
(2001) 09 KL CK 0041
In the High Court Of Kerala
Case No : O.P. No. 15456 of 1997

Danapalan

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 13-09-2001

Acts Referred:

Army Act, 1950 — Section 27

Citation : (2001) 09 KL CK 0041

Hon'ble Judges : M.R. Hariharan Nair, J

Bench : Single Bench

Advocate : M.R. Rajendran Nair, for the Appellant; K. Ramakumar, S.C.G.S.C., N. Anil Kumar, A.C.G.S.C. and V.V. Suresh, for the Respondent

Final Decision : Dismissed

Judgement

M.R. Hariharan Nair, J.—The petitioner, who was a "Major" at the time of retirement from Army Service on 31.8.1997, is aggrieved that he was denied promotion to the rank of "Lt. Colonel" on the basis of his seniority by considering his case under para 70 of the Defence Service Regulations.

2. The petitioner joined the Indian Army in 1963. He was given permanent commission by Service Selection Centre, Bangalore, in 1980. The further commission given to him was an Administrative Officer in the Military Engineering Service in the rank of Lieutenant with effect from 27.7.1981. He got his due promotion as Captain on 27.12.1984 and became Major on 12.10.92. According to him, Ext. P1 letter issued to him stating that he was not approved for promotion to the rank of Acting Lt. Colonel is not a speaking order and the decision erroneous. He also complains that he was not screened by any subsequent Selection Board as assured in para-3 of Ext. P1.

3. The contention of the respondents is that the petitioner could not be screened again as he retired before the next screening was scheduled in August, 1998. As regards the denial of promotion, they stated that the promotion to the post is not

by way of seniority; that there was due consideration of his merit by the Selection Board and that on a comparative study, his junior was found entitled to be promoted as Lt. Colonel based on superior overall profile. It is also the case of the respondents that promotions in the Army upto the rank of Major alone go by time-scale and that further promotions are through the Selection Boards where annual confidential record alone is not the sole consideration.

4. The averment in the counter that the Selection Board for officers belonging to 1982 batch was scheduled for August, 1998 only and that the petitioner, by virtue of his retirement in 1997, could not be considered by the said Board is not denied through any reply statement. As such, the only question for consideration is whether the Selection Board acted erroneously, unfairly in deciding to select his junior overlooking his claims.

5. The Rules governing selection applicable to the officers like the petitioner is available in Ext. R1. The procedure to be followed by the Selection Board is contained in para-14 which reads as follows:

"14. The board meets as per forecast date in the MS Branch. The opening address containing guidelines of assessment is read out by the Secretary, who then proceeds to explain the MDS to voting members of the board. The guidelines of assessment and the system of grading is placed before each member for ready reference during the conduct of the board. Members are requested to glance through the cases being considered for the day and formulate independent view on the standards of selection within the batch as visualised by them (before commencement of screening by the Board primarily to highlight the meaning of the "Batch Merit". A few samples of each category of cases being considered are placed before the members and the profiles are discussed."

The criteria for selection are contained in para-13 of Ext. R1 which reads as follows:

"13. Promotions are made primarily on the basis of the assessed fitness of an officer to hold command appointment in his own Arm/Services and to help the management to provide a pool of officers to be rotated in Staff-ERE appointment. While assessing the potential of the officer no mention is made to the number of vacancies available in the next rank."

Under Clause-16 the members of the Selection Board have to apply their mind on the following aspects:

"(i) Overall performance of the officer.

(ii) Employability of the officer in the next higher ranks.

(iii) Important character qualities of the officer particularly Drive and Determination, Decisiveness, Initiative, Dependability, Integrity and Loyalty.

(iv) Important aspects of demonstrated performance which indicate an officer's

professional knowledge and its application as also the conceptual ability of an officer.

(v) Management of resources and technical equipment".

The guidelines for selection are contained in para-10 which reads as follows:

"10. These directives are approved by the COAS for each rank and are comprehensive by themselves. The salient features of the guidelines as follows:-

(a) Selection is to be based on the overall profile of the Officer with special stress on the performance in criteria command appointment.

(b) Due consideration is given to officers who show consistency in overall performance and they are given performance over late starters.

(c) The officer should have been consistently recommended for promotion to the next rank. Credit is given to those officers who have earned positive recommendations for promotion in their very first report in Command.

(d) The officer should have done PSC/Ptsc/Post Graduate courses and/or worked well in Staff ERE/Instructional Appts. However, qualification of PSC, Ptsc or HC is neither a substitute for mediocre performance in Command nor a licence for promotion.

(e) Officers should have the potential for being employed or being rotated in Staff, Instruction or ERE appointments.

(f) Character Qualities, Disciplinary background and decorations form an important input to the overall profile of the officer and due consideration should be given while assessing borderline cases.

(g) While assessing officers with disciplinary background the gravity and nature of the offence and the service level at which the offence was committed should be taken into consideration.

(h) Cases involving moral turpitude, gross negligence, acts of cowardice, or un-officer like behaviour which reflects on the moral fibre of an officer will not be recommended for promotion.

(j) Performance during war forms an important facet of the overall record of the officer.

(k) Cautionary Notes by the COAS:

(i) Elements of magnanimity on the part of the reporting officers leading to sudden elevation in figurative ratings especially in the case of officers who have been superseded earlier or on the eve of the selection or on the eve of the reporting officer's retirement.

(ii) Moderation by RO, SRO, NSRO particularly in cases where officers have been over or under rated.

(iii) Disparity in recommendations for promotion viz-a-viz the box grading, penpicture and recommendations for employment.

(iv) Comparative merit of officers in Staff-ERE viz-a-viz an officer in command in the same rank.

(v) Reports from NCC and ERE are given less weightage as compared to the reports earned from command and graded staff.

(l) Assessment of the officer are based on the comparative merit of the overall profile of the officers within its own batch. Needless to say, the grading of the board is to be assessed from the material placed before the board, and not from personal knowledge, if any.

(m) In case of doubt, benefit must go to the "service".

(n) Grading to be awarded by the Selection Board."

Aim of the selection system is the following:

"(a) Serve the best interest of the service by selecting only those officers who are considered competent to shoulder the responsibilities of higher ranks.

(b) Ensure objectivity and impartiality in Selection so as to give fair consideration to every officer who is eligible for promotion.

Under Clause 10(1), assessment of the officer is based on the comparative merit of the overall profile of the officer within his own batch. The grading of the Board is to be assessed from the material placed before the Board and not from the personal knowledge.

6. The petitioner relied on Clause 70 of the Regulations which provides that officers would normally be considered for promotion in the order of seniority in their Corps; but an officer whose early advancement is in the interest of service may be specially selected for promotion to fill a vacancy whatever his seniority in the rank at the time. The cases of officers who are superseded for promotion will be kept under review in accordance with the existing instructions. The case of the petitioner is that if Clause 70 is applied, it can be seen that the junior candidate Major James Kallan was not an officer with demonstrably superior qualities whose early advancement can be said to be the interest of service.

7. The copies of the papers relating to the selection were placed before me in sealed cover for my perusal during hearing. What is seen in it that the petitioner's case came up before the Board along with his juniors Major James Kallan and P.R.K. Murthy and the consideration of J. Kallan aforementioned was deferred and marks awarded to the other two based on perusal of the confidential record and on consideration of all other relevant data, with due regard to qualities like adaptability, decisiveness, discipline, dependability and drive determination, ingenuity, initiative, integrity, loyalty, maturity, stamina, tenacity, verbal expression, written expression etc. In that process where

performance for the period upto May 95 was considered by the Board in its sitting held from 30th July to 9th August, 1996, the petitioner's ranking was below that of Major P.R.K. Murthy with regard to the said 11 items and equal in 3 aspects. It may not be proper for this Court to disclose the contents of the confidential documents. Suffice it to say that going by the assessment of the Board, the petitioner was not entitled for promotion to the cadre of Lt. Colonel albeit it is a fact that his confidential records did not contain any adverse remarks.

8. The deferred case of Major J. Kallan was considered again by the Board in its sittings between 12th to 15th November in the same year; but then his performance for the subsequent period from 6/95 to 5/96 was also taken into account because of the time lag. His overall performance had improved during the period. Even with regard to the prior periods the performance of Major Kallan was slightly better than that of the petitioner.

9. The scope of judicial review in a case of the present nature is rather limited. *Rae Bareli Kshetriya Gramin Bank Vs. Bhola Nath Singh and other*, is authority for the proposition that judicial review is not akin to adjudication of the case on merits as an appellate authority. The High Court in such proceedings does not act as an appellate authority; but exercises within the limits of judicial review to correct errors of law or procedural errors leading to manifest injustice or violation of principles of natural justice. In *State of Bihar and Others Vs. Bateshwar Sharma*, it was laid down that even if the Court finds that the DPC erred in its decision, the remedy is only to remit the matter to the Government for constitution of the DPC to consider his case again. In the instant case, the petitioner having already retired, the question of sending up his case to another DPC does not arise.

10. In *Air Vice Marshal S.L. Chhabra, VSM (Retd.) Vs. Union of India (UOI) and Another*, the question that came up for consideration was whether the petitioner, who was an Air Marshal, was entitled to be promoted with effect from a prior date with eligibility for extension of service. The court found that a Selection Board, while considering the suitability of an officer for promotion to a higher post or rank, takes into consideration several factors and it is not solely based on the Appraisal Report of the controlling officer that the matter is decided. Where the Board obviously has applied its mind the High Court cannot act as appellate body and interfere with its decision, especially when no oblique motive is suggested against any member of the Selection Board.

11. Public interest should be the primary consideration of all Selection Boards constituted for selecting candidates for promotion to the higher posts; but it is all the more important in respect of selection to higher posts in the Armed Forces where officers selected are to play a decisive role to safeguard the safety and security of the country. The Court cannot encroach over the power of such Selection Boards which have specialised knowledge of relevant criteria and substitute its own views and opinions instead. The Court has to confine itself to

know limits of judicial review. What is reviewed is the regularity of the decision making process; not that of the decision itself.

12. There is one more reason why this Court should not interfere to upset the decision of the Selection Board and that is the availability of an alternative remedy. Section 27 of the Army Act, 1950 provides that any officer who deems himself wronged by his commanding officer or any superior officer and who, on due application made to his commanding officer does not receive the redress to which he considers himself entitled, may complain to the Central Government. The availability of such an alternative remedy is also a factor which stands in the way of the Court granting any relief in exercise of writ jurisdiction in such matters.

13. In the circumstances, the Original Petition is found to be without merit and it is accordingly dismissed.