

(2011) 09 DEL CK 0553

In the Delhi High Court

Case No : Writ Petition (C) 2310 of 2005

Commandant Shamsheer Singh Malik

APPELLANT

Vs

UOI and Others

RESPONDENT

Date of Decision : 19-09-2011

Acts Referred:

Coast Guard Act, 1978 — Section 123(1)
Constitution of India, 1950 — Article 226, 227

Citation : (2011) 09 DEL CK 0553

Hon'ble Judges : Sunil Gaur, J; Pradeep Nandrajog, J

Bench : Division Bench

Advocate : Jyoti Singh, Avni Singh and Tinu Bajwa, for the Appellant; Barkha Babbar, for the Respondent

Final Decision : Disposed Off

Judgement

Pradeep Nandrajog, J.—With the promulgation of the Coast Guard Act 1978, a cadre of Coast Guards was created by hiving off a wing of the Indian Navy. A distinct and separate service with separate cadre was constituted. Various posts were notified with eligibility and service conditions thereto.

2. The hierarchical structure of the Coast Guard Service is as follows: - Director General - Inspector General - Deputy Inspector General - Commandant - Commandant (Junior Grade) - Deputy Commandant - Assistant Commandant.

3. The Petitioner was appointed in the year 1982 as Assistant Commandant (Technical) in the Coast Guard Service and earned promotion in the year 1993 as Commandant.

4. In exercise of the powers conferred by Section 123(1) of the Coast Guard Act 1978, the Central Government framed the Coast Guard (Seniority and Promotion) Rules 1987, (hereinafter referred to as the "1987 Rules"). Rule 7 of the 1987 Rules reads as under:

7. Promotion rules. - (1) Officers shall be eligible for promotion against the

vacancies occurring in the respective branches to which they belong.

(2) The promotion of officers to the rank of Deputy Commandant shall be made on the basis of their seniority subject to fitness.

(3) The promotion of officers to the rank of Commandant and above shall be made on the basis of merit with due regard to seniority.

(4) The promotion of officers to the rank of Commandant and above shall be on acting basis. They will be confirmed from the date of their promotion on rendering satisfactory service for a period of one year in the higher rank. The service shall be assessed from the Annual Confidential Report rendered on the officers.

(Emphasis Supplied)

5. Directorate General Coast Guard Service, issued an Office Order No. 14/2002 prescribing the guidelines for selection and promotion of Coast Guard Officers, the relevant portion whereof reads as under:

Introduction

5. The procedure for selection of officers for promotion to higher ranks is given in the succeeding paragraphs. This procedure is subject to review from time to time and is to be read in conjunction with relevant Recruitment Rules for each rank and the Coast Guard (Seniority and Promotion) Rules, 1987. Foot notes below paragraphs serve the purpose of amplifying the text of the respective paragraphs.

...

Promotion Method

...

11. In case of selective promotion to Commandant and higher ranks, the zone of consideration vis-?-vis number of vacancies available is as follows:

Vacancies

No. of officers in the zone

01

05

02

08

03

10

04

12

05 or more

Twice the vacancies + 4

Note: (a) In the event of eligible officers being less than the zone as above, all eligible officers to be considered.

(Emphasis Supplied)

6. 2 vacancies arose to the post of Deputy Inspector General on 3.12.2003 due to creation of 2 additional posts of Deputy Inspector General. Another vacancy arose on 1.1.2004 to the said post of Deputy Inspector General on account of superannuation of one officer holding the said post.

7. In exercise of the powers conferred by Section 123(1) of the Coast Guard Act 1978, on 17.09.2004, the Central Government notified the Coast Guard (Seniority and Promotion) Amendment Rules 2004, (hereinafter referred to as the "2004 Rules") to amend certain provisions of the 1987 Rules. Relevant would it be to note that the amendment rules of 2004 amended Rule 7 of the 1987 Rules in the following terms:

4. In Rule 7 of the said rules, for the rules (1) to (3), the following sub-rules shall be substituted, namely:

(1) Officers shall be eligible for promotion against vacancies occurring during a financial year in the respective branches and cadres to which they belong.

(2) The promotion of officers to the ranks of Deputy Commandant and Commandant and Commandant (Junior Grade) shall be made on the basis of their seniority subject to fitness and possession of requisite qualifications contained in the relevant Annexure to these rules.

(3) The promotion of an officer to the rank of Commandant and above shall be made on relative merit based selection within the eligible batch of officers of his cadre to which he belongs and subject to possession of requisite qualifications contained in the relevant Annexure to these rules.

(Emphasis Supplied)

8. As evident from a reading of the 1987 and 2004 Rules, it becomes apparent that as per the un-amended Rule 7 as it existed in the 1987 Rules, the promotion of an officer to the post of Commandant and higher posts including the post of Deputy Inspector was made on the basis of merit with due regard to seniority whereas as per the amended Rule 7 the same was to be made on relative merit based selection.

9. On 19.10.2004 a Departmental Promotion Committee was convened to fill up 2 vacancies which had arisen to the post of Deputy Inspector General on 03.12.2003. Since 5 Commandants including the Petitioner fulfilled the eligibility

criteria prescribed for promotion from the post of Commandant to the post of Deputy Inspector General the Departmental Promotion Committee considered all the 5 Commandants and prepared a selection list on the basis of the provisions of Rule 7 of the 1987 Rules as amended by the 2004 Rules. Be it noted here that name of the Petitioner appeared at serial No. 4 of the selection list. Needless to state, the Commandants whose names appeared at serial Nos. 1 and 2 of the selection list were promoted to the post of Deputy Inspector General.

10. On 29.12.2004 an Office Order was issued by the Directorate General Coast Guard Service, revising the guidelines for selection and promotion of Coast Guard officers contained in the Office Order No. 14/2002, the relevant portion whereof reads as under:

...

2. The revised Conditions of Service in respect of Coast Guard officers have been notified vide SRO 133 dated 17 Sep 2004 as amendment for various provisions of Coast Guard (Seniority & Promotion) Rules, 1987. Rule 7(3) of the rule *ibid* has been amended to provide promotions to the selective rank of commandant and above on relative merit basis within the eligible batch. Further the residency period for promotion to each rank has been revised consequent to inclusion of a new rank of Commandant (Junior Grade) in between the ranks of Deputy Commandant and Commandant in all branches.

3. In view of the above amendments in the Coast Guard (Seniority & Promotion) Rules, 1987 the corresponding provisions of the CGO 14/2002 will be modified as follows:

....

(c) Selection Procedure

.....

(iv) Zone of Consideration. Each Promotion Board is to consider a full batch each year ensuring that a minimum of two eligible candidates are available for each vacancy in the rank of Comdt and three candidates against every vacancy in the rank of Dy Inspector General and Inspector General.

...

11. Aggrieved by the selection list prepared by the Departmental Promotion Committee convened on 19.10.2004 for promotion to the post of Deputy Inspector General the Petitioner made a representation to the Director General Coast Guard Service, which representation was rejected on 02.02.2005.

12. In such circumstances, the Petitioner filed W.P.(C) No. 2310/2005 under Articles 226 and 227 of the Constitution of India in which it has been prayed as under:

PRAYER:

It is, therefore, most respectfully prayed that this Hon''ble Court may graciously be pleased to allow this application and

(1) Issue notice to Respondent No. 3 and 4 so that service can be effectuated on them.

(2) Pass any other order or further orders, as this Hon''ble court may deem fit and proper in the facts and circumstances of the case.

13. During the pendency of the aforesaid petition, a Promotion Board was convened on 06.06.2006 to fill up the vacancy which had arisen to the post of Deputy Inspector General on 01.01.2004 due to superannuation of an officer holding the said post. The Petitioner and other eligible officers were considered by the Board and a selection list was prepared on the basis of the amended Rule 7. The name of an officer who was junior to the Petitioner appeared at serial No. 1 of the selection list and thus said officer was promoted as Deputy Inspector General.

14. Feeling aggrieved by the selection list prepared by the Promotion Board convened on 06.06.2006 for promotion to the post of Deputy Inspector General the Petitioner filed W.P.(C) No. 12719/2006 under Articles 226 and 227 of the Constitution of India in which the prayers made read as under:

PRAYER

It is, therefore, most respectfully prayed that your Lordships may graciously be pleased to:

a. Quash/set aside the DPC held on 19.10.2004 for the purposes of making promotions from the rank of Commandant (Technical) to Deputy Inspector General (Technical).

b. Direct the Respondents herein to constitute a review DPC for three vacancies in accordance with the Recruitment Rules existing on the date of aforesaid vacancies, for the purposes of making promotions from the rank of Commandant (Technical) to Deputy Inspector General (Technical) in reference of DPC held on 19.10.2004.

c. Award cost of the proceedings.

d. Pass any order or orders as this Hon''ble Court may deem fit or proper in the facts and circumstances of the case and as well as in the interest of justice.

15. During hearing of the two writ petitions, following arguments were advanced by the learned senior counsel for the Petitioner:

A That the department fell an error in filling only two vacancies with reference to the recommendations of the Departmental Promotion Committee which met on 19.10.2004 for the reason by said date 3 vacancies to the post of Deputy Inspector General had accrued; 2 being the result of 2 additional posts created on 3.12.2003 and 1 vacancy accruing on 1.1.2004 due to superannuation.

B That it is settled legal position that the vacancies which occurred prior to the amendment of the Recruitment Rules have to be filled up as per the Rules in force as on the date of the vacancy and thus since Rule 7 of the 1987 Rules was amended when the amendment rules of 2004 were promulgated on 17.9.2004, the 2nd DPC pursuant to recommendations whereof the 3rd vacancy was filled up had to draw the select panel as per the un-amended Rule i.e. with regard to merit and due consideration of seniority and not relative seniority.

16. In response to the above arguments, the learned Counsel for the Respondents contended that:

A That the Departmental Promotion Committee convened on 19.10.2004 was justified in being required to make recommendations for only 2 vacancies in view of the guidelines for selection and promotion of Coast Guard Officers as per the office order dated 29.12.2004. It was highlighted that as per the said office order guidelines were listed which require at least 3 officers to be within the zone of consideration for promotion to 1 post of Deputy Inspector General. Learned Counsel for the Respondents argued that before filling up all the 3 vacancies existing to the post of Deputy Inspector General on 19.10.2004 it was incumbent upon the Departmental Promotion Committee to ensure that at least 9 officers fell within the zone of consideration for promotion to the said 3 posts. It was highlighted that in the instant case, on 19.10.2004, only 5 officers were eligible to be considered for promotion to the post Deputy Inspector General. Thus, due to non-availability of the required number of eligible officers in the zone of consideration the Departmental Promotion Committee convened on 17.09.2004 recommended filling up only 2 of the 3 vacancies existing to the post of Deputy Inspector General.

B That the date on which eligible candidates are considered for promotion is the relevant date and rules applicable as on said date would govern the selection and thus when the 3rd vacancy was filled up when DPC met on 6.6.2006 it was justified in preparing the said panel as per the amended rules. The decision reported as Deepak Agarwal and Another Vs. State of Uttar Pradesh and Others, was relied upon to make good the argument.

17. Having considered the rival arguments it is apparent that the reliance placed by learned counsel for the Respondents upon the guidelines for selection and promotion of Coast Guard Officers contained in the Office Order dated 29.12.2004 to justify the action of the Departmental Promotion Committee convened on 19.10.2004 to fill up only 2 out of the 3 vacancies existing to the post of Deputy Inspector General on said date is wholly misplaced. The said Office Order dated 29.12.2004 was issued after the Departmental Promotion Committee had been convened and had met on 19.10.2004, thus the guidelines for selection and promotion of Coast Guard Officers contained therein have No. relevance in the present case. It was the guidelines for selection and promotion of Coast Guard Officers contained in the Office Order No. 14/2002 which were holding the field on 19.10.2004 i.e. the date when the DPC was convened. As per

para 11 of the said guidelines, as noted hereinabove in para 5, 10 officers must fall within the zone of consideration for promotion to the post of Commandant and higher posts including the rank of Deputy Inspector General. However, a note appended to the said para provides that in case of non-availability of required number of eligible officers in the zone of consideration all the eligible officers are to be considered for promotion to the post of Commandant and higher posts including the post of Deputy Inspector General. Thus, the guidelines for selection and promotion of Coast Guard officers contained in the Office Order No. 14/2002 did not preclude the promotion to the post of Commandant and higher posts including the post of Deputy Inspector General on account of non-availability of required number of eligible officers in the zone of consideration. That being the position, there was No. occasion for the Departmental Promotion Committee convened on 19.10.2004 to fill up only 2 of the 3 existing vacancies.

18. W.P.(C) No. 2310/2005 must succeed, but we would also decide the second issue on which the parties debated for the reason it would be relevant for W.P.(C) No. 12179/2006 i.e. whether the amending rule of 2004 had a retrospective operation.

19. In the decision reported as Y.V. Rangaiah and Others Vs. J. Sreenivasa Rao and Others, the Supreme Court observed as under:

The vacancies which occurred prior to the amended rules would be governed by the old rules and not by the amended rules. It is admitted by counsel for both the parties that henceforth promotion to the post of SubRegistrar Grade II will be according to the new rules on the zonal basis and not on the Statewide basis and, therefore, there was No. question of challenging the new rules. But the question is of filling the vacancies that occurred prior to the amended rules. We have not the slightest doubt that the posts which fell vacant prior to the amended rules would be governed by the old rules and not by the new rules.

20. The aforesaid dictum of law laid down in Rangaiah's case (supra) was followed by the Supreme Court in the decisions reported as P. Ganeshwar Rao and Others Vs. State of Andhra Pradesh and Others, N.T. Bevin Katti, etc., Vs. Karnataka public Service Commission and others, , A.A. Calton Vs. Director of Education and Another, State of Rajasthan Vs. R. Dayal and Others,

21. On the other hand of the spectrum are the decisions of the Supreme Court reported as Dr. Ramulu and another, etc. Vs. Dr. S. Suryaprakash Rao and others, and State of Punjab and Others Vs. Arun Kumar Aggarwal and Others,

22. In Ramulu's case (supra) it was held by the Supreme Court that when a conscious decision is taken by the government not to fill up the vacancies in terms of the existing Recruitment Rules till the amendment to the existing Rules is effected, the vacancies which had arisen before the amendment of the Recruitment Rules would be governed by the amended Rules and not by the unamended Rules. The relevant observations made by the Supreme Court are being noted herein under:

The same ratio was reiterated in *Union of India v. K.V. Vijeesh* (SCC paras 5 and 7). Thus, it could be seen that for reasons germane to the decision, the Government is entitled to take a decision not to fill up the existing vacancies as on the relevant date. Shri H.S. Gururaja Rao, contends that this Court in *Y.V. Rangaiah v. J. Sreenivasa Rao* had held that the existing vacancies were required to be filled up as per the law prior to the date of the amended Rules. The mere fact that Rules came to be amended subsequently does not empower the Government not to consider the persons who were eligible prior to the date of amendment. It is seen that the case related to the amendment of the Rules. Prior to the amendment of the Rules two sources were available for appointment as Sub-Registrar, namely, UDCs and LDCs. Subsequently, Rules came to be amended taking away the right of the LDCs for appointment as Sub-Registrar. When the vacancies were not being filled up in accordance with the existing Rules, this Court had pointed out that prior to the amendment of the Rules, the vacancies were existing and that the eligible candidates were required to be considered in accordance with the prevailing Rules. Therefore, the mere fact of subsequent amendment does not take away the right to be considered in accordance with the existing Rules. As a proposition of law, there is No. dispute and cannot be disputed. But the question is whether the ratio in *Rangaiah* case would apply to the facts of this case. The Government therein merely amended the Rules, applied the amended Rules without taking any conscious decision not to fill up the existing vacancies pending amendment of the Rules on the date the new Rules came into force. It is true, as contended by Mr H.S. Gururaja Rao, that this Court has followed the ratio therein in many a decision and those cited by him are *P. Ganeshwar Rao v. State of A.P.*, *P. Mahendran v. State of Karnataka*, *A.A. Calton v. Director of Education*, *N.T. Devin Katti v. Karnataka Public Service Commission*, *Ramesh Kumar Choudha v. State of M.P.* In none of these decisions, a situation which has arisen in the present case had come up for consideration. Even Rule 3 of the General Rules is not of any help to the Respondent for the reason that Rule 3 contemplates making of an appointment in accordance with the existing Rules.

(Emphasis Supplied)

23. The aforesaid dictum of law laid down in *Rangaiah's* case (supra) was followed by the Supreme Court in *Deepak Agarwal and Another Vs. State of Uttar Pradesh and Others*,

24. In *Arun Kumar Aggarwal's* case (supra), the Supreme Court observed as under:

There is No. quarrel over the proposition of law that normal rule is that the vacancy prior to the new Rules would be governed by the old Rules and not by the new Rules. However, in the present case, we have already held that the Government has taken conscious decision not to fill the vacancy under the old Rules and that such decision has been validly taken keeping in view the facts and circumstances of the case.

25. From a conjoint reading of the afore-noted judicial decisions, the legal principle which emerges is that the normal rule is that the vacancy which had arisen prior to amendment of the rules would be governed by the un-amended Rules and not by the amended Rules unless the amending rule is made retrospective in operation or a conscious decision is taken to fill up existing vacancies as per the amended Rule.

26. In the instant case, nothing has been shown to us by the learned Counsel for the Respondents that the Government had taken a conscious decision not to fill up the vacancies which had arisen to the post of Deputy Inspector General on 03.12.2003 and 01.01.2004 till the existing 1987 Rules were amended.

27. That being the position, we have No. hesitation in holding that the vacancies which had arisen to the post of Deputy Inspector General on 03.12.2003 and 01.01.2004 were governed by the un-amended 1987 Rules.

28. We note that R-3 and R-4 in W.P.(C) No. 2310/2005 i.e. the two persons who were selected and promoted at the DPC which was held on 19.10.2004 are senior to the Petitioner and notwithstanding that the DPC applied the selection criteria as per the amended recruitment rules i.e. relative merit, the instant decision would not affect them inasmuch as having scored better than the Petitioner on merit and being senior to him, they would in any case be promoted even if it be directed that the selection process be as per the criteria under the 1987 Rules. But, qua Respondent No. 3 in W.P.(C) No. 12179/2006 it needs to be highlighted the said Respondent earned a promotion during the pendency of W.P.(C) No. 2310/2005 and his promotion has been challenged by way of W.P.(C) No. 12179/2006. Being admittedly junior to the Petitioner, his promotion has certainly affected the Petitioner and thus appropriate directions require to be passed.

29. In view of the above discussion, the two writ petitions are disposed of directing that a review DPC be held as of 9.10.2004 to make recommendation for the 3rd post which had fallen vacant as on 1.1.2004 and would consider such officers who were in the zone of consideration and eligible as of 9.10.2004 and thereafter make a recommendation by applying the criteria for promotion as per un-amended Rule 7 as contained in the 1987 Rules. If the Petitioner is selected for promotion he be accorded the benefit thereof from the same date on which 2 persons were promoted pursuant to the recommendation of the DPC which met on 19.10.2004 and for which promotion the Petitioner would be entitled to all consequential benefits save and except actual salary in the promotion post, which we deny on the principle of "No work, No. pay". The department is left free to pass an appropriate order with respect to Respondent No. 3 in W.P.(C) No. 12179/2006 and if decision taken is not to revert him, the department may create a supernumerary post to accommodate him. Needful would be done within 8 weeks from today.

30. No. costs.