

(2007) 07 KAR CK 0041

In the Karnataka High Court

Case No : Writ Petition No. 24910 of 2005

Havildar N. Bheeman Gowder

APPELLANT

Vs

The Union of India (UOI)

RESPONDENT

Date of Decision : 10-07-2007

Acts Referred:

Indian Army Regulations — Regulation 149, 149A, 149B, 149C

Citation : (2008) 1 KarLJ 331

Hon'ble Judges : D.V. Shylendra Kumar, J

Bench : Single Bench

Advocate : Bhupinder Singh, for the Appellant; S.N. Rajendra, CGSC, for the Respondent

Final Decision : Allowed

Judgement

D.V. Shylendra Kumar, J.—Writ petition by a person serving as Havildar in the Indian Army who is aggrieved that his case is not considered for promotion to the next promotional post of "Naib Subedar" though he richly deserves the post.

2. Though many grounds are raised and contentions are urged on behalf of the petitioner, the crux of the matter is that the petitioner nurses a feeling that his case for promotion to the post of "Naib Subedar" has not been duly considered, notwithstanding a recommendatory letter or a letter seeking for permission by his Commanding Officer for relaxing the age criteria in terms of the provisions of the Regulation-149 of the Regulations for the Indian Army, Revised Edition, 1987 [for short "the regulations"].

3. This situation is the development in the light of some additional facts sought to be brought before this court through I.A. No. I of 2007 wherein the petitioner has produced a copy of such communication dated 6.7.2006 from the respondent No. 4 - Commanding Officer of 12, Engineer Regiment, PIN 914012, C/o. 56 A P O where the petitioner is working as Havildar.

4. Having heard Sri. Col. Bhupinder Singh, learned Counsel for the petitioner and

Sri. Rajendra, learned Standing Counsel appearing for the respondents, I.A. No. I of 2007 is ordered. Petitioner permitted to raise additional grounds and additional documents received.

5. Few brief facts leading to the above petition are that the writ petitioner who had joined the Indian Army as a Sepoy in the year 1982 was promoted to the post of Havildar in the year 1998 i.e., with effect from 5.12.1998 in terms of the order dated 23.1.1999. Though there are some disputes in this regard, this is accepted as this is the version given by the learned standing Counsel for the respondents.

6. It is the common ground that next promotional post is the post of "Naib Subedar" and the eligibility criteria for being considered to be promoted to the post of "Naib Subedar" is that the person should have elicited five confidential reports among which three should be above average at the time of consideration of the case of Havildar before the Departmental Promotion Committee [for short "the DPC"].

7. Apart from such eligibility, regulation - 149 of the Regulations for the Indian Army, Revised Edition, 1987, which reads as under:

149. Promotions - JCOs -

[a] NCOs except those given in sub para (b) below will not normally be promoted to the rank of JCO if over 44 years of age or with more than twenty-two years" service.

[b] NCOs of the undermentioned categories will not be promoted to JCO rank if over 46 years of age or with more than 25 years of service:

(i) Clerks GD, GD (SD) and Store.

(ii) Storekeeper [Storeman Technical]

(iii) Ammunition [Technicians] Examiners

(iv) Personal Assistants [ASC]

[c] The age and service limits given in sub-paras (a) and (b) above may be waived in very exceptional cases with the permission of the COAS.

Also imposes certain outer limit for consideration of a person for being promoted to the post of "Naib Subedar" and Regulation - 149(a) which is the relevant regulation which applies to the petitioner indicates that if the person is aged beyond 44 years he cannot be considered and also if the person had put in more than twenty two years of service then also he cannot be considered.

8. It appears that the confidential reports are given periodically once in a year by the Commanding Officer who is the controlling officer of the Havildar under whom the Havildar functions and the petitioner would have elicited minimum of five confidential reports only on and after 4.12.2003 when he would have

completed five years of service for the post of Havildar.

9. It also further transpires that the DPC which had assembled during March 2003 did not consider the case of the petitioner as the petitioner not only did not have five reports but even did not come within the zone of consideration in view of the number of eligible persons who can be considered for promotion at that time being much larger than the number of persons who were coming within the zone of consideration.

10. Though Col. Bhupinder Singh, learned Counsel for the petitioner has urged several grounds including that even by then the petitioner had more than five reports etc., factually it is not so and even practically or in reality, the petitioner could not have elicited five reports by then, the question of non-consideration by the DPC which met during March-2003 cannot be an issue for the purpose of petitioner's claim for promotion.

11. It appears that in terms of the policy guidelines laid down in the year 1997, the minimum requirement for being considered to be promoted to the post of "Naib Subedar" from the post of "Havildar" is that out of the five confidential reports, three should be above average and two should be high average and if a person falls short of this criteria, his case will not be considered for promotion.

12. It is the version of the respondents that even by the year 2004, the petitioner did not qualify on this ground apart from being not within the zone of consideration also.

13. What is of more importance and significance is that the petitioner appears to have crossed the age of 44 by June-2004 and thereafter he has not been considered by the DPC and that virtually amounts that the petitioner has lost his chance for promotion to the post of "Naib Subedar".

14. It is in these circumstances that the petitioner sought the aid of Regulation 149(c) which enables persons who do not fulfil the requirement under Sub-regulations (a) and (b) of Regulation-149 to be given a waiver from fulfilling the criteria and that too with the permission of the Chief of Army Staff.

15. Though the version of the petitioner when the writ petition was presented was that in view of certain better educational qualification, the petitioner's case could have been considered as an exceptional case for relaxation of age criteria etc., nothing much is made out on such premise. But, as good luck may have it, the petitioner has come up with an application with the supporting document i.e., the communication from his Commanding Officer - the respondent No. 4 herein indicating that the petitioner's services were very impressive; that he has an impeccable record and is a person richly deserving for according permission to waive the age limit as indicated in Regulation 149(a). It is such communication which has been produced as Annexure-A1 along with the IA for production for additional documents which has been ordered as indicated above.

16. A perusal of this communication though no doubt does not indicate that it

has been addressed to the Chief of Army Staff, but on the other hand addressed to Brig. A.S. Chand, OIC Records, Madras Engr Gp, C/o. 56 APO, reading of the contents will make it very obvious that the Commanding Officer is interested in invoking the provisions of Clause(c) of Regulation-149 to the benefit of the petitioner and he is seeking permission for waiving the upper age limit and therefore the communication if at all should be responded, it should be only by the Chief of Army Staff.

17. In the statement of objections filed on behalf of the respondents, while the respondents have emphatically denied any right of the petitioner for claiming either the promotional post or for relaxation based on any of his better educational qualification, even in response to the I.A. for additional documents filed by the petitioner, objections have been filed and it is indicated therein that the communication from the respondent No. 4 addressed to respondent No. 3 has already been rejected in terms of the communication dated 18.7.2006 produced as Annexure-R2 to the objections.

18. It is not necessary to look into the contents of Annexure-R2 as it is a response admittedly by the respondent No. 3 and not by the respondent No. 2 who alone has the power to accord permission for waiver of the prescribed age limit as prescribed in terms of Regulation-149(a) of the regulations.

19. It is submitted at the Bar that the petitioner is still in service and is due for retirement somewhere around June-2008.

20. Submission of Col. Bhupinder Singh, learned Counsel for the petitioner is that if the competent authority should bestow its attention to the permission sought for by the Commanding Officer and if there should be a favourable order on the permission sought for, petitioner still stands a chance of being promoted to the post of "Naib Subedar" if his case is considered by the DPC before his retirement and he makes a grade.

21. While a relaxation for the fulfillment of the condition in terms of Sub-regulation (a) of Regulation-149 is not a matter of right and the petitioner cannot seek it as a matter of rights the request or recommendation or permission sought for by the respondent No. 4 in favour of the petitioner for waiving the requisite eligibility criteria should necessarily be considered by the competent authority - the Chief of Army Staff and unless it is so considered, the request or the permission sought for is not taken to its logical conclusion.

22. It is not very clear as to whether the communication at Annexure-R2 is on instructions or as per the order passed by the Chief of Army Staff.

23. On the other hand, it is emphatically asserted by Col. Bhupinder Singh, learned Counsel for the petitioner that the communication had never reached the Chief of Army Staff and decision taken by any lower officer including the respondent No. 3 is not a valid decision for the purpose of Clause (c) of Regulation-149 of the regulations.

24. In the absence of any positive assertion that the matter had received due consideration by the Chief of Army Staff also, it is inevitable to conclude that the permission sought for had not been considered by the competent authority in accordance with Regulation-149. It is for such purpose, this writ petition is to be allowed and mandamus issued to the respondent No. 2 - the Chief of Army Staff to exercise his power in terms of Clause (c) of Regulation-149 and to pass orders on the request made by the respondent No. 4 seeking for permission to relax the age criteria for considering the case of the petitioner for promotion in accordance with law etc.,.

25. Accordingly, this writ petition is allowed.

26. A writ of mandamus is issued directing the respondent No. 2 to pass orders under the statutory provision referred to above i.e., under Regulation 149(c) of the regulations as expeditiously as possible but not later than three months from the date of receipt of a copy of this order.

27. Respondent No. 3 to act in aid of the respondent No. 2 for passing the order under Regulation 149(c) of the Regulations by forwarding necessary papers/record to the second respondent promptly.