
(1993) 05 SHI CK 0016
In the High Court Of Himachal Pradesh
Case No : C.M.W.P. No. 587 of 1992

Brig. J.S. Sivia

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 12-05-1993

Acts Referred:

Citation : (1994) 1 LLJ 906 : (1993) 2 ShimLC 162

Hon'ble Judges : L.S. Panta, J; Kamlesh Sharma, J

Bench : Division Bench

Advocate : Chhaabil Dass, for the Appellant; P.A. Sharma, Sr. C.G. Standing Counsel, for the Respondent

Judgement

Kamlesh Sharma, J.—The petitioner was promoted to the acting rank of Brigadier on April 10, 1990 and since then he has been working as such. By letter dated March 4, 1992 (Annexure PD/1) he was informed that the competent authority had not approved the grant of substantive rank of Brigadier to him. In view of his not being deemed fit for appointment to the substantive rank of Brigadier, by letter dated July 17, 1992 (Annexure P-D), the Military Secretary to the Government of India asked the option of the petitioner, besides two others, to seek voluntary retirement as acting Brigadier or revert to lower substantive rank and retire in due course, as per the instructions contained in Army Head-quarter letter No. 29189/II/MS (X) dated February 23, 1986.

2. Instead of exercising his option, the petitioner has knocked at the door of this Court by way of the present writ petition to challenge the letters dated March 4, 1992 and July 17, 1992 (Annexure P. D/I and P.D.) on the ground, inter alia, that he has been denied the substantive rank of Brigadier not on the basis of his performance during the period he held the acting rank of Brigadier but on account of award of "Severe Displeasure (recordable)" as a result of Court of Enquiry held in 1989-90 for dereliction of duty during the period May 1989 when he was holding substantive rank of Colonel and posted as Commandant Supply Depot, Delhi Cantt The case of the petitioner is that once he was selected for

acting rank of Brigadier and his performance as such has been good, he should automatically get substantive rank of Brigadier and award of "Severe Displeasure (recordable)" should not be made basis for denying to him the substantive rank of Brigadier. He has also challenged the instructions contained in letter dated February 23, 1986 (Annexure P-E) by which earlier instructions of automatic confirmation/promotion in the substantive rank have been modified and it is provided that the question of confirmation/ promotion is required to be examined on the basis of performance of the officer while he holds acting rank. Another challenge made by the petitioner is that his case for appointment to the substantive rank of Brigadier has not been considered by the competent authority in accordance with the procedure prescribed in the instructions in this regard. In the alternative, the petitioner has assailed the award of "Severe Displeasure (recordable)" on various grounds and has prayed that it may be quashed.

3. On the other hand, the respondent, in their reply filed on the affidavit of Lt Col. S.B. Mathur, presently posted as Administrative Commandant, Station Headquarters, Shimla, have raised three preliminary objections besides traversing the facts on merits. The first preliminary objection is that the writ petition was premature as the petitioner's statutory complaint dated July 28, 1992 (Annexure PG) was still pending with the authorities. As per the time frame laid down in para 364 of the Regulations for the Army, it was required to be disposed of by or before December 10, 1992, but the petitioner has filed the present writ petition much before, on August 14, 1992. Another preliminary objection is that at this late stage, the petitioner is not entitled to challenge the Court of Enquiry or the "Severe Displeasure (recordable)" which was awarded on November 14, 1990. In fact, as admitted by him in his statutory complaint dated July 28, 1992, the petitioner had accepted both the Court of Enquiry and the "Severe Displeasure (recordable)" and would not have challenged these had these not adversely affected his considerations for substantive rank of Brigadier. The third preliminary objection is that the award of "Severe Displeasure (recordable)" has not debarred the consideration of the petitioner for substantive rank of Brigadier but while it is operative, it is taken cognizance of as part of overall record of service in assessing his performance as acting Brigadier.

4. On merits, the respondents have justified "Severe Displeasure (recordable)" which was awarded to the petitioner after convening Court of Enquiry in accordance with the procedure prescribed in the Army Rules and also after considering his reply to the notice to show cause served upon him. It is admitted that the petitioner was promoted to the acting rank of Brigadier in April 1990 after his due selection by the Selection Board in accordance with the instructions but before conferring the substantive rank on him, his entire service record including "Severe Displeasure (recordable)" awarded to him on November 14, 1990 was to be taken into account. The "Severe Displeasure (recordable)" does pertain to the misconduct committed by the petitioner in the year 1989 when he was holding the lower substantive rank of Colonel but it could not be considered

at the time of his selection for promotion to the acting rank of Brigadier in April, 1990 as at that time it had not come into existence and only Court of Enquiry was being held. By the time the petitioner was considered for substantive rank of Brigadier in January/February, 1992, the "Severe Displeasure (recordable)" was already placed on his dossier on November 14, 1990 and formed part of his overall record. It is specifically stated on behalf of the respondents that the Chief of Army Staff is the competent authority to grant substantive rank upto the post of Major General and the case of the petitioner was considered by him. It is denied that the instructions contained in the letter dated February 23, 1986 (Annexure P-E) are ultra vires of Army Act, Army Rules or the Regulations for the Army.

5. The petitioner has filed a rejoinder, reiterated the averments made in the writ petition and denied the contrary stated in the reply- affidavit of the respondents. Alongwith the rejoinder, the petitioner has brought on record the instructions annexed to Army Headquarters letter No. 31525/P/MS/5-B dated May 6, 1987 (Annexure-PRA), containing the selection system for promotion to the rank of acting Lt. Colonel to acting Major General and thereafter Lt. General and also the letter dated November 26, 1990 (Annexure-PRB) in respect of promotions to the substantive rank of Brigadier and Major General.

6. We have given our best consideration to the respective submissions made by the learned Counsel for the parties. Before we deal with them, we will examine what were the instructions for the grant of substantive rank of Brigadier when the case of the petitioner was: considered in January/February, 1992. Admittedly there was no statutory rules in this regard. The system being followed for selection of officers to the rank of acting Lt. Colonel upto the rank of acting Major Genl. and Lt. General was prescribed in the letter annexed to Army Headquarter letter dated May 6, 1987 (Annexure-PRA). The composition of Selection Board is provided in para 6 and guidelines of assessment to be followed by this Board are given in para 10 of the instructions. Since there is no dispute that the petitioner was found fit and selected for acting rank of Brigadier in accordance with these instructions, we need not refer to them in detail. For deciding the controversy in the present writ petition, we are, in fact, concerned with the instructions of confirmation/promotion to the substantive rank of Brigadier from the acting rank of Brigadier. The earliest instructions placed before us in this regard are contained in the letter dated March 9, 1965 whereby, inter alia, it was decided that within each batch of officers selected for promotion to higher acting rank, substantive promotion to the corresponding rank will be made in the order of seniority in the particular selection grading subject to the following conditions:-

"(a) Where Officers graded fit for promotion cannot be promoted to acting rank strictly in order of seniority for administrative or military reasons, the substantive seniority of the 1 senior one, if promoted later, will be safeguarded. This safeguarding will not extend beyond two years if the officer is in India and three years if he is on overseas assignment.

(b) Where an officer is graded "D" (Defer), his substantive seniority will be protected only if he earns a selection grading ("A" or "B") in the next assessment.

(c) Where an officer is initially graded "R" (Unfit for promotion to the next higher rank at present) and earns a selection grading ("A" or "B") subsequently, he will take substantive seniority after officers who were approved; for promotion in the preceding batch."

7. These instructions clearly indicate that confirmation/promotion from the acting rank to the corresponding substantive rank was automatic in the order of seniority in the particular selection grading made by the Selection Board at the time of making selection for promotion to the higher acting rank. These instructions were further modified by Army Headquarters letter No. 29189/II/MS (X) dated February 23, 1986 (Annexure P E) whereby it was laid down that in future the following principles will be valid in the matter of substantive promotion to selective ranks:-

"(a) An officer promoted to a higher acting rank will not be considered as automatically fit for promotion to corresponding substantive rank. The question of confirmation will be examined after he has earned at least one report which should cover a minimum period of 9 months.

(b) Where an officer is not deemed fit for confirmation in a particular rank, he will be reverted to his substantive rank. However, before his reversion is actually implemented he will be informed of the position and given the option of voluntary retirement in which case he may be allowed to retire in his acting rank.

(c) Where an officer referred to at (b) above has only a short period of service (not more than one year) before the date of retirement in lower substantive rank, he will be allowed to continue in the acting rank till he retires."

8. Another letter dated November 26, 1990 (Annexure-PRB) of Joint Secretary (G) to the Government of India, Ministry of Defence, is also on the record. It is laid down in this letter that the existing procedure of screening cases for promotion to the substantive rank of Brigadiers and Maj Gens. will continue and the cases considered and recommended by the Selection Board will be submitted for approval of the Government as hitherto.

9. A joint reading of letters dated March 9, 1965, February 23, 1986, May 6, 1987 and November 26, 1990 clearly shows that the Selection Board only considers and makes recommendations for promotion to the acting rank of Brigadier and promotion to the substantive rank of Brigadier used to be automatic subject to availability of vacancy and in the order of seniority in the particular selection grading made at the time of selection for acting rank of Brigadier, which procedure was later on amended and confirmation/promotion to the substantive rank of Brigadier no longer remained automatic and was made on the basis of performance of the officer while on acting rank. The competent

authority to consider the performance of the officer on the acting rank for his confirmation/promotion to the substantive rank is the Chief of Army Staff. So far as the case of the petitioner is concerned, from the reply-affidavit filed on behalf of the respondents as well as the record which was placed before us in a sealed cover, we find that he was considered for confirmation/promotion to the substantive rank of Brigadier by the Chief of Army Staff. The petitioner was not found fit only because of "Severe Displeasure (recordable)" for carrying out illegal purchase of ten tonnes of grams crushed on May 23 and 24, 1989 which was considered a gross dereliction of duty with regard to both quality and quantity purchased. Otherwise, he fulfilled all other conditions for the grant of substantive rank of Brigadier, namely, reckonable service of 23 years, acceptable medical category and availability of substantive vacancy in the substantive cadre. Therefore, there is no substance in the submission made on behalf of the petitioner that he was not considered by the competent authority and also that confirmation/promotion to the substantive rank of Brigadier was automatic. The instructions applicable at the time of his consideration to the substantive rank of Brigadier were as contained in the letter dated February 23, 1986 whereby confirmation/promotion to the substantive rank of Brigadier was to be made on the basis of his service record as acting Brigadier. Mr. Chhabil Dass, learned Counsel for the petitioner, is also not able to show how these instructions are bad. These instructions are issued by the same authority which had issued the earlier instructions on March 9, 1965. In the absence of any statutory provision, in respect of confirmation/promotion to the substantive rank of Brigadier, the competent authority could issue these instructions which have the force of law.

10. Now the question arises whether the "Severe Displeasure (recordable)" which pertains to the alleged misconduct for the period May, 1989 when the petitioner was working on the lower rank of substantive Colonel could be considered for confirmation/promotion to the substantive rank of Brigadier when there is nothing adverse in his performance as acting Brigadier. The answer to this is in the affirmative. The misconduct was noticed and enquired into by the Court of Enquiry but it was not taken into account at the time of his selection to the acting rank of Brigadier, and rightly so, as the findings of Court of Enquiry and ultimate decision of the competent authority on the basis of findings were yet to be arrived at. Later on, when the case of the petitioner was due to be considered in January/February, 1992 for the grant of substantive rank of Brigadier, the "Severe Displeasure (recordable)" was brought on the dossier of the petitioner on November 14, 1990 which was valid for a duration of three years from the date of award. Therefore, we hold that the "Severe Displeasure (recordable)" was rightly considered along with the other service record of the petitioner for his confirmation/promotion to the substantive rank of Brigadier and it could form the basis of his rejection.

11. The next question raised on behalf of the petitioner is that the punishment of "Severe Displeasure (recordable)" * deserves to be quashed on the ground that it was awarded in accordance with the instructions contained in the Army

Headquarter letter No. 32908/AG/DV-1 dated January 5, 1989 (Annexure P-F) which does not have any legal sanction and is violative of Army Act, Army Rules and the Regulations for the Army. For making this submission, Mr. Chhabil Dass, learned Counsel for the petitioner, has relied upon the recent judgment of the Division Bench of the Jammu and Kashmir High Court in C.M.P. No. 297 of 1992 Maj. Gen P.C. Puri v. Union of India and Ors.. Mr. P.A. Sharma, learned Sr. Standing Counsel for the Central Government appearing for the respondents, has opposed this submission on similar grounds as were noticed and rejected in the said judgment.

12. The letter dated January 5, 1989 lays down the procedure and policy regarding the award of censure in the Army. In its para 2 it is provided that the award of censure to an officer or J.C.O is an administrative action in accordance with the custom of service. It takes the form of severe displeasure (either recordable or otherwise) or displeasure of the officer awarding the censure as specified in the succeeding paragraphs. As per para 5, the censure is awardable where the act, conduct or omission is of minor nature and gravity. An offence of serious nature under the Army Act will not be disposed of by award of censure but will be dealt with by initiating a disciplinary action. The severe displeasure awarded by the Chief of Army Staff remains with the dossier of the officer and J.C.O. concerned permanently as stated in para 9. The award of censure does not debar an officer for being considered for promotion and may not itself affect his promotion but while it is operative its cognizance is taken as part of an officer's overall record of service in assessing his performance for such promotion. The effect of recordable censure for promotion is considered in its totality on the overall performance.

13. Considering the tone and tenor of the letter, we are in respectful agreement with the learned Judges of the Jammu and Kashmir High Court as held by their Lordships in the case of Maj. Gen. P.C. Puri v. Union of India and Ors. that the award of censure or severe displeasure (recordable) is a punishment. Interpreting similar letter/circular issued by the Adjutant General of the Army, same view was taken by the Punjab and Haryana High Court in Maj J.S. Kang v. the U.O.I. and Ors. 1987 (5) SLR 66, which was approved by the Division Bench of that court in L.P.A. No. 396 of 1987 decided on March 14, 1989 and reiterated in the case of Maj. S.S. Sabharwal v. Chief of Army Staff 1989(6) SLR 236, and also by Division Bench of Rajasthan High Court in C.W.P. No. 1433 of 1986 Colonel M.S. Uppalv. Union of India, decided on March 17, 1989. These judgments have also been relied upon in Maj Gen. P.C. Puri v. Union of India and Ors., (supra)

14. The point whether the letter dated January 5, 1989 has any legal sanction has been answered by the learned Judges of the Jammu and Kashmir High Court in the negative. It has been held by their Lordships:-

"..... The policy letter has been issued by the Adjutant General. He is not authorised to issue any such policy letter under the Army Act, Army Rules or

Regulations. Army Rules have been framed u/s 191 of the Army Act

These Regulations have been issued by the Central Government in exercise of the powers conferred on it by Section 192 of the Army Act. In the preface thereof it has been stated that these regulations being non-statutory are supplemental to the relevant statutory provisions wherever they exist and do not supplement them. It has been further stated that departmental orders and instructions are based on and take their authority from these regulations, should any variance arise between such orders and instructions and these Regulations, the latter shall prevail. The respondents seek to justify the issuance of this Policy letter on the plea that the Adjutant General is the Principal Staff Officer responsible to the Chief of Army Staff for maintenance of discipline in the Army. The power to issue the executive instructions in the Policy letter are incidental to the exercise of those powers. We are not impressed. The Regulations are themselves non-statutory. Any authority flowing from these Regulations will also be non-statutory in nature. Chapter VI of the Army Act comprising Sections 34 to 68 specifies and defines the various offences under the Act. Sections 71 to 89 of Chapter VII denote the various punishments. Rules 106 to 133 of the Army Rules prescribe the procedure of and before Court Martial. These constituted a self-contained code specifying offences and the procedure for detention, custody and control of the offenders. Section 79 lays down that punishment may also be inflicted in respect of offence committed by person subject to the Act without the intervention of a Court Martial and in the manner stated in Sections 80, 83, 84, 85. The proceedings under these provisions are summary proceedings. Paragraph 327 of the Regulations provides for reproof. It lays down that reproof may be verbal or in writing. Warning, a minor censure, may take the form of reproof and be administered verbally or in writing. Warning will not be recorded in the service documents of the person concerned. Reproof therefore does not form part of the service record even though it has its origin in the Regulations. No punishment can be added to the punishments provided in the Act, Rules or Regulations by mere administrative instructions by Adjutant General.

Further,

"Rule 6 also does not authorise the issuance of instructions which may have the effect of adding to the punishment It reads as under:-

"In regard to any matter not specifically provided for in these rules, it shall be lawful for the competent authority to do such thing or to take such action as appears to it just and proper."

The competent authority has not been defined in the Rules or anywhere. All that Rule 6 provides for is that when an officer is faced with a particular situation which is not envisaged by the Rules, then he can take any appropriate action which may seem to him to be just and proper. This power, however, cannot encompass the authority to issue executive instructions. If the construction placed by the respondents is accepted, then an officer of any rank may arrogate

to himself the authority of issuing executive instructions. That will lead to chaos. The language of the Rule does not admit of the construction sought to be put thereon by the respondents." And

"Regulation 353 provides that an officer will not introduce or adopt any system of punishment that is in any respect at variance with the Army Act, Army Rules or the Regulations. The award of severe displeasure recordable which has to permanently become part of the dossier of the concerned officer is not envisaged by the Army Act, Rules or Regulations. It is definitely at variance with the Regulation 327. The minor censure provided therein cannot be recorded in the service documents of the person concerned. So a major censure by virtue of the Policy letter shall become a part of the service record of the concerned officer for all times and affect his chances of promotion cannot be justified on any canon of construction.

It deserves highlighting that under the Army act, Army Rules and Regulations, an officer of the rank of Lt. Colonel and above cannot be punished summarily. Summary punishment can however be awarded to the officers below the rank of Lt. Colonel/J.C.Os. The policy letter has the effect of providing punishment to officers of the rank of Lt. Colonel and above. This is not permissible in law.

The policy letter cannot be justified on the ground that it has been issued to fill in the gaps to remove the lacunae and cover the grey areas. Power to issue executive instructions on matters which are not covered by the Rules vests only in the Central Govt. and the State Governments by Articles 73 and 162 of the Constitution respectively. This power cannot be ascribed to any subordinate or inferior authority or officer. The Adjutant General or for that matter the Chief of the Army Staff cannot issue any executive instructions to fill in the gaps or to cover the grey areas in relation to the conditions of service of the Army personnel."

15. The argument that the letter dated January 5, 1989 embodies custom of service which authorises the award of censure in the form of severe displeasure (recordable) was also rejected by the learned Judges.

16. We are in respectful agreement with the conclusion arrived at by the learned Judges of the Jammu and Kashmir High Court that the letter dated January 5, 1989 which sanctions the award of "severe displeasure (recordable)" is without legal sanction or authority. This does not in law confer any powers on the Chief of Army Staff or the Officers to issue a show cause notice and to award any displeasure to any officer or J.C.O. Therefore, we hold that the award of "Severe Displeasure (recordable)" brought on the dossier of the petitioner on November 14, 1990 is bad and is quashed. We need not deal with the other points raised on behalf of the petitioner in respect of constitution of the Court of Enquiry and its proceedings. On the other hand, the respondents have relied upon the order dated February 28, 1990 passed by the Supreme Court in SLP No. 3821 of 1989, *Major General O.P. Sabharwal v. Union of India and Ors.*, where the learned

Judges declined to interfere with the judgment of the Delhi High Court, which had held that the officer had earned "displeasure" on one occasion and "severe displeasure" on the second occasion after his promotion to the acting rank of Major General, therefore, he had no right to be promoted to the substantive rank of Major General. Admittedly, in the case before the Supreme Court, the validity of the letter dated January 5, 1989 was not under challenge, which has been declared without any legal sanction and authority by us. Once the instructions, under which "Severe Displeasure" is awarded, are held bad, the award of Severe Displeasure cannot be saved. Hence, the order dated February 28, 1990 is not of any help to us.

17. In the absence of "Severe Displeasure (recordable)" there is no impediment in the confirmation/promotion of the petitioner to the substantive rank of Brigadier as otherwise, he fulfilled all other conditions for the grant of substantive rank of Brigadier. Therefore, we allow the writ petition, set aside the award of "Severe Displeasure (recordable)" and direct the respondents to consider the petitioner for the grant of substantive rank of Brigadier from the due date on the basis of his performance as acting Brigadier in accordance with law and also in the light of the observations made in this judgment. The letters dated March 4, 1992 and July 17, 1992 (Annexures PD/1 and PD) to the extent these pertain to the petitioner are also quashed. There is no order as to costs.