

(2020) 10 DEL CK 0116

In the Delhi High Court

Case No : Civil Writ Petition No. 8285 Of 2020

Col. Mukul Dev

APPELLANT

Vs

Union Of India

RESPONDENT

Date of Decision : 21-10-2020

Acts Referred:

Constitution Of India, 1950 — Article 226

Citation : (2020) 10 DEL CK 0116

Hon'ble Judges : Rajiv Sahai Endlaw, J;Asha Menon, J

Bench : Division Bench

Advocate : Harish Vaidyanathan Shankar, Syed Hussain Adil Taqvi

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J

CM No.26851/2020 (for exemption)

1. Allowed, subject to just exceptions and as per extant rules.

2. The application is disposed of.

W.P.(C) No.8285/2020 & CM No.26852/2020 (for stay)

3. The petitioner had earlier filed W.P.(C) No.7194/2020 which had come up before us on 29th September, 2020 and which was disposed of by the following order:

"3. The petitioner, a colonel in the JAG Branch of the Indian Army, has filed this petition impugning the order dated 21st September 2020, of the Armed Forces Tribunal (AFT), Principal Bench, in O.A. No.2410/2020, declining interim relief sought by the petitioner of stay of superannuation of the petitioner from the post of Colonel, due on 30th September 2020.

4. We have heard the petitioner appearing in person and the counsel for the respondents appearing on advance notice.

5. It is the case of the petitioner, (i) that owing to the interim orders in OA filed by one Col. Leena Gaurav, the declaration of the result of No.2 Selection Board (JAG), held in December 2019, whereupon depends the promotion of the petitioner to the rank of Brigadier, was stayed; (ii) that the petitioner was not made a party in the OAs filed by Col. Leena Gaurav; (iii) the OA filed by Col. Leena Gaurav has been ordered to be taken up alongwith OA filed by Col. V.S. Gaur; (iv) the interim order affecting the petitioner in OA filed by Col. Leena Gaurav, was passed in the absence of the petitioner; (v) that though the petitioner applied for impleadment in the OA filed by Col. Leena Gaurav but his application for impleadment was rejected, reasoning that he could support the petitioner Col. Leena Gaurav and not contradict her; (vi) that this compelled the petitioner to file his own O.A. No.787/2020 alongwith application for interim relief seeking stay of his superannuation due on 30th September 2020, till the declaration of the result, but which order was declined, observing that the petitioner, if succeeds in his OA, the superannuation/retirement of the petitioner will not come in the way of grant of the relief; (vii) that the petitioner, if promoted, would superannuate after one year; and, (viii) that though AFT vide order dated 28th August 2020 in O.A. No.996/2020 titled Brig. K.K. Nandwani vs. Union of India & Ors., stayed the superannuation of the Applicant therein, but declined such an order to the petitioner.

6. The petitioner, neither in this petition nor in the OA filed before the AFT, has impleaded Col. Leena Gaurav, vide interim order in OA filed by whom, the petitioner is affected. This, in our opinion has potential to result in conflicting orders. The AFT, in our opinion cannot grant relief claimed in the OA filed by the petitioner, without considering the contentions of Col. Leena Gaurav and Col. V.S. Gaur in OAs filed by them.

7. In our view it is thus necessary that the AFT has a look at the three OAs together.

8. The counsel for the respondents appearing on advance notice has also placed before us the concern of the respondents, of the posts lying vacant in JAG owing to the interim order and affecting the functioning of JAG and states that the respondents are also desirous of early resolution of the matter.

9. In the circumstances, without going into the merits of the claim of the petitioner, we deem it appropriate to request the AFT (We are informed by the counsel for the respondents that the Bench of Hon'ble the Chairperson and Hon'ble the Member of AFT which has heard all the three petitions, is scheduled to hold sitting tomorrow), to take up all the three petitions together, tomorrow itself i.e. 30th September 2020, in view of the impending superannuation of the petitioner tomorrow.

10. Till such consideration of the matter by the AFT and passing of order in pursuance thereto, the order of superannuation of the petitioner be not given effect to.

11. The counsel for the respondents to inform all the counsels in the OAs preferred by Col. Leena Gaurav and Col. V.S. Gaur of the listing of the matter tomorrow i.e. on 30th September 2020.

12. The AFT, while considering the matter, to also consider the interim order, if any, required to be passed in favour of the petitioner.

13. We also direct the respondents to produce the records of the No.2 Selection Board (JAG), held in December 2019, before the AFT, during the hearing tomorrow or any subsequent date directed.

14. A copy of this order be forwarded to the petitioner and the respondents immediately for onward transmission to the AFT today itself, for compliance.

15. The petition is disposed of."

4. Pursuant to the aforesaid order, the Armed Forces Tribunal (AFT) has passed the order dated 14th October, 2020 in OA 787/2020 filed by the petitioner as well as in the OAs filed by Col. Leena Gurav and Col. Vinod Singh Gaur, directing that the petitioner whose retirement due on 30th September, 2020 had been stayed by the interim order of the same date of the AFT would be deemed to have retired from service on 30th September, 2020 but the said retirement shall be subject to any final order passed on merits in the OAs pending before the AFT. Impugning the said order, this petition has been filed. Additionally the petitioner also seeks a stay on the superannuation of the petitioner till the OAs aforesaid are finally decided on merits and seeks a direction to the respondents Indian Army to constitute the No. 2 Selection Board again, in case the earlier No. 2 Selection Board is quashed and also seeks consideration of the petitioner's case as a case of Final Review of 1990 Batch of the Judge Advocate General (JAG) branch, in case not approved for promotion by the No. 2 Selection Board.

5. Though we entertain doubts as to the maintainability of the petition under Article 226 of the Constitution of India with respect to orders of the AFT and are yet to hear the counsels in an appropriate matter on the said aspect but are considering this petition, keeping the said question of law open, since the petitioner appears in person in this case.

6. The petitioner appearing in person has contended, (i) that the AFT, in the impugned order dated 14th October, 2020 has misinterpreted our order dated 29th September, 2020; specific reference is invited to paragraph 11 of the impugned order of the AFT and to paragraph 12 of our order dated 29th September, 2020; it is argued that since the three OAs are still pending before the AFT, status-quo qua superannuation of the petitioner on 30th September, 2020 should have been maintained till all the OAs were finally heard and adjudicated; (ii) that the AFT has erred in, vide impugned order dated 14th October, 2020, retiring the petitioner from back date of 30th September, 2020; it is argued that there could not have been retrospective retirement of the petitioner, particularly as the petitioner had worked for 17 days of October, 2020;

(iii) that the AFT has for wrong reasons denied parity to the petitioner with Brigadier K.K. Nandwani in whose matter stay of superannuation has been granted; and, (iv) that the AFT has not considered that the proceedings of the Selection Board have not been finalised by the Approving Authority.

7. The counsel for the respondents Indian Army appearing on advance notice has contended that the matter of entitlement of the petitioner to dues for having worked for 17 days of October, 2020 shall be considered and subject to any serious objection being found, the petitioner shall be paid the dues for 17 days of work of October, 2020.

8. We have considered the other submissions of the petitioner and do not find any merit therein.

9. In our view, the AFT in the impugned order has not misinterpreted our order dated 29th September, 2020. We had in the order dated 29th September, 2020 left it to the AFT to either consider the three OAs together finally or to pass interim order qua the petitioner.

10. As far as the parity claimed by the petitioner with Brigadier K.K. Nandwani is concerned, the AFT in the impugned order has reasoned that while the Selection Board in the case of Brigadier K.K. Nandwani had recommended Brigadier K.K. Nandwani for promotion, the Selection Board constituted to consider the petitioner for promotion to the rank of Brigadier had not recommended the petitioner for promotion and thus the petitioner was not entitled to parity with Brigadier K.K. Nandwani in whose case interim stay qua superannuation had been granted.

11. Of the several questions which the petitioner in the petition has pleaded as arising in this case, the only question which we find relevant for the present, since the OAs are still pending before the AFT, is "whether the Ld. Tribunal has not erred in relying upon only the recommendations of the Selection Board, without it being finalised by the approving authority, when in the past in many cases as well as in the case of Brig. Nandwani, the recommendations of the Selection Board have not been accepted by the approving authority". It is also submitted that the AFT also has not accepted the prayer of the counsel for the petitioner that the notings of the approving authority on the instant result be perused and only recommendations should not be relied upon.

12. We have enquired from the counsel for the respondents Indian Army, why the proceedings of the Selection Board qua the petitioner were kept pending and not forwarded to the Approving Authority.

13. The counsel for the respondents Indian Army states that the proceedings of the Selection Board qua the petitioner were not put up before the Approving Authority for the reason of the interim stay granted by the AFT in the OA filed by Col. Leena Gurav. It is also stated that now that the AFT has vacated the said stay, the proceedings of the Selection Board qua the petitioner shall be put up

before the Approving Authority at the earliest.

14. The petitioner appearing in person states that the petitioner was entitled to three reviews for promotion from the rank of Colonel to Brigadier and has had only two chances and the third review was not availed of by the petitioner and could not be availed of for the reason of the interim stay in the OA filed by Col. Leena Gurav.

15. We are of the prima facie opinion that a review, even if permitted cannot be availed of post superannuation. However, we do not deem it appropriate to render any final view on this aspect, inasmuch as the OAs of the petitioner and others, as aforesaid, are still pending before the AFT and deem it apposite to leave the said question open for consideration by the AFT.

16. Thus, while dismissing the petition, we bind the respondents Indian Army to the statement aforesaid, of considering release of dues of 17 days work to the petitioner and to release the said dues unless any serious objection is found thereto and further grant liberty to the petitioner to, on being communicated the decision of the Approving Authority, if at variance with the recommendation of the Selection Board, approach the AFT for directions. The respondents Indian Army, to communicate the decision of the Approving Authority to the petitioner, within ten days as sought. We also grant liberty to the petitioner to apply for third review and which application shall be dealt with by the respondents Indian Army in accordance with law.