

(2006) 02 DEL CK 0171

In the Delhi High Court

Case No : Writ Petition (C) No. 14467 of 2004

Commodore F.H. Dubash VSM

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 07-02-2006

Acts Referred:

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

Citation : (2006) 128 DLT 471 : (2006) 87 DRJ 354 : (2007) 1 SLJ 273

Hon'ble Judges : Mukul Mudgal, J;H.R. Malhotra, J

Bench : Division Bench

Advocate : Meet Malhotra and Raghvinder Singh, for the Appellant; P.P. Malhotra, Addl. Solicitor General, Sidharth Mridul, Tanuj Khurana and Aman Anand, for the Respondent

Judgement

Mukul Mudgal, J.—The petitioner, a senior Naval Officer of the Indian Navy has approached this Court under Article 226 of the Constitution of India feeling aggrieved by the recommendation of the Promotion Board No. 1/2004 dated 18th June, 2004 as according to him he was wrongfully denied promotion to the next higher rank of Rear Admiral of Indian Navy for which he was fully qualified. The respondents acted arbitrarily and contrary to the Government's directive dated 25th August, 2000 while calculating the vacancies available and wrongly denied promotion to the petitioner to the post of Rear Admiral even though he was ranked second in merit. A proper calculation according to the said guideline showed that the two vacancies were available which proper calculation as per the aforesaid binding guideline would have ensured the promotion to the petitioner. The respondent No. 1 is the Union of India through Secretary, Ministry of defense and the respondent No. 2 is the Chief of Naval Staff.

2. The petitioner's case is as under:-

(a) The petitioner was selected as a gentleman cadet to the National defense Academy in the year 1965. Having completed his training, he was commissioned in the Indian Navy on 1st January, 1970 and rose to the rank of Commodore and

was also awarded the Vishist Sewa Medal in 2004. It is the case of the petitioner that promotions from the rank of Commodore to Rear Admiral are held twice in a year, once between 1st January to 30th June and another between 1st July to 31st December. However this is subject to availability of vacancies. It is further the case of the petitioner that in 2002 there was one vacancy for the rank of Rear Admiral, against which promotion Board No. 1/2002 was convened. The petitioner was considered and found fit for promotion but since he had been placed at Serial No. 2 in the merit list, another officer namely Commodore Ramsay being at Serial No. 1 in the merit list was promoted as the Rear Admiral in 2003. On June 18, 2004 another promotion Board No. 1/2004 was convened for consideration of promotion to the rank of Rear Admiral. In this petition the relevant promotion Board is No. 1/2004. Though two vacancies for the rank of Rear Admiral were available as per the counter affidavit filed by respondent No. 2 but selection was erroneously made on the basis that only one vacancy was available. Vital facts were suppressed from promotion Board No. 1/2004 by the officials of the respondent No. 2 with a view to deprive the petitioner of his promotion, despite there being a note of the respondent No. 2 communicating to the respondent No. 1, i.e. the Union of India that though the petitioner had a good career record and was found fit for promotion, he could not be promoted as there was no vacancy available.

(b) Since the petitioner was again placed at Serial No. 2 in the merit list, Commodore K. Raina was promoted as Rear Admiral thus denying the promotion to the petitioner despite there being two vacancies which were to and in fact had actually arisen within a period of 12 months from the date of convening of the promotion board on 18th June, 2004. The petitioner made a statutory complaint followed by representations dated 2nd July, 2004 and 16th July, 2004. The respondents did not respond to the said statutory complaints and representations of the petitioner but ordered a Re-board(hereinafter called the 'new Board') which was held on 24th August, 2004. The constituted new Board was nothing but a sham as the respondents this time included the list of candidates for the purposes of promotion from the batches of 93-A and 93-B who were admittedly much junior to the petitioner. According to the petitioner, the Board dated 18th June, 2004 had considered only one vacancy on a wrong premise although two clear vacancies were available at that time and Therefore, the action of the respondents denying promotion to the petitioner is contrary to law.

3. The contentions of the respondents are as under:-

(a) The promotion Boards are ordered by the Chief of the Naval Staff when required. No specific time slot is fixed for the scheduling of Promotion Board as per the Para 11 (b) of the NO (S) 4/99 which reads as under:-

(b) Selection to the rank of Rear Admiral and below: For promotion to the rank of Rear Admiral and below, officers of each branch will be divided into half-yearly batches depending on their seniority, i.e. Officers of 01 Jan to 30 Jun seniority forming one batch and of 01 Jul to 31 Dec seniority forming the other. The

number of half-yearly batches to be considered on a particular occasion will be decided on the basis of the long-and short-term requirements of the Service and the number of vacancies likely to become available.

(b) The promotion is based upon the 'equitable distribution of vacancies' (Promotion factor or PF) amongst the consecutive batches. This is to ensure that there is no undue benefit to one batch due to the accrual of large number of vacancies in a particular year and thus the officers of the subsequent batch are not penalized by allotment of large number of vacancies to the previous batch. This policy of 'equitable distribution of vacancies' has been accepted by the Government.

(c) The petitioner belongs to Select List Year (SLY) 1989. The Promotion Board 1A held on 19 Apr 02 considered four First Look Commodores of Select List Year-1989 (including the petitioner) and Select List Year-1990A (18 months batch), in addition to five review cases, for promotion to Rear Admiral, against only one vacancy available during 2002. On comparative merit, the petitioner was rejected and was graded R1 (to be reviewed next time). Since there was no vacancy in 2003, there was no Board.

(d) The promotion Board dated 18th June, 2004 considered only one vacancy due to the retirement of Vice Admiral Barin Ghose on 30th September, 2004. The second vacancy arising due to retirement of Rear Admiral Rao was not considered.

(e) The Promotion Board dated 18th June, 2004 listed Commodore Raina who stood at Sl. No. 1 in the merit list for promotion. Since the petitioner was lower in merit list compared to Commodore Raina, he was again rejected and was graded R2 (to be reviewed next time, if still eligible)

(f) Pursuant to the referral of the Ministry of defense dated 17th August, 2004 a fresh Promotion Board was held on 24th August, 2004 which considered two additional vacancies arising in 2005, with a view to ensuring equitable distribution of promotion factor, as per NO (S) 4/99 five First Look Officers of next 18 months batch (Select List Years 1993 and 1994A) were also considered, in addition to officers considered by Promotion Board 1-A/04 held on 18th June 2004 including the petitioner, making the total number of officers considered as nine against the 3 vacancies. The Board after examining the records of all the nine officers, recommended select listing of three officers, as per their order of merit for promotion to the rank of Rear Admiral (X/Log) against the three vacancies. Commodore Dubash was again rejected for promotion and was graded R2, as he was figuring lower in the order of merit as compared to the other three select listed candidates.

(g) In the interests of natural justice and in accordance with time tested Flag Rank promotion policies, the endeavor of the respondents has been that the current batch (2004) should get one vacancy to provide a promotion factor of 50% and the next batch should get two retirement vacancies of 2005, to provide

an equitable promotion factor of 40%.

(h) The respondent No. 2 received and analyzed petitioner's representations dated 2nd July, 2004 and 16th July, 2004 and forwarded its response of the same to the Ministry of defense for further consideration or communication to the petitioner. The third representation dated 3rd August, 2004 was unsuccessfully preferred by the petitioner directly to the Ministry of defense.

(i) That the respondent No. 2 did not communicate to the respondent No. 1 that the petitioner was found fit for promotion. In fact the Promotion Board held on 18th June, 2004 had rejected the petitioner for promotion and grade him R2 (to be reviewed).

4. It is not in dispute that the crucial issue involved in the present writ petition is the number of vacancies which were available and the manner and method of calculation of such vacancies for the post of Rear Admiral in the Indian Navy when the promotion board No. 1/2004 was convened on 18th June, 2004. It is the case of the petitioner that two clear vacancies were available as Rear Admiral V.S. Mathur & S.S.Rao retired on 30th November, 2004 and 31st May, 2004. The petitioner was denied his promotion solely on the ground that he was placed at Sl. No. 2 in the merit list in the recommendations from the Promotion Board No. 1/2004 and only one vacancy was available.

5. The paragraph 6 of the respondent's counter affidavit dated 30th October, 2004 reads as follows:-

6. The next Promotion Board was scheduled on 18th June, 2004. In this Board the single chain vacancy due to retirement of Vice Admiral Barin Ghose on 30 Sep 04 was only considered. The second vacancy of Rear Admiral due to arise on 31.05.05 on retirement of RADM Rao was not considered by the 18th June 04 Board....

Thus, it has not been denied by the respondent No. 2 that there were two vacancies available on 18th June, 2004 but only one vacancy was released in line with what is stated to be the laid down policy of equitable distribution of vacancies. The fact that the petitioner was placed at Serial No. 2 in the merit list of selection Board of 18th June, 2004 has also not been denied. It has been contended by the petitioner that even if such a policy of equitable distribution existed it could not override the Government's directive dated 25th September, 2000 which required that the vacancy selection will be based on the actual number of available vacancies.

6. The relevant Ministry of defense "guideline of 2000 (hereinafter referred to as the 'guideline') which is the sheet anchor of the petitioner's case reads as under:-

3. As regards calculation of vacancies, Government has also approved that in all future Promotion Boards for selection of officers for promotion to Flag Ranks in the Navy, the selection will be based on actual vacancies available during a

period of one year following the Boards held in August each year,

Sd/-

(MN Sukumaran)

US (pers)/25.9.2000

7. The petitioners have also strongly relied upon the statement made by the learned ASG on 31st August, 2004 which is in the following terms:-

He has, however, fairly stated that if the petitioner has been or is put in the select list in that event the respondents would re-induct the petitioner to service even if the petitioner retires from service with effect from 31st August, 2004.

8. On 12th May, 2005 this Court recorded the plea of the petitioner that there was a general circular/regulation/gazette notification/rule issued by the defense Ministry providing that the future vacancies were necessarily required to be referred to the Selection Board that had been held earlier.

9. The matter was adjourned till 23rd May, 2005 for the respondents to examine the record to show whether any policy/regulation/gazette notification/rule existed for vacancies occurring in future/subsequent one year.

10. In fact a perusal of the respondent No. 2's affidavit dated 30th June, 2005 filed subsequent to the order of this Court dated 23rd May, 2005 shows that the guideline was being followed. The following was the statement made by the respondent No. 2 in the said affidavit dated 30th June, 2005:-

...The case was referred by Ministry of defense to Naval Headquarters on 9th July, 2004 for clarification regarding vacancies arising on 31 May, 2005, due to retirement of Rear Admiral S.S.Rao (para 6 above) and Ministry of defense Guide line communicated to Naval Headquarters in 2000 to consider actual vacancies arising during a period of one year following the Promotion Board....

11. This clearly shows that the Government's directive dated 25th September, 2000 issued by the respondent No. 1 has been followed by the respondent No. 2. This Court passed the following order on 22nd September, 2005:-

In the light of the facts contained in the affidavits dated 24th September, 2004 and 30th October, 2004 filed on behalf of respondent No. 2, which state that the mandatory instructions/directions dated 25.9.2000 are applicable, the Secretary Ministry of defense is directed to file an affidavit whether direction/ instructions dated 25th September, 2000 contained at page 113 of the paper book are applicable for the Selection Board and the vacancies occurring from 2000 to 2005. Since the matter is being listed on 6th October, 2005 at the request of the respondent as an interim order it is directed that in the meanwhile if any post of Rear Admiral is filled up and the petitioner is found eligible to be promoted to the post of Rear Admiral such filling up of the post will not come in the way of the petitioner from being promoted as a Rear Admiral if he succeeds in the writ

petition.

List on 6th October, 2005 as part heard. dusty.

12. The relevant portions of the affidavit dated 5th October, 2005 filed pursuant to the direction of this Court dated 22nd September, 2005 are as follows:-

4. I submit that the directions contained in MOD note of 25 Sep 2000 as contained at page 113 of the paper book were in the nature of general instructions and they were not mandatory in nature. Perusal of records reveals that these guidelines were not formally adopted or implemented for the Selection Board PB 1A and the vacancies occurring in 2001 and 2002.

5. Naval Headquarters evidently followed the selection procedure for the rank of RADM as given in NO(S) 4/99. The prescribed procedure required distribution of vacancies to batches on the basis of long and short term requirement of service and the number of vacancies available. Position in this regard has already been explained in para 10 of the affidavit dated 30 Oct 04 filed by the Respondents. The prescribed procedure required distribution of vacancies to batches on the basis of long and short term requirement of service. The record reveals that this procedure was followed during the period 2000-2005.

13. The aforesaid affidavit is not categorical in its assertion regarding the non-following of the government directive dated 25th September, 2000 by the respondent No. 2 and indeed supports the submission of the petitioner that these directions were followed except for the selection board PB is 2001 and 2002 as per the statement made in the counter affidavit of respondent No. 2 as extracted above, for vacancies occurring in the year 2003 onwards. This shows that the petitioner's plea that this directive was applicable during 2002 till 2005 which includes the relevant Promotion Board dated 18th June, 2004 was justified.

14. Thus, it is clear from a perusal of the aforesaid affidavit dated 5th October, 2005 filed by the respondents pursuant to the directions of this Court dated 22nd September, 2005 that the Government's directive dated 25th September, 2000 indeed was in force at least from the year 2002 onwards. This is also supported by the stand earlier taken by the respondent No. 2 and indeed the stand taken in the affidavit dated 24th September 2004 by the Navy that while not denying that there were two vacancies which arose in so far as the Promotion Board held on 18th June, 2004 was concerned, the second vacancy was not allotted to the petitioner so as to ensure that the promotion factor of the first look officers of the Select List years 1990B and 1990A which included the petitioner did not become hundred per cent and which reduced the promotion factor for the next batch of 5 officers coming up for consideration in the year 2005 to an unacceptably low 20 per cent. The respondents' pleadings in this regard are as under:-

The case was referred by Ministry of defense to Naval Headquarters on 9th July, 2004 for clarification regarding vacancy arising on 31 May 2005, due to

retirement of Rear Admiral SS Rao (Para 9 above) and Ministry of defense guideline recommended in 2000 to consider actual vacancies arising during a period of one year following the Promotion Board held in August every year. Naval Headquarters clarified that the subsequent two vacancies are arising in 2005, one on 31 May 05 and the other on 30 September 2005. Promotion Board 1-A held on 18 June 2004 did not allot the second vacancy of 2005 to the two First Look Officers of Select List Years 1990B and 1991A, as in the event of doing so their Promotion Factor would become 100% and simultaneously reduce the Promotion Factor to an unacceptably low 20% for the next batch of 5 officers coming up for consideration in 2005. This would be against the laid down policy of equitable distribution of vacancies. The two vacancies of 2005 were earmarked for that batch, to ensure a Promotion Factor of 40%. To allocate the second vacancy of 31 May 2005 to the current batch would have been unjust and unfair, since such a decision would result in a 100% Promotion Factor for the current batch, simultaneously reducing the Promotion Factor for the next batch to an unacceptably low 20%.

Thus, if the respondent's contention of equal distribution of vacancies in the promotion Board convened on 18th June, 2004 and allotting of 2 vacancies in the new Board convened on 24th August, 2004 to the next batch of 5 officers who would come into consideration in 2005 is accepted which stand runs counter to the binding directive of the Government of India dated 25th September, 2000, it would mean that the petitioner inspired of having a good service record could never be promoted to the rank of the Rear Admiral. This in our view is unjust, unreasonable and arbitrary and acceptance of such a plea would run counter to the mandate of Article 14 and 16 of the Constitution.

15. The case of the respondents in the said affidavit is categorical to the effect that the two vacancies did arise but the second vacancy was not allotted to the Promotion Board held on 18th June, 2004 because of the laid down policy of equitable distribution. A similar stand has been adopted by the respondent No. 2-Navy in its affidavit dated 30th October, 2004. This affidavit is also significant as it clearly states that the Promotion Board held on 24th August, 2004 took into account the two additional vacancies of 2005 keeping in view the guideline issued by the Ministry of defense in 2000. The said assertion made in the same affidavit dated 30th October, 2004 is to be found in the following terms:-

...The fresh Board held on 24 Aug 04 took into account two additional vacancies of 2005 keeping in view the guidelines issued by MoD in 2000 (Annexure R-II) and five more First Look Officers of next 18 months batch were included in the list for consideration in accordance with NO (S) 4/99 (Annexure R-1), to ensure equitable distribution of Promotion Factor amongst consecutive batches.

This is thus a clear admission even on behalf of the respondent No. 2 that the guidelines/directive were issued by the Ministry of defense in 2000, and were followed by the respondents when the new Board was held on 24th August, 2004 for the promotion.

16. Having come to a conclusion that the Government's directive dated 25th September, 2000 was applicable, it is clear that as per the said directive two vacancies were available at the time the first Board was held on 18th June, 2004. Thus, the petitioner was entitled to succeed on the basis of the aforesaid calculation but it has been contended on behalf of the respondents that this was further governed by the laid down policy of equitable distribution.

17. It is the contention of the respondents that the Chief of the Naval Staff has to approve the approach paper to be prepared by the Personnel Branch, to be laid before each promotion board and the approach paper was required to lay down the procedure to be followed by the Board and to supply the information regarding the batches to be considered, number of officers to be selected and the other policy decisions. The aforesaid procedure was not to be departed from. Reliance was placed in particular on the said approach paper and the Para 11 (b) of the NO (S) 4/99 which provides that selection to the post of Rear Admiral and below require the each branch to be divided into half-yearly batches depending on their seniority and the number of half-yearly batches to be considered on a particular occasion and was to be decided on the basis of long and short term requirements of the service and the number of vacancies likely to become available. Thus, it is clear that No(S) 4/99 empowers the Chief of Navy Staff to consider for promotion the number of batches against the vacancies available and not the number of vacancies.

18. In so far as the petitioner's case is concerned, the respondents' plea is that the petitioner belong to the Select List Year (SLY 89) and the Promotion Board 1A held on 19th April, 2002 considered four First Look Commodores of Select List Year-1989 that is the petitioner and the Select List Year-1990A (18 months batch), in addition to five review cases for promotion to the Rear Admiral against only one vacancy available during the year 2002. The petitioner was rejected on comparative merit and was graded R1. The next Promotion Board was scheduled on 18th June, 2004 and this Board considered the single vacancy owing to the retirement of Vice Admiral Barin Ghose on 30th September, 2004. For this single vacancy, with a view to provide equitable promotion factor of 50% to the First Look Officers of Select List Years 1990B and 1991A, the review of the petitioner's case was included. The case of the petitioner was considered and again rejected on comparative merit. Commodore K. Raina, who belonged to the Select List Year-1991A stood first on the merit list and was selected and the petitioner's case was again rejected and he was graded R2, i.e., to be reviewed again if still eligible.

19. Even though two vacancies arose in 2005, the Promotion Board held on 18th June, 2004 did not allot the second vacancy of 2005 to the two First Look Officers of Select List Years 1990B and 1991A as in the event of doing so their promotion factor would become 100% and simultaneously reduce the promotion factor to an unacceptably low 20% for the next batch of five officers coming up for consideration in the year 2005. The two vacancies of 2005 were earmarked

for the batch of 5 officers coming up for consideration in the year 2005 to ensure a promotion factor of 40%.

20. The petitioner has also made certain allegations against Commodore SA O'Leary and Commodore Paras Nath who were selected by the Promotion Board of 24th August, 2004 which according to the petitioner did not qualify in order of merit as this Board took into account all the three vacancies occurring during the period 2004 to September, 2005 and took into account the First Five Look Officers of next 18 months" batch i.e., Select List Years 1993A, 1993B and 1994A. These nine officers were considered for the three vacancies by this Board held on 24th August, 2004 and three officers were selected in the order of merit and as the petitioner did not figure in the first three officers in the order of merit he was graded R2. The competent authority accepted that the recommendations of Promotion Board held on 24th August, 2004 and had approved the select list of Commodore K. Raina, Commodore SA O'Leary and Commodore Paras Nath.

21. The petitioner has raised serious doubts about the career record of Commodore SA O'Leary and Commodore Paras Nath as according to him they were involved in the infamous Chiller's controversy. However, these officers have not been joined as parties by the petitioner and Therefore this plea of the petitioner is not being considered by this Court as any adverse decision would affect such officers. No action can be taken in this writ petition affecting such officers without making them parties in the writ petition.

22. Thus, the petitioner has relied upon the Government's directive dated 25th September, 2000 providing for the promotion on the basis of actual number of vacancies whereas the respondent No. 2 has relied upon the policy of equal distribution of vacancies amongst the consecutive batches as the basis of promotion. We are of the view that the policy of equitable distribution i.e. NO (s) No. 4/99 cannot override the Government's directive dated 25th September, 2000 and if the two cannot be harmonized then the Government's directive has to prevail.

23. In the light of the above discussion, we arrive at the following findings:-

a) That two vacancies were available when the Promotion Board was convened on 18th June, 2004 for consideration of promotion to the rank of the Rear Admiral.

b) That in spite of the availability of two vacancies, the petitioner who was eligible, being placed at Sl. No. 2 in the merit list was thus denied promotion wrongly.

c) That the policy of "equal distribution" of vacancies was utilized by the respondent No. 2 as the reason to deny promotion to the petitioner cannot override the government's directive dated 25th September, 2000 according to which the selection is to be based on the actual vacancies available during the period of one year following the Boards held in August each year. The

government's directive dated 25th September, 2000 was applicable in the petitioner's case. If there is no conflict between the respondent No. 2's equitable distribution policy and Government's directive dated 25th September, 2000 the two can coexist. But if there is a conflict between the respondent No. 2 is equitable policy of distribution i.e. NO(s) No. 4/99 and the Government's directive dated 25th September, 2000 the Government's directive shall prevail over the policy of equitable distribution of vacancies.

d) That the respondent No. 2's affidavit dated 30th June, 2005 itself mentions that on 9th July, 2004 the case was referred for clarification to the Naval Headquarters by the Ministry of defense due to the guideline communicated to the Naval Headquarters in 2000 for the purpose of considering the actual number of vacancies arising during a period of one year following the Promotion Board. Thus, this shows that the respondent No. 2 itself has been following the Government's directive dated 25th September, 2000 which provides for promotion on the basis of actual number of vacancies and not the basis of equal distribution of vacancies for promotion.

e) That further admission by the respondent No. 2 of the Government's directive dated 25th August, 2000 and its efficacy is evident from the assertion of the respondent in its affidavit dated 30th October, 2004 wherein it has been stated that the new Board held on 24th August, 2004, took into account two additional vacancies of 2005 keeping in view the guidelines issued by the Ministry of defense in the year 2000.

(f) The respondent No. 2's affidavit dated 5th October, 2004 clearly shows that the government's directive dated 25th August, 2000 was being followed by it since the year 2002 for the purposes of promotion. Therefore there was no reason for the respondent No. 2 to not apply the government's directive dated 25th August, 2000 in the promotion board held on 18th June, 2004.

23. This Court had ordered on 22nd September, 2005 that if any posts of Rear Admiral are filled up in the interregnum it would not come in the way of the petitioner being promoted in case he succeeds in the writ petition. Therefore, we issue a writ of mandamus and thus direct the respondents to take appropriate and consequent action in accordance with the above findings recorded in paragraph 22 of this judgment not later than 10th March, 2006. However, any action taken pursuant to our judgment shall only be prospective in nature and the petitioner in the event of success shall not claim seniority against any officers already promoted nor any promotion already made shall be affected.

24. This writ petition stands disposed of in accordance with the above mentioned directions.