

(2010) 03 GAU CK 0049

In the Gauhati High Court

Case No : Writ Petition (C) No. 312 (SH) of 2006

Ganesh Kumar

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 23-03-2010

Acts Referred:

Army Act, 1950 — Section 80

Citation : (2010) 03 GAU CK 0049

Hon'ble Judges : Hrishikesh Roy, J

Bench : Single Bench

Advocate : H.S. Thangkhiew, L. Khyriem, P. Nongbri, N. Mozika and N.F. Kharshing, for the Appellant; S.C. Shyam, C.G.C., for the Respondent

Final Decision : Allowed

Judgement

Hrishikesh Roy, J.—Heard Mr. N. Mozika, learned Counsel appearing for the Petitioner. Also heard Mr. S.C. Shyam, learned Central Government counsel representing the Respondents.

2. The Petitioner was enrolled as a Rifleman under the Assam Rifles Organization and in pursuant to the promotion order dated 1.8.2006 (Annexure-9), currently he is serving as an Assistant Commandant. He seeks direction for retrospective effect to his promotion from the time, when 7 others were granted promotion/appointment in the cadre of Assistant Commandant. Retrospective promotion is claimed on the ground that the said 7 officers were given promotion in 1997, on the basis of common recommendation made in August, 1996 for all of them, by the final Departmental Promotion Committee (hereinafter referred to as "the DPC"). After they were short listed by the DPC, the writ Petitioner and the others were made to undergo a mandatory 42 days training, prior to their scheduled appointment as officers.

3. This is the second round of litigation for the Petitioner. In the earlier Writ Petition i.e. W.P. (C) No. 209 (SH) 2001, the Petitioner challenged the "severe

reprimand" penalty order dated 20.10.1999. He also sought the same promotion granted to others who were together recommended with him, w.e.f. the date, when his batchmates received their promotion.

4. This Court by judgment and order dated 7.4.2003 disposed of WP(C) No. 209 (SH) 2001 directing that, the Petitioner's case be examined and appropriate orders for granting promotion on the basis of his recommendation by the DPC be passed.

5. The Union of India filed a belated writ appeal i.e. WA No. 366 of 2004 with an accompanying delay condonation application i.e. MC No. 2961 of 2004 to challenge the order dated 07.04.2003 passed in WP(C) No. 209 (SH) 2001. As the Appellants failed to take necessary steps in the delay condonation application, the Division Bench by order dated 02.03.2005 dismissed MC No. 2961 of 2004 and as a consequences thereof, also dismissed the writ appeal filed by the Assam Rifles Authorities.

6. Only after the dismissal of the Writ Appeal, the Respondent Authorities considered the Petitioner's case and by order dated 1.8.2006, the Petitioner was promoted/appointed in the rank of Assistant Commandant.

7.1. It is contended by the Petitioner that after the common recommendation in August 1996 of the final DPC, when 9 men of the Organization were recommended for promotion to the post of Assistant Commandant and when all the 9 persons including the writ Petitioner were sent for officers' training, there was No. justification to withhold appointment to the Petitioner while his other 7 batchmates were given promotion in January 1997.

7.2. It is also contended that pursuant to the learned Single Judge's direction on 7.4.2003, the Petitioner ought to have been considered for appointment in the officer's rank and his promotion could not be withheld a second time only because the Respondents filed a belated writ appeal (dismissed on 02.03.2005) and accordingly it is submitted that although subsequently, the Petitioner was appointed as Assistant Commandant on 01.08.2006, the same should have been given with retrospective affect, so that the Petitioner is not deprived of his due service benefits vis-a-vis his 7 batchmates.

8.1. Arguing for the Respondents, Mr. S.C. Shyam, learned Central Government counsel submits that the Petitioner was not considered for appointment/promotion along with his batchmates in January 1997 as at that time, information was given on 15.01.1997 just prior to the promotion exercise, that a disciplinary case against the Petitioner and two others was pending. By referring to Clause 17.1 of the Guidelines on Departmental Promotion Committee (hereinafter referred to as "the Guidelines on DPC), Mr. Shyam contends that even after recommendation by the DPC, before making the actual promotion, it was required to be ascertained that No. disciplinary proceedings are pending against any of the recommended persons and since in the instant case, departmental proceeding was pending, the Petitioner was not considered for

promotion/appointment in January, 1997, along with his batchmates.

8.2. It is further submitted that the Petitioner has been inflicted with the penalty of "severe reprimand" on 20.10.1999 and considering the charge for which such penalty has been inflicted, the Petitioner was considered unsuitable for appointment/promotion to the cadre of Assistant Commandant.

8.3. The learned Central Government counsel also contends that the present writ petition is hit by the principle of res judicata inasmuch as, in the earlier writ petition i.e. W.P.(C) No. 209 (SH) 2001, the Petitioner claimed the same relief as is claimed in the second writ petition.

9.1. Before considering the other submission, it would be appropriate to deal with the third submission of Mr. Shyam that the present writ petition is not liable to be entertained, by applying the principle of res judicata.

9.2. A cursory examination of the prayers made in the first writ petition shows that the Petitioner had challenged the penalty of "severe reprimand" and had also sought direction for his promotion from the date when his batchmates were promoted.

9.3. In the present case the writ Petitioner after he received the belated promotion on 01.08.2006, prays for retrospective operation to his promotion as Assistant Commandant and prays for further promotion to the rank of Deputy Commandant w.e.f. 01.04.2004, when his batchmates received such further promotion. The Petitioner also seeks retrospective benefits of seniority, pay and allowances etc. and also damage and compensation, for wrongful withholding of his due promotion for 9 years.

9.4. Having compared the prayers in the 2 writ petitions and considering that a fresh cause of action that arises after the Petitioner was given only prospective promotion from 01.08.2006, I am of the considered opinion that the present writ petition is on a separate cause of action with additional facts and should not be thrown out at the threshold by applying the principle of res judicata. Accordingly the case is taken up for consideration on merit.

10. While the Respondents tries to justify the initial denial of promotion in January, 1997 along with his batchmates on the ground of pendency of a disciplinary proceeding by referring to Clause 17.1 of the Guidelines of DPC, there is No. explanation as to why, after conclusion of the disciplinary proceeding with infliction of penalty on 20.10.1999, the Petitioner's promotion was not considered in 1999. The only explanation that is forthcoming from the Respondents' counsel for non-considering the Petitioner's case for promotion, is pendency of the legal proceedings before this Court.

11.1. While considering Mr. Shyam's above explanation, it may be put on record that when the Petitioner was promoted 10 years later in August 2006, it was given on the basis of earlier recommendation of the DPC in August 1996, as there was No. subsequent DPC recommendation. Therefore it is apparent that

the Respondents considered the August 1996 recommendation to be good enough, for appointment/promotion of the Petitioner in the year 2006.

11.2. It is also seen that the punishment of "severe reprimand" is not considered as a disqualification for appointment/promotion as Assistant Commandant. It may be noted that amongst the conditions laid down for selection to Assistant Commandant as per the Head Quarters, DGAR letter No. A/I-A/5-81 issued in May 1985 and more particularly Annexure-I thereto, amongst the various offences under the Army Act which puts a bar on appointment as Assistant Commandant, there is No. mention of the penalty u/s 80(g) of the Army Act. Therefore, the penalty received by the Petitioner u/s 80(g) is not a disqualification for appointment to the cadre of Assistant Commandant. Perhaps keeping this in mind, the Respondents have appointed the Petitioner as Assistant Commandant, notwithstanding the "severe reprimand" penalty.

11.3. From the Petitioner's appointment in 2006 to the cadre of Assistant Commandant, in the absence of any later recommendation, it can be clearly inferred that the basis of the said promotion was the 1996 recommendation of the DPC in favour of the Petitioner and 7 others and the penalty of "severe reprimand" or the charge for which such penalty was inflicted, were not considered to be disqualifying factor, for the Petitioner's appointment in the Officers Cadre in the Organization.

12. Although a parallel submission is made by the learned Central Government counsel that a Rifleman punished for misconduct, cannot be considered suitable for appointment as an Officer in the Assam Rifle Organization, since the Respondent themselves have not considered this to be an inhibiting factor in 2006, I do not see any scope for accepting the argument of the learned Central Government counsel that the Petitioner is not a suitable person because of his past conduct, for appointment as an Officer in the Assam Rifle Organization.

13. In this case the Court is examining as to whether the Petitioner is entitled to the benefit of retrospective promotion along with his batchmates who were appointed as Assistant Commandant in January 1997. It is explained that promotion in 1997, after recommendation of the DPC, could not be given to the Petitioner because of pendency of the disciplinary proceedings. Having regard to Clause 17, 1 of the Guidelines of DPC, I feel that such denial in January 1997. may not be considered a wrongful denial at that stage.

14.1. But after conclusion of the disciplinary proceeding and the penalty ordered against him on 20.01.1999, there is No. reason for the Respondents to not consider the case of the Petitioner, as penalty u/s 80(g) of the Army Act is not a bar for considering the appointment to the cadre of Assistant Commandant and since the Petitioner has been duly recommended by the DPC and had also underwent the Officers training prior to getting the recommended promotion, the pendency of Court litigation may perhaps be a good explanation, for not carrying out the necessary exercises for promotion.

14.2. But when eventually the promotion exercise was taken up, denial of retrospective effect to the promotion cannot certainly be justified particularly when, it was the Respondents who had filed the WA No. 366 (SH) 2004 to challenge the judgment and order dated 07.04.2003 in WP(C) No. 209 (SH) 2001, wherein direction was given to consider the case of the Petitioner for promotion to the cadre of Assistant Commandant.

15. After conclusion of the disciplinary proceeding in October 1999 and particularly when the penalty of "severe reprimand" is not a bar for appointment to the cadre of Assistant Commandant, the Respondents in all fairness, ought to have considered the Petitioner for appointment as Assistant Commandant w.e.f. January, 1997.

16. By their failure to do the right for the Petitioner, he was constrained to move the Court in 2001 by filing WP(C) No. 209 (SH) 2001 and even after direction was given by the Court while disposing of the said writ petition on 7.4.2003, the authorities, instead of implementing the Court's order, chose to file a belated Writ Appeal to challenge the order dated 7.4.2003 passed by the learned Single Judge. The Writ Appeal filed by the Union of India was dismissed on 2.3.2005 and it took more than a year thereafter for the Respondents, to appoint him as Assistant Commandant. The entire process shows that the Respondents failed to consider the appointment of the Petitioner in due time after he was recommended in August 1996.

17. The Respondents now want to say that the Petitioner is entitled to have the benefit of promotion only prospectively w.e.f. 1.8.2006 and he cannot be considered for retrospective promotion. But when the basis for appointment/promotion of the Petitioner is the common recommendation made in August 1996 to the Petitioner and Ors. in his batch (who were promoted in January 1997), it is difficult to accept the Respondents' contention that the Petitioner is entitled to promotion/appointment only prospectively from 1.8.2006. No. legal reason could be cited by the Respondents to deny retrospective appointment benefit to the Petitioner and this is found to be an unfair denial by the Respondents.

18. In view of above discussion and conclusion, I am of the considered opinion that the Petitioner is entitled to retrospective benefit of appointment to the cadre of Assistant Commandant from the time when his batchmates who were appointed as Assistant Commandants in pursuant to the common recommendation made by the DPC in August 1996. But at this stage only a notional exercise is possible.

19. Accordingly the Respondents are directed to give notional promotion to the Petitioner from the date of the promotion of his batchmates and grant him benefit of seniority on the basis of such retrospective notional promotion. Further promotion to the cadre of Deputy Commandant be also considered on the basis of retrospective appointment to the cadre of Assistant Commandant, in

accordance with the norms in force, by convening, if necessary, a review DPC for the said purpose. Obviously the suitability and the other criteria for promotion to the Deputy Commandant may kept in mind, at the time of considering promotion to the cadre of Deputy Commandant. It is ordered accordingly.

20. In view of the above, the petition is allowed to the extent indicated above without any order of cost.