

(2020) 01 AFT CK 0011
In the Armed Forces Tribunal
Case No : Original Application No. 1038 Of 2019

Ajay Dogra

APPELLANT

Vs

Union Of India And Others

RESPONDENT

Date of Decision : 24-01-2020

Acts Referred:

Armed Forces Tribunal Act, 2007 — Section 31(1)

Citation : (2020) 01 AFT CK 0011

Hon'ble Judges : Rajendra Menon, J; Philip Campose, Member (A)

Bench : Division Bench

Advocate : I.S. Singh, K.S. Bhati

Final Decision : Dismissed

Judgement

1. Vide our detailed judgment of even date, we have dismissed the main OA. Faced with this situation, learned counsel for the applicant makes an oral

prayer for grant of leave to appeal to the Hon'ble Supreme Court in terms of Section 31(1) of the Armed Forces Tribunal Act, 2007.

After hearing learned counsel for the applicant and going through our judgment, in our considered view, there appears to be no point of law much less

any point of law of general public importance involved in the judgment rendered by the Tribunal, therefore prayer for grant of leave to appeal is

declined.

This O.A is filed by the applicant, a serving Army Officer of Lt. Colonel rank, who is aggrieved by the fact that, though he was empanelled for

promotion by No.3 Selection Board (SB) in April 2014, but could not be promoted immediately due to his having gone thereafter for a two years UN

tenure in the Department of Peace Keeping Operations (DPKO), New York from 14.04.2015 to 16.04.2017, after having rendered an 'Adverse

Career Certificate', his promotion to the rank of Colonel has not been given effect post-return due to 'drop in performance' coming in the way on

account of a report of sexual misconduct of January 2017 having been received against him. The applicant has sought the following reliefs:

(a) Call for the complete records related to consideration of his statutory complaint and consequent order of Respondent No 1 (GoI/MoD)

dated 15.05.2019 and set aside the latter, being arbitrary and illegal.

(b) Call for the complete records leading to order of Respondent No.3 (MS Branch) dated 01.03.2019, whereby the applicant is being

treated as a 'drop in performance' case and being subjected to 'Special Review' and set aside the said order.

(c) Promote the applicant to the rank of Colonel, for which he stands approved by the No.3 SB held in April 2014.

2. Heard the learned counsel on both sides and perused the documents on record.

3. Facts germane to the case are that the applicant, a serving Lt. Colonel of the Army Air Defence (MD) Corps, who was commissioned on

13.06.1998, was empanelled for promotion to the rank of Colonel by No.3 SB held in April 2014, for which the result was declassified in June 2014.

The applicant was serving in the MS Branch (MS-18) at that time. However, though he was the senior most officer of his AAD batch, he was not

promoted immediately due to command planning schedule of his Regiment (142 AD Regiment (Self Propelled) and he was scheduled to be promoted

on 22.09.2014, on completion of tenure of the incumbent of CO of the Unit. The applicant was detailed for Senior Command Course from 17.11.2014

to 24.01.2015. In the meanwhile, his name was under process for selection as Military Training Officer, in the rank of Lt Colonel, at the Department

of Peace Keeping Operations at UNO, New York, a selection process which was undertaken under the aegis of the section of MS Branch that he

was serving in (MS-18). Government sanction for his selection and deployment was issued on 19.02.2015 and he was finally deployed at New York in

April 2015. Towards the end of his tenure at UNO, New York, the applicant had come to New Delhi for conduct of a capsule course titled 'Global

Roll Out Course on Conflict Related Sexual Violence' from 09.01.2017 to 13.01.2017, for which he was detailed as an Instructor. Following that

capsule, allegations of misconduct were levelled against the applicant by two

foreign officers viz, a woman officer each from Australia and Egypt, which were received through their respective Embassy/High Commission in New Delhi. A complaint in this regard was also received at UNO HQ, New York and it was inquired into as per UN Rules. After repatriation of the applicant in April 2017 at the end of his UN tenure, a Court of Inquiry (Col) was convened by the Indian Army, vide its order dated 01.07.2017, to investigate the allegations of misconduct leveled against the applicant by the Women Military Officers of Australia and Egypt during the capsule course conducted in January, 2017. The applicant, it appears, was placed on a DV Ban pending finalization of Col, resulting in his not getting promotion to the rank of Colonel. Consequent to the submission of findings of Col, a Show Cause Notice (SCN) was issued to the officer and, based on his reply, he was awarded a censure on 25.01.2019 in the form of 'Displeasure' by the competent authority (GOC 21 Corps). Subsequently, on 01.03.2019, the respondents issued a notification that the applicant should be considered afresh, as a 'Drop in Performance (DIP)' case by the No.3 SB Promotion Board scheduled on 05.03.2019. The applicant filed O.A No. 368 of 2019 before this Tribunal, which, by its order dated 26.03.2019, allowed the applicant to withdraw his OA enabling him to avail alternate remedies and file statutory complaint to the respondents. In the meanwhile, the result of his review by No.3 SB as a 'Drop in Performance' case was received on 04.04.2019, whereby he has not been empanelled for promotion to the rank of Colonel. The statutory complaint submitted by him was rejected vide an order of Respondent No.1 dated 15.05.2019. Hence this O.A.

4. Mr. I.S. Singh, learned counsel for the applicant submits that, on declassification of No.3 SB results on 26.06.2014, the applicant stood approved for

promotion to the rank of Colonel. However, he could not be promoted as he was selected for deputation as a Military Training Officer at UNO, New

York and deployed thereto in April 2015. Learned counsel contends that though a complaint of misconduct during a training capsule at New Delhi had

been received from an Australian Woman Naval Officer by the respondents as well as by UNO HQ, New York in January 2017, he had been

exonerated by the latter after the investigation, and thus, he cannot be found guilty subsequently by the Indian Army authorities for the same purported

offence based on a Col conducted by the Army. In this regard, learned counsel contends that his attachment for Col, which was conducted from

05.07.2017 to 13.11.2017, was irregular and contrary to the law on the subject. Further, the learned counsel contends that the subsequent actions of

the respondents to issue SCN and censure as well as orders for subjecting his promotion approval to review were illegal and arbitrary as 'Drop in

Performance' would occur only if he had been found blameworthy by the investigation inquiring into the complaint.

5. Learned counsel for the applicant has referred to the 'Discipline and Vigilance (DV) Ban' Policy of 20.04.2010 to contend that the respondents

placing the applicant on DV Ban was irregular as no disciplinary or administrative proceedings had been initiated against the applicant at that stage.

The relevant paras of the aforesaid Policy letter on DV Ban are reproduced as hereunder:

'2 DV Ban is imposed only when the competent disciplinary authority comes to a conclusion that prima-facie, a case is made out against an

officer. Such a situation arises as soon as the competent disciplinary authority applies its mind to the facts and circumstances of the case

and issues directions for initiation of disciplinary administrative proceedings against the officer on the basis of C of I proceedings.

Imposition of DV Ban therefore has - origin in the decision of the Cdr to initiate disciplinary/ administrative action against an officer.

3. In case the Show Cause Notice (SCN) has been issued w/o conducting C of I on the basis of documentary evidence, then the DV Ban will

be imposed from the date of issue of SCN by the competent authority.

4. In CBI cases the DV Ban will be imposed when the competent authority (COAS) accords approval to progress the case to MOD for

prosecution of an offr by CBI in a civil court.

5. In criminal cases the Ban will be imposed when the charge sheet has been filed by the Poke in a court and after carrying out the

investigations.

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9. Scope and Implications of DV Ban

DV Ban covers the following service matter:-

(a) All normal postings and Transfers, (these will not be ordered in cases of DV Ban Type 'S' since an officer is on suspension and cannot perform duties) and DV Ban Type 'D' (since disciplinary proceedings have to be completed),

(b) Posting to sensitive appointments (to be decided by MS Branch),

(c) Promotions, both to substantive and acting ranks,

(d) Premature retirement, release or acceptance of resignation,

(e) Grant of Study Leave, Nominations on foreign and career courses by selection,

(g) Nominations on foreign assignments / postings,

(h) Honours and Awards,

(j) Pension,

(k) Deputations, including acceptance of assignments from other Govt. Departments and Establishments.

(l) Visit to Foreign Countries in official or private capacity

(m) Re-employment or extension of re-employment.

6. Accordingly, learned counsel contends that a DV Ban stopping his promotion could have been activated against the applicant only when the

disciplinary authority came to a conclusion that, prima facie, a case had been made out against the applicant, which did not happen in this case. Hence,

the stoppage of promotion, without a case having been made out against the applicant, is arbitrary and illegal, and thus needs to be set aside.

7. In support of his submissions, learned counsel for the applicant relied on the following decisions:

(i) COI Plindifi Bali v. Union of India and others (0.A No. 282 of 2013 decided on 17.04.2014)

(ii) J.P.5 Mahla v. Union of India and others (2003 SCC Online Del 999)

(iii) Bank of India and another v. Degala Suryanarayana (1999) 5 SCC 762

(iv) Maj Gen H. M. Singh v. Union of India and another (C.A No. 192 of 2014 of Hon'ble Supreme Court decided on 09.01.2014); and

(v) Union of India and others v. KV. Jankiraman and others (1991) 4 SCC 109),

8. On the other hand, Mr. K.S. Bhati, learned Senior Central Government Standing Counsel (Sr. CGSC) appearing for the respondents, controverted

the arguments made on behalf of the applicant, Learned Sr. CGSC has argued

that the initial delay in 2014-15 in the applicant's promotion was due to the fact that the applicant was selected for secondment to UNO HQ, New York for two years, a fact that the applicant was fully aware of, he having been part of the very section of MS Branch/Army HQ, which deals with selection of officers for foreign postings. Further, he signed on 'Adverse Career Certificate' accepting all adverse effects of his foreign tenure on his career prospects, including delay in promotion. Subsequently, all continuing delays in his promotion were due to the fact that at the stage of his repatriation from UNO HQ in April 2017, there was a complaint of sexual misconduct pending against him, which needed to be investigated, keeping in view the policy on the subject. Further, after completion of inquiry and based on his reply dated 05.11.2018 to the SCN issued to him on 06.09.2018, he was served with a censure in the form of "'Displeasure'. Thus, as per the policy on 'Drop in Performance', the applicant had to be subjected to Special Review, after which his earlier approval for promotion has been cancelled.

9. Learned counsel for the respondents has contended that the UN inquiry did not exonerate the applicant, as claimed by him. The said inquiry was closed as the applicant was posted back to India at the end of his tenure, thus, it was anticipated that the Government/Army authorities in India would take necessary action for finalization of the case. The applicant, by his conduct, has tarnished the highly esteemed image of the Indian Army at the International level. Learned counsel contends that the officer being a representative of the Country and the Army at UNO, New York was duty bound to display conduct whereby the troops placed under his command in future would look up to him as a leader on whom faith and trust could be reposed. The applicant by his misconduct, during his interactions with women officers of foreign Countries, has dented the ethos and image of the Indian Army and thus cannot hold the organization responsible for the adverse effects of such behavior. The censure was awarded to him after due process of Col and serving of SCN, to which he had forwarded his reply. It is only after going through the merits of his reply to the show cause notice that the respondents served him with the censure 'Displeasure'. Further, as per the current procedure as elucidated in Para 4 of MS Branch Letter No.04502/MS Policy dated 17.09.2010, he was subjected to Special Review by

No. 3 SB on account of his 'Drop in Performance', which review found him unfit for promotion. Thus, the applicant has only himself to blame for not being promoted and there is no merit in his case. Respondent No.1, accordingly, rejected his statutory complaint, after due consideration and process.

10. With regard to the judgment cited on behalf of the applicant, learned Sr CGSC argued that these cases are clearly distinguishable from the facts of the applicant's case and he cannot take any support from them towards his case.

11. In Col Punam Bars case (supra), the issue related to the deferment of promotion of the petitioner therein in view of the DV Ban imposed by the respondents after his result was declassified by the Promotion Board. The questions that had come up for consideration before a Coordinate Bench of this Tribunal was whether the respondents could have imposed the DV Ban against the petitioner therein when admittedly no disciplinary proceeding was initiated against him as no charge sheet was served on him at that point of time. The facts of that case is distinguishable as, in this case, the allegations made against the applicant are more serious. In J.P.5 Mahla (supra), learned counsel for the applicant relied on Paragraphs 23 to 26, wherein the admitted position was that the Col concluded somewhere in September 1999 and on 03.10.1999, the Station Commander recommended disciplinary action against the appellant therein. The Honble Delhi High Court opined that under normal circumstances if that be the position, then obviously the order dated 01.10.1999 could not have been issued and, to that extent, the High Court agreed with the submission made by learned counsel for the appellant. The Court also specifically held that mere approval of the promotion of acting rank does not confer any legal right. Here also we find that the facts are distinguishable and the applicant cannot take any benefit by relying on that decision. The learned counsel for the applicant thereafter relied on the decision in Degala Suryanarayana (supra), wherein the employee, who was working in Middle Management Grade II in the Bank of India, was due for promotion. Complaint was made against him to CBI alleging certain misappropriations. While the complaint was under investigation, the employee was interviewed for promotion in the year 1981-82. The result of the interview was withheld on the ground of pendency of criminal proceedings against him. Finally, the criminal cases ended in his favour acquitting him of the offences charged. However, the order of

promotion was not issued. The Hon'ble Supreme Court held that the matter as to promotion stood on a different footing and the question decided was the applicability of the sealed cover procedure. The facts of the said case are also distinguishable and the said decision does not lend any help to the case of the applicant. The decision in Maj Gen H.M. Singh (supra) also does not lend any assistance to the case of the applicant, wherein the Hon'ble Supreme Court was considering the claim of the appellant for promotion to the rank of Lieutenant General. In that case, the Selection Board had recommended the promotion of the appellant on the basis of his record of service, past performance, etc. out of a panel of four names. The Appointments Committee of the Cabinet did not record any reason to negate the inference relating to the merit and suitability of the appellant. And in K. V. _lank/roman's case (supra) also, the Hon'ble Supreme Court held that if an employee is visited with any penalty in disciplinary proceedings or found to be guilty by a criminal court, the sealed cover should not be acted upon and his case for promotion be considered in usual manner by the next DPC. It also held that the employee has a right to be considered for promotion but not a right to promotion.

Consideration:

12. Having given careful consideration to the arguments made before us, we find that the primary issue before us is, whether the applicant, who stood approved for promotion to the rank of Colonel by a Selection Board conducted in 2014, who could not be promoted soon thereafter due to having proceeded on a foreign posting to UNO HQ, New York, can be denied promotion subsequently after his return due to the fact that the respondents ascribed a 'Drop in Performance' with regard to his promotability status on account of the fact that complaints of misconduct were made against him by foreign women officers during the conduct of a UN Training Workshop conducted at New Delhi and these were found to be true by a Col convened to investigate the complaints, resulting in award of censure 'Displeasure' to him.

13. Learned counsel for the applicant has cited a number of judgments whereby the Courts granted redress to petitioners in case they had been selected for promotion, but were not promoted due to subsequent turn of events or activation of DV Ban, which the Courts found to be unjustified to

the extent of coming in the way of promotion of the petitioners.

14. On the other hand, the respondents have submitted that, in the first instance, the applicant himself was responsible for his not being promoted

despite his approval for promotion due to the fact that he voluntarily accepted to proceed to UNO HQ, New York in his present (lower) rank, after

signing an Adverse Career Certificate, whereby he accepted the adverse effects of his posting on his career/promotion. Further, the respondents have

contended that continued satisfactory performance, clearance from the DV angle and acceptable medical category are mandatory criteria for grant of

promotion to an officer subsequent to being empanelled by the Selection Board. To that extent, having been selected for a prestigious assignment

abroad, it was for the applicant to desist from any improper behaviour which would tarnish the image of the country and the Indian Army.

Furthermore, the applicant was well aware, having been in the MS Branch, that any improper behaviour on his part, if proved, would come in the way

of his promotion to the rank of Colonel as it would undermine his authority in his subsequent command functions and thus, would be construed as a

'drop in performance'.

15. We are in agreement with the respondents that, as the CoI found truth in the allegations of misconduct on the part of the applicant, they were

justified in awarding censure 'Displeasure' after serving a SCN, as per the policy on the subject. Thus, we do not see any reason to set aside the

decision of the respondents to cancel the empanelment for promotion after treating it as a case of 'Drop in Performance' after a Special Review

Board, as per the policy letter dated 17.09.2010, made a recommendation accordingly.

16. In the result, the O.A lacks merit and is dismissed. No order as to costs.

Pronounced in open Court on this the 24th day of January 2020.