

(2019) 09 DEL CK 0077

In the Delhi High Court

Case No : Civil Writ Petition No. 7583 Of 2018

Colonel Vijynath Jha

APPELLANT

Vs

Union Of India And Ors

RESPONDENT

Date of Decision : 12-09-2019

Acts Referred:

Constitution Of India, 1950 — Article 226
Army Act, 1950 — Section 27

Citation : (2019) 09 DEL CK 0077

Hon'ble Judges : Dr. S. Muralidhar, J; Talwant Singh, J

Bench : Division Bench

Advocate : Jasmeet Singh, Srivats Kaushal, V.K. Tiwari

Final Decision : Dismissed

Judgement

Dr. S. Muralidhar, J

1. Aggrieved by the denial of permanent secondment to the Directorate General of Quality Assurance ("DGQA") by the impugned order dated 17th December 2007 issued by the Ministry of Defence ("MoD"), the Petitioner has filed the present petition under Article 226 of the Constitution.

2. In response to the notice issued in the present petition on 4th September, 2018 the Respondents i.e. the MoD (Respondent No.1), the Secretary, Department of Defence Production ("DoDP") (Respondent No.2), Quality Assurance Selection Board ("QASB") (Respondent No.3), the DGQA - Respondent No.4 and the Military Secretary, Indian Army - Respondent No.5 have in the common counter-affidavit filed on their behalf by Respondent No.1 raised a preliminary objection that the petition is barred by laches. It is pointed out by the Respondents that the Petitioner challenged the impugned order dated 17th December, 2007 rejecting the statutory complaint dated 5th September, 2007 filed by the Petitioner under Section 27 of the Army Act, 1950 ("Act"). The Petitioner waited for 4 years and challenged the order first before the Armed

Forces Tribunal ("AFT"), Lucknow. By an order dated 23rd August, 2012, the AFT rejected the petition on the ground that the AFT was not the right forum for adjudication of DGQA matters.

The Petitioner then preferred Civil Appeal No.2020 of 2013 which was dismissed by the Supreme Court by a judgment dated 18th May, 2018 affirming the view of the AFT that the subject matter of the Petitioner before the AFT was beyond its purview. The Respondents submit that the petition is barred by laches as the Petitioner has failed to satisfactorily explain the delay of 4 years in approaching the AFT for relief.

3. The Petitioner has in para 9 of the rejoinder in response to para 17 of the counter-affidavit where the above preliminary objection is raised, stated as under:

"9. The contents of paragraph 17 are denied to the extent it is not arising out of records and in response it is submitted that the delay in challenging the Order of central Govt dated 17.12.2007 was due to the circumstances beyond the control of the Petitioner and it has been condoned by the competent Authority. The DGQA itself delayed the proceedings both in Hon'ble AFT Lucknow and in the Hon'ble Supreme Court by unduly taking long time to file their CA. This Hon'ble Court admitted this WP and issued notice to the Respondents only after satisfactory reply of the Petitioner regarding the delay."

4. Even before this Court the Petitioner, who appears in person put forth the above explanation failing to realise that it still does not answer why the Petitioner waited for 4 years to approach the AFT, in the first place. It was pointed out to the Petitioner that the objection of the Respondents did not concern the delay in the disposal of the petition by the AFT or the pendency of the Petitioner's appeal before the Supreme Court, but the delay in the Petitioner approaching the AFT in the first place.

5. Even in the present petition there is no attempt made by the Petitioner to explain the delay in approaching the AFT. The principles that apply to test the delay of over 3 years in seeking remedies in the writ jurisdiction would equally apply to the delay in approaching the AFT. Illustratively, the Court may refer only to the following observations of the Supreme Court in *State of M.P. v. Nandlal Jaiswal* (1986) 4 SCC 566:

"24. ... it is well settled that the power of the High Court to issue an appropriate writ under Article 226 of the Constitution is discretionary and the High Court in the exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. If there is inordinate delay on the part of the petitioner in filing a writ petition and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in the exercise of its writ jurisdiction. The evolution of this rule of laches or delay is premised upon a number of factors. The High Court does not ordinarily permit a belated resort to the extraordinary remedy under the writ jurisdiction because it

is likely to cause confusion and public inconvenience and bring in its train new injustices. The rights of third parties may intervene and if the writ jurisdiction is exercised on a writ petition filed after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties. When the writ jurisdiction of the High Court is invoked, unexplained delay coupled with the creation of third party rights in the meanwhile is an important factor which always weighs with the High Court in deciding whether or not to exercise jurisdiction."

6. Subsequently in *Chennai Metropolitan Water Supply & Sewerage Board v. T.T. Murali Babu* (2014) 4 SCC 10, the Supreme Court reiterated the above legal position and held:

"16. Thus, the doctrine of delay and laches should not be lightly brushed aside. A writ court is required to weigh the explanation offered and the acceptability of the same. The court should bear in mind that it is exercising an extraordinary and equitable jurisdiction. As a constitutional court it has a duty to protect the rights of the citizens but simultaneously it is to keep itself alive to the primary principle that when an aggrieved person, without adequate reason, approaches the court at his own leisure or pleasure, the Court would be under legal obligation to scrutinize whether the lis at a belated stage should be entertained or not. Be it noted, delay comes in the way of equity. In certain circumstances delay and laches may not be fatal but in most circumstances inordinate delay would only invite disaster for the litigant who knocks at the doors of the Court. Delay reflects inactivity and inaction on the part of a litigant - a litigant who has forgotten the basic norms, namely, "procrastination is the greatest thief of time" and second, law does not permit one to sleep and rise like a phoenix. Delay does bring in hazard and causes injury to the lis. In the case at hand, though there has been four years" delay in approaching the court, yet the writ court chose not to address the same. It is the duty of the court to scrutinize whether such enormous delay is to be ignored without any justification."

7. The Court finds no credible explanation offered by the Petitioner for the delay of about 4 years in seeking remedies and, therefore, sustains the preliminary objections of the Respondents that the present petition should be rejected on the ground of laches.

8. Nevertheless, the Court has also examined the claim of the Petitioner on merits, considering that he had mistakenly approached the AFT first for relief and then the Supreme Court, which affirmed the view of the AFT in that regard. The Court further notes that the present petition has been filed on 18th July 2018, within 2 months of the decision of the Supreme Court.

9. The background facts are that the Petitioner was commissioned in the Indian Army on 11th March 1989 in the Engineering discipline. With effect from 27th May 2004 the Petitioner, who is a Colonel, was inducted into the DGQA on tenure basis and posted to the CQAE (EE) Aundh Camp, Pune.

10. On completion of the tenure of 2 years, the Petitioner was considered for grant of permanent secondment in QASB3 which was held on 6th June, 2007. He was again considered in QASB5 held on 20th December, 2007. He was not found fit by both QASBs as he was not recommended in the Technical Assessment Report ("TAR") by the officers in the chain of command. His case was also not recommended for grant of a second tenure.

11. At this stage it requires to be noticed that the DGQA, which is under the technical and administrative control of the DoDP MoD, is responsible for carrying out Quality Assurance of all defence stores and equipment of vital importance to the defence forces. The officers of the DGQA are drawn from the Army. These officers have operational experience of defence weapons, vehicles, equipments and stores. A smaller number of service officers are inducted from the Indian Navy which would include civilian scientists and engineers.

12. The terms and conditions of service of the personnel borne on the said cadre of DGQA were governed by memorandum dated 18th March, 1967 as amended by a MoD Corrigendum dated 12th March, 1970 and Office Memorandum (OM) dated 22nd September, 1971. By an OM dated 28th October, 1978 fresh rules for intake of service officers in the DGQA as well as the terms and conditions of those permanently retained were made by the DoDP in the MoD and amended from time to time. It is accordingly pointed out by the Respondents that the DGQA is an independent organisation with its own policies for induction of service officers on tenure and for granting them permanent secondment after fulfilling the eligibility criteria.

13. The MoD OM dated 4th May 1993, as further amended by an OM dated 22nd December 1993, lays down guidelines for grant of permanent secondment to service officers of the rank of Lieutenant Colonel (including Lieutenant Colonel/TS) and Major in terms thereof:

"(a) Officers should have a minimum of 2 years service in the DGQA organization before consideration.

(b) The officers should not be finally superseded.

(c) Mean value of all Box grading for 7 years should not be less than '7'.

(d) Mean value of box grading in the 3 Mandatory Qualities (Loyalty, Decisiveness and Dependability) should not be less than '7' and in respect of 'INTEGRITY' should not be less than '8'.

(e) Exceptional performance of the officers during the tenure with DGQA should be given weightage for permanent secondment.

(f) The disciplinary record of the officers should not be adverse."

14. The Respondents pointed out that under the OM dated 4th May, 1993, amended by OM dated 22nd December, 1993 of the MoD, an officer was required to earn 2 TARs before being considered for permanent secondment.

It is pointed out that the officers should be recommended "fit" in the TARs. This requirement came about as a result of the executive directions of the Cadre Controlling Authority i.e. the Secretary (DP) during the QASB (2)2004 held on 5th April, 2004. This was crystallised in a policy letter dated 8th April, 2004. It is stated that the requirement of 2 TARs as a precondition for grant of permanent secondment, introduced first in 2005, is still invoked. The stand of the Respondents was that there is no legal right of the Petitioner to be granted permanent secondment in the DGQA.

15. The case of the Petitioner is that he was denied permanent secondment due to the vindictiveness and mala fides of a superior, who was a Brigadier at the relevant time but who had by the time of filing the petition retired as Lieutenant General and who went on to become the Controller, CQAE (EE), in which position he worked till 21st September 2006. The Petitioner alleged that he was not informed of the outcome of the Selection Board, except the verbal communication by the aforementioned superior to the Petitioner on 7th June 2007 that it had been "successfully ensured" that the Petitioner's name does not figure in the list of selected officers by the aforesaid Selection Board including ensuring the non grant of any further tenure in DGQA organization.

16. The Petitioner claims that he then approached the then Major General requesting the "General Officer to confirm the proceedings of the QASB."

However, the Petitioner did not receive any reply. The Petitioner says that he then filed an application dated 30th August 2007 under the Right to Information Act, 2005 ("RTI Act"). Annexed to the petition as Annexure "P6" is the copy of the 64 questions raised by the Petitioner in his application which was replied to on 26th November 2007. Relevant to the case in hand are the answers to Questions 3, 9 and 10 which are as under:

"Q 3. When was the last PSSB Board held before 31 Jul 2007? Was IC-43413H Lt Col Vijaynath Jha selected by the said PSSB? If not what were the reasons for his non selector?

Q 9. What has been and presently is the detailed policy, for the Permanent Secondment of an Army Officer to the DGQA as on 31 July 2007?

Q10. What are the Qualitative Requirements (QR) including the minimum QR for selection of Army officers by the PSSB and offer/grant them Permanent Secondment?"

17. In the reply dated 26th November 2007 of the Respondents, the said queries and the responses thereto are set out below in a tabular form:

Sl.No.

Para/Sub-Para

Our Comments

3.

Q3

QASB for permanent secondment is generally held once/ twice in a year, thirteen QASBs for permanent secondment in DGOA have been held during the past eight years.

8.

Q9 & 10

Policy as enumerated in SI. No. above is being followed.

18. The detailed procedure set out in the reply to the RTI question reads as under:

"Detailed procedure for permanent secondment of service; officers into DGQA has been laid down in Para 4 of MOD OM No 67952/Q/DGI (Adm-4) / 10412/D(Prod) dated 28 Oct 78 as amended from time to time. Composition of QASB is laid down vide GOI OM No 86173/1 GI(Adm-4)/2170D(Prod)' dated 28 Apr 81. Service officers who have completed minimum 2 years of service in DGQA on tenure basis possessing requisite QR for permanent secondment as laid down vide MOD OM dated 28 Oct 78 as amended from time to time and MOD OM No.21 (43)/92 / D (Inspection) dated 04 May, 93 as amended vide OM No 21(4)/92/ D(Inspection) dated 22 Dec,93 are considered by QASB. Service profile and assessment report of such officers is placed before QASB for their consideration final orders for permanent secondment are issued by M.S. Branch only after the selected officer's willingness has been obtained in writing."

19. In several paragraphs in the writ petition the Petitioner has made allegations against the aforementioned superior officer but has chosen not to make him a party to the petition.

20. The Petitioner fails to point out how he can claim permanent secondment as a matter of right. The decision to grant permanent secondment is based on an assessment from a technical point of view. The question of the superior officer manipulating the TARs has been vehemently denied by the Respondents. In fact, there is no material produced by the Petitioner on record to substantiate such an allegation. The Petitioner does not complain of any procedural violation in the evaluation of applicants for secondment. The grievance is essentially about the decision taken by the Respondents to refuse the Petitioner permanent secondment.

20.1 The Petitioner has placed reliance on a decision dated 16th April 2018 of this Court in WP (C) 9233 of 2016 (Lt. Col. Sameer Singh v. Union of India). The Court has perused the said judgment. It appears that in the said case the result of QASB (01 2016) not granting permanent secondment to the Petitioner was published on 4th April 2016. The Petitioner there obtained information through the RTI route. He realised that while he was considered fit in the TAR for

2013-14, for 2014-15 it was stated that he was "not yet fit".

20.2 The QASB Board then recommended that he should be considered again for permanent secondment with the next Permanent Secondment Board after one more TAR was initiated. If he was found fit then his case would be recommended for permanent secondment. When the Petitioner's case was again considered in 2015-16, he was declared unfit. On completion of his 3 year tenure the Petitioner was reverted to the Indian Army.

20.3 The Court there noted that the criteria for grant of permanent secondment was contained in an OM dated 12th May 2011. The Court held that once the additional quality assurance of seeking TAR was dispensed with, the same could not be insisted upon as eligibility criteria for recommending the Petitioner's name for permanent secondment. The Court referred to the OM dated 12th May 2011 and observed as under:

"13. As can be seen from a perusal of the O.M. dated 12.05.2011, officers once rejected in the QASB for grant of permanent secondment, could be reconsidered only once in the subsequent QASBs and officers rejected in the QASB would continue to serve with the DGQA, subject to the recommendations made in that regard, up to a maximum of two tenures. There is no mention of qualifying TAR assessment in the captioned O.M. The concluding para of the said O.M. states as follow:

"3. These revised criteria will be applicable to all Service Officers inducted into DGQA on tenure prospectively from the date of issue of this OM. In the interim period QASBs will be held as per policy in vogue.

4. This supersedes all previous instructions/guidelines issued on the subject.

5. This issues with the approval of Hon"ble Raksha Mantri."

20.4 The Court in the above case agreed with the counsel for the Petitioners that if the Respondents had proposed to change the eligibility criteria, they ought to have amended OM dated 12th May, 2011 which they, however, did not. The changed criteria would not apply retrospectively. It was in those circumstances the Court directed the Respondents to reassess the eligibility of the Petitioner for permanent secondment.

21. In the present case, however, there is no grievance about any wrongful application of the relevant rules in terms of which the Petitioner failed to earn 2 TARs, a mandatory requirement. This is purely a subjective assessment based on objective criteria. Indeed, the Petitioner at the highest had only a right to be considered for permanent secondment. It is not shown to the Court that the criterion was wrongly applied by the Respondents or that their decision was based on any extraneous material.

22. As regards the attribution of malice to the immediate superior officer, with the Petitioner not having made him a party thereby depriving such superior

officer to present his point of view, the Court cannot permit the Petitioner to urge any ground in that regard.

23. In the circumstances, apart from the petition being barred by laches, the Court even on merits finds that no case has been made out by the Petitioner for grant of the relief as prayed for. The petition is accordingly dismissed