

(2019) 11 GAU CK 0073

In the Gauhati High Court

Case No : Writ Petition (C) No. 3786 Of 2017

Durga Bahadur Sona

APPELLANT

Vs

Union Of India And Ors

RESPONDENT

Date of Decision : 26-11-2019

Acts Referred:

Constitution Of India, 1950 — Article 16

Citation : (2019) 11 GAU CK 0073

Hon'ble Judges : N. Kotiswar Singh, J

Bench : Single Bench

Advocate : K. Paul, J.P. Chauhan, B. Sarma

Final Decision : Allowed

Judgement

1. Heard Mr. K. Paul as well as Mr. J.P. Chauhan, learned counsel for the petitioner. Also heard Ms. B. Sarma, learned Central Government Counsel, appearing for respondent Nos.1 to 4.

2. In this petition, the petitioner has claimed for giving the benefit of promotion from an earlier date as given to his junior officers in the grade of Second-in-Command in the Sashastra Seema Bal (in short, SSB) and other higher ranks. Though the petitioner was given promotion to the post of Second-in-Command of the SSB vide order dated 13.10.2010 he is seeking promotion w.e.f. 10.11.2009, on which date his juniors were given promotion.

3. The petitioner is also seeking consequential benefits in the next higher promotional posts. According to the petitioner, because of the belated date of promotion to the post of Second-in-Command, his promotion to the post of Commandant had been also delayed and he also seeks promotion to the post of Commandant w.e.f. 04.12.2014.

4. In view of the above claims made by the petitioner, it would be necessary to revert back to the initial appointment of the petitioner to the post of Assistant Commandant as according to the petitioner, the seniority list of the Assistant

Commandants was prepared defectively which led to consequential deprivation of promotion from an earlier date. The original seniority list which was acted upon by the authorities in the grade of Assistant Commandant is to be found in Annexure-B to the writ petition, which was notified on 09.07.2001. In the said defective seniority list of Assistant Commandants, the name of the petitioner is to be found at serial No.108, whereas the names of the private respondent Nos.5, 6 and 7 are to be found at serial Nos.93, 94 & 96, respectively.

5. It may be stated that the said seniority list of Assistant Commandants was put to challenge in various High Courts including the High Court of Himachal Pradesh and this Court, which interfered with the aforesaid defective seniority list and directed the authorities to revise the seniority list. Accordingly, in terms of the directions of this Court as well as the High Court of Himachal Pradesh, the authorities issued the OM dated 25.11.2011 by which the seniority list of Assistant Commandants for the year 2000 was redrawn, which was finalized vide Office Memorandum dated 22.11.2012 (Annexure-F to the writ petition). In the said redrawn seniority list, the name of the petitioner is found at Serial No.111 and the names of the other private respondents at Serial No.113, 115, 119, 122, 124 etc, thus were placed as junior to him.

6. In view of the aforesaid revision of the Seniority List in the rank of Assistant Commandant, the earlier DPC which was held for promotion to the post of Deputy Commandant prior to the revision of the select list was obviously required to be reviewed which exercise was undertaken by the authorities by holding a review DPC on 25.09.2014.

7. In order to examine whether the promotion from the post of Assistant Commandant to the post of Deputy Commandant was validly done, the following aspects are to be kept in mind:

(i) Firstly, the promotion must be based on a valid seniority list.

(ii) The prospective candidates must have fulfilled the criteria for promotion to the higher post.

Only when the aforesaid two conditions are in order, then the promotion can be said to be validly made.

8. As mentioned above, the seniority in grade of Assistant Commandant was required to be redrawn as it was found to be defective by the High Courts, which was ultimately done. In the said redrawn seniority list, the petitioner is admittedly found to be senior to the private respondents.

9. If that is so, the question that arises for consideration is whether the petitioner and the private respondents had all fulfilled the eligibility criteria for promotion to the higher post. If the petitioner and the private respondents were direct recruits and appointed in terms of the same selection process and if the petitioner is found to be more meritorious in the said selection process and is placed higher in merit and seniority list, and if the petitioner had been found not

to have fulfilled the eligibility criteria by the review DPC for promotion to the post of Deputy Commandant on the ground that he did not possess requisite years of service required in the grade of Assistant Commandant, which is six years in terms of the relevant service rules, the question which will arise to be considered is as to whether the private respondents who were recruited directly along with the petitioner and who were placed junior to the petitioner in merit and seniority could be said to have been fulfilled the aforesaid criteria of six years of regular service. Since, they were given promotion to the post of Deputy Commandant and it will be deemed that they had fulfilled the said six years of regular service in the grade of Assistant Commandant.

10. However, in view of the submission made by the learned counsel for the petitioner that there is an element of doubt as to whether they actually had rendered six years of regular service, and as the petitioner was admittedly senior to them and they were recruited under the same recruitment process, this aspect required examination by this Court.

11. As regards this issue, the official respondents have filed an affidavit on 07.08.2019 clarifying the position in paragraphs 3, 4 and 5 of the said affidavit, which are extracted herein below:-

"3. That the deponent begs to submit that a recruitment test for 35 vacancies for the post of Assistant Commandant (GD) was conducted from 10/5/97 to 17/5/97 at the then GC Delhi and GC Ranidanga. The select panel prepared by the recruitment board was approved vide Cab. Sectt. UO No.6/13/98-DO.II/2657 dated 16th July, 1998. As per merit list approved by the Cab. Sectt., Shri Durga Bahadur Sonar, an OBC category candidate was at Sl.No.24 of select panel. Accordingly the offer of appointment was issued to him vide Cab. Sectt., OM No.6/13/98-DO.II dated 22/1/99 with the direction to report to Commandant GC, SSB, Tezu for appointment. He had joined on 22/2/99 and his appointment was confirmed vide Cab. Sectt., Order No.1093-96 dated 5th April, 99.

4. That the deponent begs to submit that after the select panel prepared by the recruitment board was approved vide Cab. Sectt. UO No.6/13/98-DO.II/2657 dated 16th July, 1998, the SSB authorities to complete all the formalities for each of the selected candidates, viz, verification of character and antecedents, IB Security clearance etc. After final selection it was mandatory to obtain IB clearance before issuing offer of appointment. Therefore as and when IB clearance of the selected candidates received by Force Hqrs, SSB, New Delhi, offer of appointment was issued. The IB clearance of the petitioner was received at Force Hqrs SSB, New Delhi after some of his batch mate and that is the reason for late issuing offer of appointment to the petitioner in compare to some of his batch mate. The Commandant (EB) vide communication dated 29/12/98 intimated the Cabinet Sectt. about completion of all formalities in respect of the petitioner alongwith another selected candidate and requested to offer of appointment to them.

A copy of the communication dated 29/12/98 is annexed hereto and is marked as ANNEXURE-A.

5. That the deponent states that there is no illegality or unfairness in the process of offering order of appointment and same procedure followed for all the candidates and the reason of delay in offering order of appointment to the petitioner is that his IB clearance was received after some of his batch mate. The deponent further states that under the facts and circumstances of the case the petitioner failed to make out any case for entitlement of any relief from this Hon'ble Court and, as such, the writ petition is liable to be dismissed and the interim order is liable to be vacated."

12. Thus, from the above, it can be observed that the stand of the respondent authorities is that the private respondents though were junior to the petitioner, were given appointment to the post of Assistant Commandant from an earlier date because of the appointment orders being issued earlier after getting earlier clearance from the concerned security agency. In the case of the petitioner, it took some more time for security clearance which resulted in delayed issuance of appointment order. However, while the private respondents completed six years of service at the time when the DPC was held, the petitioner did not complete because of delayed appointment order being issued.

13. Nevertheless, in the seniority list, which was redrawn subsequently at the intervention of the Court as mentioned above, the petitioner has been shown to be senior to the private respondents vide OM dated 22.11.2012 (Annexure-F).

14. Subsequent to the redrawing of the seniority list as mentioned above, a review DPC was required to be held and which was accordingly held on 25.09.2014. The review DPC took into consideration the revised seniority list in terms of the orders passed by the Hon'ble High Court of Himachal Pradesh, Shimla in CWP No.149/2010 (Neeraj Chand Vs. Union of India and others) and of this Court in WP(C) No.3937/2011 (Paramjeet Singh Slaria Vs. Union of India and others).

15. Learned CGC has produced the original proceedings of the said DPC. This Court also has gone through the same, a copy of which is also placed on record.

16. While perusing the proceedings of the said DPC, this Court made certain observations which indicated certain apparent anomalies. In the light of such apparent anomalies, this Court passed the following order on 31.10.2019 seeking clarifications as regards the apparent anomalies:

"Heard Mr. K. Paul, learned counsel for the petitioner and Ms. B. Sharma, learned Central Government Counsel.

In the review DPC held on 25.09.2014 to consider promotion of Assistant Commandant to the rank of Deputy Commandant in respect of the supplementary DPC held on 09.08.2005, persons at Serial No.10, 11, 12, 13, 14 etc, namely, Rajesh Thakur, Umesh Kumar Thapliyal, Mahesh Kumar, Amit Kumar

Thakur, D.N. Bhombey, Anil Kumar Sharma have been shown to be senior to the petitioner who has been placed at Serial No.26.

According to the petitioner, the said placement is incorrect as the petitioner ought to have been shown as senior to the aforesaid persons at the time of holding the review DPC in terms of the seniority list as notified vide Office Memorandum dated 22.11.2012 (Annexure-F). As per the aforesaid Office Memorandum, petitioner has been shown to be senior to all these private respondents.

In the said review DPC, case of the petitioner was not considered on the ground that residency period was less by 1 month and 21 days and the private respondents though junior to the petitioner were recommended for promotion by showing them to be senior in the list acted upon by the review DPC.

This Court has also noted that in respect of Paramjeet Singh Slaria at Serial No.17 though he completed 6 years, his case was not considered on the ground of non-completion of his immediate senior's required residency period. Immediate senior is one Hrisikesh Sharma placed at Serial No.16 in the list before the DPC whose case was not considered due to shortage of 9 month in the residency period.

Similarly, in respect of Shiv Dayal who is shown at Serial No.34 of the list before the DPC, though he had also completed 6 years of service, his case was not considered due to non-completion of required residency period by his immediate senior. One S.D. Sherkhane has been shown to be immediate senior to Shiv Dayal at Serial No.33 and his case was not considered on account of shortage of 7 years 9 days of residency period.

From the above, it is evident that the review DPC did not consider some of the junior Assistant Commandants for promotion to the post of Deputy Commandant though they had completed residency period on the ground that their immediate seniors did not complete the residency period.

It may be noted that in the said list of officers in the zone of consideration considered by the review DPC name of the petitioner is shown at Serial No.26 and his juniors have been shown at Serial No.10, 11, 12, 13, 14 and 15.

In the seniority list of Assistant Commandants as per Office Memorandum dated 22.11.2012, the petitioner is above all of these persons in which event petitioner ought to have been shown above these persons while being considered by the review DPC. In such an event, if the petitioner's case could not have been considered because of lack of residency period, the case of all these private respondents who are junior to the petitioner could not have been also considered, even if they had completed the residency period by following the same principle and yardstick applied to Paramjeet Singh Slaria and Shiv Dayal referred to above. However, these officers, namely, Rajesh Thakur, U.K. Thapliyal, Mahesh Kumar, D.N. Bhombey, Anil Kumar Sharma, Amit Kumar

Thakur though junior to the petitioner as per the corrected seniority list, i.e., the Office Memorandum dated 22.11.2012 have all been recommended by the review DPC for promotion to the posts of Deputy Commandant.

Authorities may explain the aforesaid apparent anomaly by the next date.

List on 14.11.2019."

17. Today learned CGC has clarified the queries raised by this Court as above based on certain written instructions received. Since the said instructions are not in the form of affidavit, the said instructions are placed on record and reproduced herein below:-

"Parawise reply on the observation of Hon'ble High Court Gauhati in connection with WP(C) No.3786 of 2017 titled Shri Durga Bahadur Sonar Vs. UOI & others vide order dated 31.10.2019

Observation of Hon'ble Court

Reply

In the review DPC held on 25.09.2014 to consider promotion of Assistant Commandant to the rank of Deputy Commandant in respect of the supplementary DPC held on 09.08.2005, persons at Serial No.10, 11, 12, 13, 14 etc, namely, Rajesh Thakur, Umesh Kumar Thapliyal, Mahesh Kumar, Amit Kumar Thakur, D.N. Bhombe, Anil Kumar Sharma has been shown to be senior to the petitioner who has been placed at Serial No.26.

According to the petitioner, the said placement is incorrect as the petitioner ought to have been shown as senior to the aforesaid persons at the time of holding the review DPC in terms of the Seniority list as notified vide Office Memorandum dated 22.11.2012. As per the aforesaid Office Memorandum, petitioner has been shown to be senior to all these private respondents.

In the said review DPC, case of the petitioner was not considered on the ground that residency period was less by 1 month and 21 days and the private respondents though junior to the petitioner were recommended for promotion by showing them to be senior in the list acted upon by the review DPC.

The contention of the petitioner is incorrect. The Review DPC was held on 25.09.2014 to consider the cases for promotion of Assistant Commandant to the rank of Deputy Commandant (GD) according to the revised seniority list circulated vide Office Memorandum dated 22.11.2012 and the petitioner was placed at serial No.27 vide para No.19 of review DPC above the private respondents except Shri Amit Kumar Thakur and Shri Anil Kumar Sharma who were remained senior to him.

This Court has also noted that in respect of Paramjeet Singh Slaria at Serial No.17 though he completed 6 years, his case was not considered on the ground of non-completion of his immediate senior's required residency period.

Immediate senior is one Hrishikesh Sharma placed at Serial No.16 in list before the DPC whose case was not considered due to shortage of 9 month in the residency period.

On examination of observation made by the Hon'ble Court said observation was made with reference to para No.17 of Review DPC which has shown details of supplementary DPC, whereas, the actual facts considered by the Review DPC was shown at para No.19 vide which all the eligible persons who are junior to the petitioner were considered for promotion including Shri Paramjeet Singh Slaria and Shri Shiv Dayal.

Similarly, in respect of Shiv Dayal who is shown at Serial No.34 of the list before the DPC, though he had also completed 6 years of service, his case was not considered due to non-completion of required residency period by his immediate senior. One S.D. Sherkhane has been shown to be immediate senior to Shiv Dayal at Serial No.33 and his case was not considered on account of shortage of 1 year 9 days of residency period.

From the above, it is evident that the review DPC did not consider some of the junior Assistant Commandants for promotion to the post of Deputy Commandant though they had completed residency period on the ground that their immediate seniors did not complete the residency period.

In the seniority list of Assistant Commandants as per Office Memorandum dated 22.11.2012, the petitioner is above all of these persons in which event petitioner ought to have been shown above these persons while being considered by the review DPC. In such an event, if the petitioner's case could not have been considered because of lack of residency period, the case of all these private respondents who are junior to the petitioner could not have been also considered, even if they had completed the residency period by following the same principle and yardstick applied to Paramjeet Singh Slaria and Shiv Dayal referred to above. However, these officers, namely, Rajesh Thakur, U.K. Thapliyal, Mahesh Kumar, D.N. Bhombe, Anil Kumar Sharma, Amit Kumar Thakur though junior to the petitioner as per the corrected seniority list, i.e. the Office Memorandum dated 22.11.2012 have all been recommended by the review DPC for promotion to the post of Deputy Commandant.

It is stated that Shri Paramjeet Singh Slaria and Shri Shiv Dayal were not considered by the supplementary DPC held on 09.08.2005. However, the review DPC held on 25.09.2014 had considered their cases along with these private respondents vide Review DPC Minutes para No.19. The Hon'ble Court may please be apprised accordingly."

18. The aforesaid written instructions, however, have not really clarified the matter. As can be seen from the proceedings of the DPC, in the review DPC held for the vacancy year 2005-2006, the petitioner is shown at Serial No.27 and the other private respondents, namely, Mahesh Kumar, D.N. Bhombe and Umesh Kumar Thapliyal are shown to be junior to the petitioner at Serial Nos.29, 31 and

38, respectively, as reflected in para 19 of the said proceeding.

19. Para 20 of the said DPC proceedings again indicates that the petitioner has been shown to be unfit for the reason of being short in residency. In other words, the petitioner though was considered by the review DPC was not recommended on the ground that he did not complete 6 years of service at the relevant time. On the other hand, the juniors mentioned above, have been recommended as they had completed six years of service, since their appointment orders were issued earlier because of security clearance earlier, as mentioned above.

20. The case of the petitioner was again ignored on the ground that he has not yet completed 6 years of regular service, though the clarification made by the authorities as per the written instructions dated 29.11.2019 does not indicate that the aforesaid principle of not promoting juniors if the seniors have not yet completed residency period, has been applied or not. The aforesaid principle is found to have been applied in the Supplementary DPC held on 09.08.2005. If the said principle had been applied in the review DPC held on

25.09.2014, none of the above private respondents who were juniors to the petitioner could have been promoted in the review DPC also. If that is so, it can be presumed that the respondent authorities while holding the review DPC held on 25.09.2014 did not apply the said principle which it applied in the Supplementary DPC held on 09.08.2005. If the said principle had not been applied, the question which will arise is whether ignoring the claim of the petitioner though senior but not yet completed the 6 years requirement of regular service could be said to be valid or not. The stand of the authorities is that the petitioner's case was ignored only because of the fact that he did not complete 6 years of regular service, though others who were juniors were recommended and promoted as they had completed six years of service.

21. Learned counsel for the petitioner submits that the case of the petitioner in such an event could not have been ignored by applying the principle of Next Below Rule. In this regard, learned counsel for the petitioner has relied on the decision of the Hon'ble Supreme Court in R.K. Sethi Vs. Oil & Natural Gas Commission¹ and also a decision of this Court in WP(C) No.224/2015 (Akheruzzaman Vs. State of Assam and others).

22. From the above, what transpires is that the petitioner was initially placed as junior to the private respondents on the ground that his appointment order was issued later after the private respondents who are junior in the merit list were already appointed as their cases got security clearance earlier. However, the said discrepancy had been rectified on the intervention of the Courts and the petitioner was shown to be senior in the entry level grade of Assistant 1 (1997)¹⁰ SCC 616 Commandant in the revised seniority list vide O.M. dated 22.11.2012. However, the fact remains that even if the petitioner had been shown to be senior to the private respondents, he did not complete 6 years of regular service which is required for promotion to the higher post and that was

exactly the reason even in the review DPC for which the authorities again ignored his promotion i.e. on the ground of lack of residency period.

23. As regards the stand of the authorities, it could not be said to be arbitrary or discriminatory, but for the existence of the rule called "Next Below Rule". As held by the Hon'ble Supreme Court in R.K. Sethi (supra), Next Below Rule has become an integral part of the service jurisprudence, which can be invoked even if there is no specific provision under relevant recruitment rules. The aforesaid Next Below Rule has been evolved to deal with such a situation where a senior because of various reasons has not completed the requisite period of service and the juniors because of fulfilling the minimum required length of service would steal a march over him thus creating heart burning amongst the seniors. This Court is of the view that the Next Below Rule relied on by the petitioner will be applicable in the present case also.

24. As mentioned above, though the petitioner was more meritorious than the private respondents during the recruitment process for the initial entry in service in the grade of Assistant Commandant, because of delay on the part of the authorities to get security clearance, his appointment order came to be issued on a later date than the private respondents. The said delay in getting security clearance and issuing delayed appointment order cannot be attributed to the petitioner. However, because of the aforesaid fact, i.e., delayed security clearance, over which the petitioner had no control, his appointment was delayed. Thus issuance of early appointment order in favour of the private respondents was because of pure chance or fluke and not attributable to merit or doing of the petitioner, which cannot be allowed to adversely affect the service condition of the petitioner.

25. In the present case, as mentioned above, since the delay was not occasioned on account of any fault or contribution or negligence to the petitioner, the petitioner could not have been put to a disadvantageous position vis-a-vis officers who were less meritorious than him in the recruitment process. In fact, because of the intervention of the Court, the authorities did rectify the said discrepancy and placed the petitioner above the private respondents in the seniority list. However, the fact also remains that because of his belated joining in service, he could complete 6 years of regular service after his juniors had completed it. It is to deal with such situation that Next Below Rule has been invoked and applied by the Courts in this country to offer equal opportunity to the seniors as given to the juniors during any promotion. This Next Below Rule is in effect a jurisprudential method to effectuate Article 16 of the Constitution, which guarantees equality of opportunity in matters of public employment.

26. Accordingly, this Court by applying the aforesaid Next Below Rule would hold that the petitioner also would be entitled to be considered for promotion when his juniors were promoted. Normally, this Court would have remanded the matter to the concerned authority to hold another review DPC for considering promotion of the petitioner to the post of Deputy Commandant for the vacancy year

2005-2006 for which the said review DPC was held on 25.09.2014. However, considering the fact that about more than 15 years have elapsed since the initial supplementary DPC was held on 09.08.2005 and more than 5 years have elapsed since the subsequent review DPC was also held on 25.09.2014, it would cause undue delay in the processing the promotion of the petitioner, if the matter is remanded to the authorities again.

27. Since the petitioner had been subsequently found fit to be promoted and was given promotion subsequently on 22.05.2006, but his promotion was denied on earlier occasion along with his juniors only on the ground of his non-fulfillment of the residency period, this Court would direct the respondent authorities to grant promotion to the petitioner with effect from the date when his juniors were given promotion. This Court would also direct the respondent authorities to grant all subsequent promotions i.e. in the rank of Second-in-Command as well as Commandant from the date any of his immediate juniors had been given promotion.

28. Accordingly, the authorities will work out the dates of promotion to the subsequent higher posts of Second-in-Command and the Commandant, as the petitioner had been already found for promotion, from the date when any of his juniors was given promotion to these higher posts of Second-in-Command and Commandant.

29. This Court has opted to issue such directions, as the petitioner cannot be expected to spend the rest of his career in litigation, when it has been clearly established that a wrong had been committed on him from the very inception/entry in service by placing him as junior to those who were less meritorious in the initial recruitment process and was not given the benefit of the Next Below Rule.

30. Accordingly, the present petition is allowed with the following directions:

(i) The petitioner shall be given promotion to the post of Deputy Commandant from the date when his immediate junior was given promotion in terms of the recommendation of the review DPC held on 25.09.2014;

(ii) Thereafter, as regards subsequent promotions to the ranks of Second-in-Command and Commandant, since the petitioner has been already given promotion to the rank of Commandant as on now, the respondent authorities will work out the effective dates of promotion in the ranks of Second-in-Command as well as Commandant after taking into consideration the dates of promotion of his immediate juniors, namely, Mahesh Kumar, D.N. Bhombe and Umesh Kumar Thapliyal, if any of them or all of them had been given promotion to the post of Commandant, in which event, the petitioner will be also given promotion from the same date and be shown to be senior to them.

(iii) It is, however, made clear that because of refixation of the dates of promotion from earlier dates in the ranks of Second-in-Command and

Commandant, the petitioner will not be entitled to any arrear of pay or allowances. However, these dates will be reckoned for future benefits including promotional and pensionary benefits.

(iv) The aforesaid exercise shall be undertaken by the authorities within a period of 3(three) months from the date of receipt of a certified copy of this order.