pen picture is concerned in the report for truncated period, it cannot be in any manner be so bad as to deprive the petitioner his chance for empanelment as this report was 6.8 which is above average."

6. The learned senior counsel for the petitioner, Mr. M.N. Krishnamani, submitted that drop in performance, as stated in the counter, would not be relevant for the purpose of considering the case of the petitioner, and the learned senior counsel for the petitioner relied upon the judgment of a Division Bench of this Court in

S.P. Murgai Vs. Union of India and Others, .

7. The learned counsel for the respondents, Ms. Rekha Palli, submitted that the respondents not only considered the numerical criteria but also had considered the career of the petitioner and after taking into account overall performance of the petitioner, the promotion Board found him not fit. The learned counsel for the respondents submitted that when the experts in the field, who are in a better position to gauge the petitioner for being promoted as Air Vice-Marshal, rejected the case of the petitioner, the petitioner cannot invite this Court to sit in appeal over the decision of the experts.

8. I have perused the records produced by the respondents.

9. In the case before the Division Bench of this Court in S.P. Murgai Vs. Union of India and Others, , referred to by the learned senior counsel for the petitioner, the facts, as noticed by this Court, are :

"The petitioner was commissioned in the Indian Army in 1962 and then permanently seconded to the Directorate General, Quality Assurance Organisation in the Department of defense Production & Supplies in the Ministry of defense, Government of India, New Delhi. Earlier this department was known as Directorate General, Inspection Organisation. There are two types of officers in this organisation civilian and service (military). There are separate rules for promotion to the higher rank in the organisation by the service personnel. Office Memorandum dated 16 February 1982 issued by the Government of India in the Ministry of defense gives the procedure for intake of service officers in the organisation and the terms and conditions of those permanently retained. This Office Memorandum is for promotion to the acting/substantive ranks up to the level of Brigadier against service vacancies in the organisation. It is not disputed that the petitioner was eligible for promotion to the rank of Brigadier. The number of officers to be considered from out of eligible officers in the feeder grade are determined with reference to number of vacancies anticipated in a year. The Selection Board called the Quality Assurance Selection Board is constituted of the Chairman and four members who are respectively (1) the Secretary, defense Production & Supplies; (2) Additional Secretary (defense Supplies); (3) Joint Secretary (Dealing with DGQA); (4) Directorate General of Quality Assurance; and (4) Under Secretary/Deputy Secretary (Dealing with DGQA). Then representative from the Military Secretary Branch, Army Headquarters preferably of the rank of Brigadier, may also be co-opted, when necessary. This constitution of Selection Board is given in the letter of the Government of India dated 28th April, 1981. The functions of the Board are also given in this letter. It is to assess the officers employed in the organisation for various purposes, like acting/substantive promotion to the Lt. Colonels and above of permanently seconded officers; officiating promotions permanent secondment in the organisation; review of the cases; etc."

10. The procedure to be followed as noticed by the Division Bench, and what was

done by the respondents in that case, as noticed by the Division Bench, are:

"The Board is to prepare a panel of officers equal to the number of regular anticipated vacancies plus 25% thereof subject to a minimum of one additional name on the panel over and above the number of anticipated vacancies, to cover any exigencies. The panel so drawn up by the Board shall normally remain valid for one year from the date of approval of the competent authority. The panel can, however, be extended for a period of not more than six months, with the prior approval of the Secretary in the Department of Production & Supplies. In the present case, for the year 1992, five vacancies in the rank of Brigadier were anticipated. The Board drew up a panel of seven officers in the rank of Colonel for promotion to that of Brigadier. This panel was approved on 20 December, 1991 by the Minister-in-Charge, the competent authority. It was, thus, to remain valid up to 20 December, 1992. The petitioner was, however, at number seven being the last in the panel and was found fit for promotion to the higher rank of Brigadier. Seven vacancies in the rank of Brigadier in the organisation arose and six officers from the panel were accommodated, but when the turn of the petitioner came he was not so promoted. The petitioner says that the panel was to remain valid up to December next and he should have been promoted as a matter of course since he was medically fit and his service record was also good. He says during all this period when he was on the panel he was not given any warning or given any adverse report. Instead, he says, it was the third respondent who was not even on the panel and was junior to him, was given the rank of Brigadier and promoted. Petitioner felt aggrieved and filed this petition on 9 November, 1992. When the matter came up for admission this Court did not grant any stay but by an interim order directed that promotion of the third respondent to the post of Brigadier shall be subject to further orders of the court. This interim order is continuing."

11. Dealing with the concept of drop in performance, this Court observed:

"Respondents have not told as to what they mean by 'drop in performance' as understood in the organisation. In fact they had no answer. Rather Mr. Ahluwalia, learned counsel for the petitioner, referred to letter dated 4 December, 1992 issued by the Military Secretary's Branch, Army Headquarters, and addressed to all the Commands to show as to what 'drop in performance' meant. He said this communication would be applicable to the case of the petitioner as well who is an Army Officer though permanently seconded to the organisation. He said even according to this there cannot be said to be any drop in performance of the petitioner. Mr. Bansal then said that this communication was not applicable as it was not issued by the Department of defense Supplies & Production. It is not necessary to go into this question and it is, Therefore, not necessary for us to reproduce the circumstances which would lead to drop in performance as per aforesaid letter. We, however, called upon the respondents to show us the Annual Confidential Reports of the Respondent pending 31 March, 1992. His ACR ending 31 March, 1991 had already been considered by the Selection Board which met

in the third quarter in 1992 was competent to look into the petitioner ending 31 March, 1992. The Reporting Officer has rated him 'Very Good' and he has remarked that officer is very highly qualified with numerous qualifications of post graduate level covering different facets of electronics and that his performance in this course was very good. The Reporting Officer also said that the petitioner was very knowledgeable on technical matters and possessed necessary maturity commensurate with his age and service and also had the talent for organising mass functions. The Reviewing Officer said that he generally agreed but then said that the grading 'Very Good' given by the Reporting Officer was not commensurate with his write up and that the officer was 'Good'. The Reviewing Officer also recorded that the petitioner was a tactful officer who was able to get around problems and situations, and was resourceful and had ability to put across his view which was a good performance. We do not think that the ACR for the period from 1 April, 1991 to 31 March, 1992 would mean that there was a drop in performance of the petitioner. As noted above, the respondents themselves were unable to tell us as to in what circumstances it would be said that there was drop in performance of the officer."

12. The Division Bench, ultimately, held:

"We enquired from the respondents as to what was the necessity for the Selection Board to meet in the third quarter of 1992 for preparing a panel for the expected vacancies in the rank of Brigadier for the year 1993. As noticed above they said that since the Secretary in the Department of defense Production & Supplies was being transferred to some other posting, it was thought fit to hold a meeting of Selection Board in the third quarter of 1992 itself. It is admitted, however, that the panel earlier prepared by the Selection Board in the last quarter of 1992 was valid up to 20th December, 1992. The argument that the Secretary was about to be transferred and on that account Selection Board was held appeared rather strange to us and that would appear to be the reason why the petitioner has come up with an allegation that whole action of the respondents preparing the panel in post-haste was mala fide in order to benefit the third respondent that this was done by the second respondent who himself was retiring on 31st December, 1992. To us, Therefore, it appears that the vacancy in the rank of Brigadier in the organisation which arose on 13th November, 1992 should have gone to the petitioner. The order promoting the third respondent is dated 29th October, 1992. To that extent this order cannot stand and is set aside. It is declared that the petitioner was entitled to be promoted to the vacancy in the rank of Brigadier w.e.f.13 November, 1992. If the result of this order is that the third respondent loses his rank of Brigadier we cannot help. Of course, if other vacancy in the rank of Brigadier has arisen in the mean while, the third respondent will be entitled to continue in that rank if otherwise permissible. However, he will not be entitled to claim any seniority on the petitioner on that account."

13. It could be seen from the facts before the Division Bench are entirely

different and the ratio laid down therein is not relevant for the purpose of considering the case of the petitioner in the instant case. When the respondents had considered the case of the petitioner, it is not for this Court to say that a different view is possible on the facts and circumstances. The Promotion Board, consisting of 13 experts, had considered all the relevant aspects of the matter. When that is the position, the petitioner cannot argue the matter as an appeal in this Court. I do not find any illegality or irrationality in the order passed by the respondents. Accordingly, the writ petition is dismissed.

14. There shall be no order as to costs.