

(1996) 04 J&K CK 0003

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 74/1995

Avtar Singh, Brig.

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 19-04-1996

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226

Citation : (1996) KashLJ 318

Hon'ble Judges : V.K.Gupta, J

Bench : Single Bench

Advocate : S.Dutt, M.K.Bhardwaj, Advocates appearing for the Parties

Judgement

The petitioner is a Brigadier in the Indian Army. He was commissioned on 13th June 1963 in the Regiment of Artillery. In 1965 IndoPak war he

was inducted in the fighting theatre on the western front and, during operations was badly and seriously wounded resulting into injurious to his

various parts of the body, including right arm, left index finger, lower abdomen etc. etc. Actually the injuries were so serious that the petitioner's

right arm and left index finger had to be amputated later on. The petitioner says that he survived despite 90% disability determined by a Medical

Board duly constituted as per established International Medical Standards. Despite the aforesaid 90% disability, the amputation of his right arm

and left index finger and various other medical problems, the petitioner kept on serving in the Indian Army as a consequence of various decisions

taken by the Government of India that all Battle causality officers should be retained in service to avoid demoralising effect of boarding out young

disabled officers from service. Except however, this concession of retaining the officer in service, no other relaxation was provided to them for

promotion in service or for compensation for disability etc. The petitioner therefore, says and submits that he had to compete with able bodied

officers to get his feature promotion notwithstanding 90% disability which he had suffered in the 1965 IndoPak war. The petitioner says that he rose

to the rank of Brigadier because of his merit, outstanding performance and suitability. None of the above stated facts have been controverted by

the respondents.

The petitioner was holding the appointment of Commandant, Central Vehicles Depot, Delhi Cantt. (CVD Delhi Cantt.), prior to his having been

posted as Brigadier 'A' Hqrs. Northern Command. Respondent No. 4 Maj General Mohinder Singh who has since retired from Army service was

the petitioner's next superior officer while he was serving as a Commandant CVD Delhi and in that capacity was petitioner's Initiating Officer (10)

during the period the petitioner was serving in CVD Delhi, for the purposes of his Annual Confidential Reports (ACRs). It appears that for the

period September 1990 to August 1991 and September 1991 to June 1992, respondent No. 4 had initiated the petitioner's ACRs which were not

complementary to him and in which the petitioner were not wholly either commensurate with this performance or in consonance with his

promotional prospects, based upon his merit and his suitability. Since both the ACRs initiated by respondent No. 4 were such which were not

helpful to the petitioner and which had the potential of jeopardizing the petitioner's service interests, particularly in the matter of his promotion to the

next higher rank. The petitioner represented against both these ACRs to the Chief of Army Staff, respondent No. 2 vide communication dated 5th

May 1992, the Chief of Army Staff expunged the entire assessment in the ACRs for the period September 1990 to August 1991, as initiated by

respondent No. 4 on ground of inconsistency, In so far as the second ACR for the period September 1991 to June 1992 was concerned, vide

communication dated 9th December 1992, the Chief of Army Staff, after considering all relevant aspects granted the limited relief of expunction of

those entries which had five points awarded by respondent No. 4 in the relevant column of the said ACRs. It shall be advantageous to reproduce

the text of the communication dated 9th December 1992 which reads thus :

1. Reference your letter No. 11304/NS336/AS/MS dated 19th August, 1992.

The application dated 27th July, 1992 submitted by IC15457 Brig. Avtar Singh, AOC was placed before the Chief of the Army Staff.

The Chief of the Army Staff, after considering all relevant aspects, has directed that the 5 points awarded by 10 in six PO/DPs in ACR 1st

September 1991 to 30th January 1992 be expunged. There is no need to grant an interview to the officer by the COAS.

The officer may please be informed accordingly and his acknowledgement obtained and forwarded to this HQ,

5 Please ack.

The petitioner is a 1963 batch officer and was thus eligible for consideration by the Selection Board for promotion to the rank of Maj. General as

in October 1994, when the said Selection Board met for such consideration. The petitioner was considered by the said Selection Board in

October 1994 alongwith the other eligible officers of 1963 batch, Whereas respondents No. 5 to 7 were approved for empanelment for

promotion to the rank of Maj. General, the petitioner was not approved for such promotion because, apparently he was not cleared by the

Selection Board. The approval and empanelment of respondents No, 5 to 7 was conveyed vide Military Secretary Branch Army Headquarters

communication dated 19th January 1995. However, the petitioner was considered once again in April 1995 by another Selection Board, As a first

review case, 1963 batch, alongwith respondent No. 8 and this time both the petitioner and respondent No. 8 were approved for empanelment for

promotion to the rank of Maj. General in the Army Ordinance Corps (AOC). The petitioner's approval for empanelment for promotion to the rank

of Maj. General alongwith respondent No. 8 was communicated by the Military Secretary Branch, Army HQ vide communication dated 471975.

None of the above stated facts again have been controverted by the respondents.

There two disputes in this petition which have been projected by the petitioner. Firstly, he wants the ACRs for the period September 1991 to June

1992, as recorded by respondent No. 4 expunged and consequently, his nonapproval for promotion to the rank of Maj, General in these Selection

Board held in October 1994 be quashed and set aside. The petitioner claims that his nonapproval in the Selection Board held in October 1994 was

only because of the aforesaid ACRs which were produced before the Selection Board and in which respondent No, 4 had assessed the petitioner

lukewarmly, be just grading him as an average officer. As is seen, there is the first dispute projected by the petitioner. The second dispute is slightly

more important. The petitioner says that notwithstanding his first dispute and its result, even after his approval for empanelment to the rank of Maj

General in the Board held in April 1995, as communicated by communication dated 471995, he actually and physically was not promoted to the

rank of Maj. General, even though he was to retire on 31st December 1995 in the rank of Brigadier. Clearly stating, the petitioner's grievance is

that despite his having been approved for promotion to the rank of Maj. General in the second Selection Board alongwith respondent No, 8,

whereas respondent No. 8 picked up the rank and was actually promoted as Maj. General, till date the petitioner has not been able to pick up the

rank and get the promotion, presumably and purportedly on the ground that before his retirement on 31st December 1995, no vacancy of Maj.

General existed or was available in the AOC and therefore, he had to retire as a Brigadier on 31st December 1995 without availing the benefit

consequence of his approval for promotion as Maj. General. It may be noticed here that vide a detailed order dated 29th December 1995 passed

by this court in this petition (Hon'ble Justice Khen), it was provided and directed that the petitioner shall not retire from service, despite his

impending superannuation on 31 121995. The interim direction of the Single Bench was taken up in appeal by the respondents before a Division

Bench. The Division Bench vide its order dated 3011 1996 passed in LPA (S) No. 17/96 upheld the aforesaid direction of the learned Single

Judge with the only modification that, ever while the petitioner shall not retire and not passed outside the HQ Northern Command, the respondents

shall be at absolute liberty to change his position/appointment in the interest of administration or depending upon the requirements. The position as

emerges on date is that, because of the aforesaid direction, the petitioner continues to be in service, even though in the rank of Brigadier, despite

having reached the age of superannuation in that rank as on 31121995.

Let us deal with the first grievance of the petitioner. I have seen the original ACRs of both the years, i.e. 199091 and 199192, as recorded by

respondent No. 4 in his capacity as 10 and did find that in the first ACR, all the entries recorded by respondent No. 4 were expunged in the second ACR only such entries in the appropriate column were expunged which had graded the petitioner by giving him 5 marks. A careful perusal of the ACRs reveals to me that all the superior officers above respondent No. 4, in capacities as Reviewing Officers above him, which included the officers of the rank of Lieutenant General have given very high and outstanding rating to the petitioner and had very strongly disagreed with the rating and assessment given by respondent No. 4 and disapproved the attitude of respondent No. 4 towards the petitioner while recording his assessment in the two ACRs. I found on a careful perusal of the two ACRs that all the superior officers of the petitioner, except respondent No. 4, considered the petitioner to be an officer of outstanding merit and exceptional eminence and decried the conduct of respondent No. 4 in underfating and undermining the petitioner's capabilities as an officer and in wrongly assessing and grading him in the ACRs. It does mean that the petitioner's grievances regarding subjective, biased and prejudiced assessment about himself in the two ACRs at the hands of respondent No. 4 were genuine, bonafide, legitimate and well placed. In this backdrop therefore, whereas respondent No. 2 expunged the entire ACRs for the year 199091, he gave limited relief to the petitioner regarding the second ACR with the result that the entries in the second ACR came to be considered by the Selection Board when the petitioner was first considered for promotion in October 1994, This brings us to the crucial issue, however, as to whether this alone was the ground for the petitioner's nonapproval in the Selection Board of October 1994. Whereas the petitioner says this ACR by itself was a ground for the petitioner's nonapproval by the Selection Board, the respondents' case is that the Selection Board considered the overall profile of the petitioner and by taking into account his entire service record, found him nonsuitable for promotion to the rank of Maj. General. The respondents specific averment is that no single ACR is decisive for approval or nonapproval of an officer for promotion and that overalls profile as well as the batch merit are the main considerations before the Selection Board.

I have given my thoughtful consideration to the rival contentions regarding this point. Whereas there is some merit in the contention of the petitioner

that perhaps one single ACR might have been instrumental in his being knocked out at the time of consideration, there does appear to be equal

merit in the submission of respondents as well that the overall service profile and record is placed before and considered by the Selection Board

and that one single ACR is not the decisive factor in making final assessment about a candidate being considered by the Board. In the face of these

two rival contentions and because of the fact that finally the petitioner stood in April 1995, I am not inclined to disturb the findings of the Selection

Board held in October 1994 merely on the ground that the petitioner's second ACR was before the Selection Board, entries wherein, as recorded

by respondent No. 4 were not fully supporting the petitioner. Be that as it may, the petitioner was considered once again in the second Board held

in April 1995 and was approved for empanelment. In that view of the matter going back to the proceedings of the first Selection Board, in which

respondents No. 4 to 7 were approved will, in my view amount to disturbing the applecart in a big way, because of all three respondents have

since been promoted to the rank of Maj General and disturbing their promotion or appointment at this stage will cause great prejudice and

hardship to them, especially when the petitioner himself has now been approved for promotion.

This now takes us to the second dispute. If the petitioner stood approved for empanelment for promotion to the rank of Major General by the

Selection Board held in April 1995, the natural consequence and corollary of such approval undoubtedly would be that the petitioner is actually

promoted as Maj. General, subject of course to the availability of a vacancy. Despite vehement arguments of Mr. Bhardwaj. learned counsel

appearing for the petitioner I am not in agreement with the submission that, vacancy or no vacancy, once a person is approved, he should be

actually promoted as well. Approval for empanelment for promotion to a higher rank undoubtedly is always dependant upon availability of the

vacancy. It is normal practice and usage that a selectlist of officers is drawn up for giving them benefit of promotion to the next higher rank but,

such benefit is always dependant upon the availability of a vacancy. If and when a vacancy comes into being, or is made available depending upon

the turn of the approved officers in the selectlist, he automatically picks up the rank against such a vacancy. If, however, despite approval for

promotion and till the Very last day of his service, no vacancy exists or comes into being, that is quite unfortunate for the approved officer because,

in that event he retires from service actually without being promoted. That is the exigency of service.

In the petitioner's case as would be seen from the communication dated 471995, two Brigadiers, one the petitioner and the other respondent No.

8 were approved for promotion to the rank of Maj General. Both belonged to 1963 batch. The name of respondent No. 8 in the order of merit

appeared above the petitioner in the communication dated 471995. It is the admitted case of the respondents that respondent No. 8 has since

been promoted as Maj General.

The petitioner's promotion to the rank of Maj General, therefore would depend upon the availability of a vacancy before 31st Dec. 1995, the date

when he was to retire on superannuation the rank of Brigadier. If the petitioner was appointed as Maj General before 31st Dec. 1995, his service

tenure would have been extended by two more years. The determination of the second dispute therefore, would depend upon the question as to

whether, before 31st December 1995 there was any vacancy available in AOC. If such a vacancy was in fact available, the petitioner had the right

to be promoted as Maj General before 31st Dec. 1995. If as on, or before that date, no such vacancy was available, the petitioner could not claim

promotion as a matter of right and had to go home on retirement in the rank of Brigadier.

Let us examine the issue regarding the availability of the vacancy.

Vide communication No. B/07106/EST/OrgMP (a) dated 25.8.92, policy on the establishment of officer cadre was formulated by the Army HQrs

and conveyed by the Adjutant General's Branch. After indicating various issues in this communication, the Adjutant General Army HQ.rs gave an

allocation of vacancies of Maj Generals in various arms and branches of the Army. We are concerned with AOC only. As per the allocation

statement forming appendix to the aforesaid communication dated 25th Aug 1992, ""9 specified and 1 unspecified"" vacancies were allocated in

favour of AOC. The allocation statement also provided that one additional vacancy was required to be given to AOC so that it can fill its specified

appointments and that it could be given from the share of ""Engineers"".

However, importantly enough the allocation statement noted that one unspecified vacancy is to be held alternatively by ""ASC"" and ""AOC"" from the management cushion of Military Secretary. In other words, the allocation statement clearly provided that apart from 9 specified vacancies in the AOC, additional one unspecified vacancy was to rotate between, AOC and ASC, meaning thereby that ASC Maj General occupy this vacancy once and, on his relinquishing, AOC Maj General occupy next, and so and so forth. This is one aspect of the matter. The other slightly more important especially is the issuance of resolution No. 6/28/8S/D (011) dated 27.3.1991 whereby the Govt. of India, Ministry of Defence, and not Army Headquarters, constituted a Special Surplus Stores Disposal Committee (SSSDC) which was composed of, amongst others an officer of the rank of Additional Secretary, Ministry of Defence as Chairman and a Maj General, AOC Army Headquarters Member. It shall be advantageous to reproduce the text of this resolution which reads"" as under :

Subject:Constitution of a Special Surplus Stores Disposal Committee (SSSDC).

It has been decided to constitute a wholetime Special Surplus Stores Disposal Committee in the Ministry of Defence for disposal of surplus/obsolete warlike Ordinance stores and other stores of security nature held in ordinance installations in a time bound manner. The

Committee will function for a period of one year. The Committee consist of the following :

An Officer of the rank of Additional Secretary, Ministry of Defence Chairman

An Additional Financial Advisor, Ministry of Defence (Finance) Member

A Maj General Army Ordinance Corps, Army HQ Member

A Deputy Director General (Disposals) DGSandD Member

An Army Officer of the rank of Col. will be the Secretary of the Committee,

The Chairman may coopt any other officer *whose services are required for any particular part of the functions assigned to the Committee, on

adhoc/part time basis.

The petitioner says that as on 31st December, 1995, AOC had a total number of 11 vacancies available to it, breakup whereof is as under :

1 â?¢

Specific vacancies = 9

Unsoecified =.1

Vacancy created for membership of SSSDC ==1

Total =11

According to the petitioner, if this vacancy position is considered, much before 31121995, there were only 10 vacancies occupied out of above 11

and, one being available, the petitioner could be promoted to the rank of Maj General. This is the only contentions issue between the parties. The

respondents do not agree with the petitioner's view. They say that the post of Member SSSDC was the 10th vacancy and this was in lieu of the

unspecified vacancy as created vide communication dated 25th August 1992. Apparently the stand of the respondents does appear to be wholly

incorrect and untenable. The allocation statement was issued alongwith the communication dated 25th August 1992 whereby the policy on the

establishment of officers cadre was formulated. It was issued by Army Headquarters. The SSSDC was constituted on 2731991, i. e. much before

the issuance about the policy on establishment of officer cadre on 25th August, 1992. Not only that, SSSDC was constituted not by Army

Headquarters, but by Govt. of India, Ministry of Defence. The post of Member SSSDC, therefore, came to be created much before 25th August

1992. Not only this, there is another important angle to this. SSSDC was a temporary creation because its life was for one year initially, even

though it kept on being extended from year to year. It is said that its last extension was till 31st March 1996. Based on this, one can safely say that

memberships of SSSDC had nothing to do with the 10th unspecified vacancy created by the allocation statement. Equally importantly, there is

another vacancy was to rotate between ASC and AOC. The membership of SSSDC, however, was not to rotate and, as is seen by perusal of the

Govt. of India's letter dated 27th March 1991, it was exclusively meant for a Maj General in the AOC.

I, therefore hold that inclusive of the membership of SSSDC, AOC had a total of 11 vacancies available to it before 31st December 1995. Since

only 10 of them were occupied, one was available for being filled up by promoting the petitioner. Because the petitioner was not promoted before

31st December 1995, despite the availability of the vacancy, a wrong was done to him which does require to be undone.

In fact various affidavits filed on behalf of the respondents includethose of Shri A. Murugesam, Shri T. Abdurrassak and Maj. S. V. Rao were

carefully perused and gone through by me. It does appear that all along, the respondents were under a grossly mistaken impression about the

vacancies available in the AOC. and on that misunderstanding of the position, therefore, they wrongly construed that the membership of SSSDC

was to be linked with the unspecified vacancy. It might have been a bonafida misunderstanding and misinterpretation of the communication dated

25th August 1992 read with the Government of India, Ministry of Defences's resolution dated 27.3. 91. There was no connection between the

two. Both catered to entirely different fields. Both were independent of each other. Mixing up of the membership of SSSOC and linking it with the

unspecified vacancy as created by the communication dated 25th August 1992 was to say the very least an act which unnecessarily deprived the

AOC of one vacancy and created confusion regarding the actual number of vacancies available in the AOC. It was because of this confusion,

misunderstanding and misappreciation that the petitioner became a victim, albeit, perhaps without there being any malafides or ulterior motives.

Had the respondents correctly understood the scope of the two communications dated 25th August 1992 and 27.3 1991, there should have been

no difficulty, in their coming to the conclusion that the membership of SSSDC was to be excluded while calculating and computing the vacancies

available to the AOC. Annexure2 to the affidavit of Shri Abdurrassak dated 6th Dec. 1995 (filed on 7.12. 95) clearly indicates that the

respondents included the membership of SSSDC as the unspecified vacancy. By including this, the total number of vacancies available as at

present, i. e. as on the date of filing of the affidavit was indicated at 10 in the last column of the said annexure. This was not to be done.

The petitioner was entitled to be promoted to the rank of Maj General immediately on his being approved for promotion vide communication

dated 4.7.95. Since the unspecified vacancy was clearly available to the respondents as on the day of the approval of the petitioner, and further

since respondent No. 8 was adjusted against one of the specified vacancies, the petitioner also had a right to be promoted simultaneously against

the available unspecified vacancy, alongwith respondent No. 8. However, the petitioner was deprived of this promotion Which was legitimately

due to him.

Articles 14 and 16 of the Constitution of India guarantee equal treatment to persons similarly situated. The enjoyment of this fundamental right

guarantees that the citizens shall not suffer because of the arbitrary of the State. It also guarantees that two persons similarly situated shall not be

treated differently and discrimination shall not be practiced against the one.

Once the petitioner stood approved, he had a right to be promoted to the rank of Maj General. Denial of this right to him, while as respondent No

8 was given this benefit, does amount to decimating against the petitioner, thereby violating Article 14 of the Constitution of India The fact

however, remains that the petitioner has suffered because of the arbitrary, discriminatory and hostile attitude of the respondents, which may or may

not have been based on consideration of mala fides. The attitude may have been borne out bonefidelly to mistaken understanding interpretation

about various orders, communications and resolutions. Nonetheless, the fact remains that the petitioner suffered. The only way the petitioner can

now be compensated, the minimum possible way, is to grant him the relief of actual promotion in the rank of Mai General at least prospectively.

That is the bare minimum that the petitioner deserves and any thing short of that will amount to doing injustice to him. It is found, therefore, that as

from today, the petitioner does deserve to be promoted to the rank of Maj General against any available vacancy in the Army. Because of what

has been said above, it becomes wholly unnecessary to even think that the petitioner's promotion at this stage can be made dependant upon the

availability of vacancy in the AOC. Insisting on that condition or requirement will amount to setting at naught the entire relief giving process to the

petitioner. That may also amount to an exercise in giving illusory relief to the petitioner, which may actually never come about. The petit) should

have been promoted as Maj General in the AOC way back in 1995 Denial of that promotion has infringed and violated his rights, I therefore open

to anyone to say that the petitioner belongs to AO he should be promoted only against an available vacancy in the That might also amount to

putting premium on the acts of the respondents. When the vacancy in AOC was available, by their misunderstanding of the position, they did not fill

it up, depriving the petitioner of his legally earned promotion against that

available vacancy at that time. Now If the vacancy is not available in the AOC, the ground of its nonavailability cannot be a valid defence against promotion of the petitioner. For no fault of him, the petitioner cannot be deprived of his promotion. Ordering his promotion now against any available vacancy in the Army, not necessarily belonging to AOC is the only relief which in equity can be granted to the petitioner. It is, however entirely and altogether a different matter that, after promotion to the rank of Ms] General, it shall be absolutely at the discretion of the respondents to post the petitioner properly, depending upon administrative interests the requirements of the respondents and the exigencies of service, Posting of the petitioner and the holding of a particular appointment by him after promotion on the rank of Maj General is a matter in which this court does not at all propose to either interfere or issue any directions. This is a subject which is entirely at the discretion of the respondents.

For the foregoing reasons, therefore, this petition is allowed. By issuance of a writ of mandamus, the respondents are directed to;

promote the petitioner to the rank of Maj General against any available vacancy in the Army, notwithstanding the fact that the petitioner belongs to AOC.

treat him in service till he is promoted as Maj General in the Army and actually picks up that rank;

to create a vacancy, if none exists or if adjusting the petitioner against any available vacancy (other than ACC) results in or amounts to any administrative problem.

Since the petitioner has already suffered because of his nonpromotion, it shall be desirable if the respondents do not make any promotion to the rank of Maj General until the comply with the aforesaid directions.

No. order as to costs.