
(1991) 08 DEL CK 0034

In the Delhi High Court

Case No : Civil Writ Appeal No. 2060 of 1991

J.K. Arora

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 12-08-1991

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1991) 45 DLT 83 : (1991) 1 DRJ 401 Supp

Hon'ble Judges : Sunanda Bhandare, J;Chander Mohan Nayar, J

Bench : Division Bench

Advocate : B.P. Ojha, A.K. Ganguly, S.K. Tiwari and A.P. Aggarwal, for the Appellant;

Judgement

Sunanda Bhandare, J.

(1) By this petition under Article 266 of the Constitution of India, the petitioner who is at present Additional Director General, Armed Forces Medical Services prays that a writ of mandamus to issued directing the respondents to appoint him on the post of Director General Medical Services (Army) Dgms Army). The brief facts are as follows :

(2) The petitioner was commissioned as a Medical Officer in the Indian Army on 10th July, 1955 and on 14th June, 1990, he was promoted to the rank of Lt. General with national seniority w.e.f. 1st April, 1990 The petitioner is due for retirement on his superannuation on 31st October, 1991. The medical services of the Armed Forces is an integrated service comprising of the medical services of the three wings of the Armed Forces, namely. Army, Navy and Air Force. It is headed by Director General Armed Forces Medical Services (DGAFMS.) The services of Medical Officers are inter-changeable as per the requirements. The medical service of the respective wing of the Armed Forces is under a Director General. According to the petitioner, there are three tiers in the services The first tier is of Dgafms, the second tier consists of Dgms (Army), Dgms (Air Force) and Dgms (Navy). The third tier consists of Commandant Amc Centre and School (b)

Commandant Armed Forces Medical College and (c) Additional Director General Armed Forces Medical Services. The post of Dgafms is the senior most. The posts of Dgms (Army), Dgms (Air Force) and Dgms (Navy) are at par and second in seniority and junior to DGAFMS. The three posts in the third tier are at par and are junior most and lower in seniority to posts in the second tier. There are in all seven officers in the cadre of the rank of Lt. General in the Armed Forces Medical Services. These seven Lt. Generals in the Medical Service fill up the post according to their seniority in the first tier, second tier or third tier. The Government of India, Ministry of defense issued a departmental note that with effect from 1.4.1988 only those Lt. Generals (and equivalent) who have at least one year of service before the attainment of 60 years of age i.e. the age of superannuation will be eligible for the appointment as DGAFMS. Thus, if none of the officers in the second tier has more than one year service left an officer from the third tier having minimum one year service could be appointed as DGAFMS. It is the case of the petitioner that no such condition of minimum service is prescribed for appointment to the post of Dgms (Army), or Dgms (Air Force) or Dgms (Navy) i.e the post in the second tier. The post of Dgms (Army) fell vacant on 1st July, 1991. The petitioner claims that since he is the senior most officer of the rank of the Lt. General in the entire Armed Forces Medical Service, except one officer who is already holding the appointment of Dgms (Air Force) in the second tier. he is entitled to be appointed as Dgms (Army). According to the petitioner, since minimum service is not prescribed for appointment to the post, the respondents can not deny him the said post on the ground that he has less than one year service left and he is to retire on his superannuation on 31.10.1991. The petitioner is aggrieved by this decision of the respondents refusing to appoint him as Dgms (Army) on the ground that he has less than one year service left and hence this present writ petition.

(3) It was contended by the learned counsel for the petitioner that though all the seven posts in the cadre are of the rank of Lt. General the appointments from the third tier to the second tier is made on the basis of seniority and the senior most person in the third tier is entitled to appointment when there is a vacancy in the second tier. He further submitted that respondents can not promote a Major General directly as a Dgms in the second tier overlooking the seniority of officers working in the third tier either as Commandant in Amc School. Commandant Armed Force Medical College or Additional DGAFMS. Learned, counsel submitted that respondents now propose to promote Major General, U.S. Bhargava as Dgms (Army) superseding the petitioner who is senior to Major Genera] Bhargava. Learned counsel further submitted that n the past appointment to the post of Dgms (Army) was made even though the incumbents had less than year's service and, Therefore, the reason given for not appointing the petitioner as Dgms (Army) is unjustified and not based on any policy. Though all the seven posts are of the rank of Lt. General the posts of Dgms (Army) is considered higher because it carries higher status and the Dgms (Army) has to perform important and responsible functions. Learned counsel pointed out

following distinctive features which would show that post of Dgms (Army) and the post of Additional Director General Medical Service are not equal: (i) Dgms (Army) is the head of Medical Services of the Army, while the Additional Dgafms is merely a ministerial department post as number two. This fact is admitted in para 8 of the counter affidavit by the respondents. (ii) Dgms (Army) is the Member of Selection Board held for selection for promotion of Medical Officers from the rank of Col. to Brigadier and Brigadier to Major General, whereas Additional Dgafms is not. (iii) Dgms (Army) is the member of Medical Services Advisory Committee (an apex body for policy formulation), while Additional Dgafms is not. (iv) All Director General (DGs) in all Government Departments are senior posts than the Additional Director Generals (Addl. DGs) in such Government Departments. (v) In seating plans for official meetings Dgms (Army) has the precedence over the third tier officers as per para(a)(ii) of Dgafms letter No. 15965/seating plan of the DGAFMS/DG-3 (b) dated 2.5.1990 which reads as under:

"DGMS as the Head of Services will have precedence over the Commandant Afmc and Additional Dgafms irrespective of their individual service seniority. The precedence amongst the Dgms will be based on their individual service seniority (date of seniority)".

(4) Learned counsel referred to the judgment of the Supreme Court in Vice Chancellor, Lalit Narain. Mithila University. .1986 (Vol. 2) All India Service Saw Journal page 142 in support of his contention that although the rank of Dgms (Army) and Additional Dgafms is that of Lt. General the posts are not at par and equal because of the higher status and authority which Dgms commands. The learned counsel, Therefore, submitted that he being the senior most officer of the rank of the Lt. General in The cadre he is entitled to the appointment as Dgms (Army).

(5) Learned counsel for the petitioner further submitted that officers working in the Armed Forces are as much entitled to the protection of their fundamental rights under the Constitution as any other citizen and the petitioner can not be denied his legal and constitutional rights or appointment as Dgms (Army). He has challenged the decision as unfair, unjust, arbitrary and violative of Articles 14 and 16 of the Constitution Reference is made to the judgment of the Supreme Court in Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others, in support of his contention and it is submitted that even Army Officers are entitled to the benefits of the liberal spirit of the Constitution and are entitled to the protection of their fundamental rights.

(6) The respondents have filed counter affidavit and have taken the stand that the appointment to the post of Dgms (Army) is not made on seniority basis and is made purely by selection Lt. General J K. Arora, petitioner here in has not been selected for appointment of Dgms (Navy) nor was he selected to the post of Dgms (Army). It is further stated in the affidavit that appointment of the petitioner as Dgms (Army) for a short period is not in the service interest. It is,

however, not disputed by the respondents that Major General Bhargava is proposed to be appointed as Dgms (Army) directly and has been approved for rank of Lt. General on 7th May, 1991. However, at the hearing of the case, the learned counsel for the respondents took a different stand and contended that all the posts of seven officers of the rank of Lt General are equal in rank and status and the appointment of Dgms (Army) is a mere incident of posting. They have further reiterated that the petitioner was not selected for the post of Dgms (Army) in view of his short tenure as the petitioner was due to superannuate on 31.10.1991. The post of Dgms (Army) can not be claimed on the ground of seniority as Lt. General and appointment is to be made by selection based on service interest and continuity so that, the officer is capable of making fruitful contribution. It was thus submitted that nobody can claim appointment as his or her right when appointment is to be made by selection. The learned counsel for the respondents further submitted that the petitioner does not stand to lose in any manner since the rank and emoluments are the same for both posts. Since, the petitioner continues as Lt. General, it can not be said that denial of the posts of Dgms (Army) amounts to any disadvantage in benefits and status.

(7) Since the stand taken by the learned counsel at the hearing and the stand in counter affidavit was at variance, we summoned the record relating to the matter and perused the same very carefully. We do not propose to discuss details in this regard in view of the nature of the matter, however, we find that the record clearly indicates that the posts of Dgms (Army) does possess a higher status and authority. This fact is clearly borne out from the correspondence which forms part of the record. It is clear that the petitioner is denied the position, particularly, on the ground that he has a short tenure and thus may not be able to do justice to the assignment in the short tenure. It is, however, apparent from the record that in the past officers with short tenure were appointed to the post but now a deviation is made on the ground that it is the prerogative of the authorities to post the petitioner in any position it is deemed fit and proper.

(8) On consideration of the rival contentions we find it difficult to accept the contention of the respondent's that appointment to the post of Dgms (Army) is not of higher status and responsibility and is a matter of mere incidence of posting. Although the post is held by an officer of the same rank as Lt. General, yet in the past it was always offered to the senior most officer in the rank of Lt. General. The contention of the respondents is not supported by the record of the case. We find that the stand taken by the learned counsel for the respondents at the hearing is rather contradictory. Whereas it is categorically averred in the counter affidavit that it is a selection post and the petitioner was not selected for appointment to the said post, at the hearing it was contended that the post is of equal status to the one already held by the petitioner and he is not posted as Dgms (Army) in view of his short tenure.

(9) Assuming that respondents have mentioned selection in a loose sense other than normally understood in service terminology, and what is meant is selection

for posting, the important question for consideration is whether all the seven posts in the cadre are equal status posts. Undoubtedly even when posting of officers is to be done there is some kind of selection inasmuch as an officer who is most fit for the job has to be posted to do a particular job. Such posting permit shuffling of officers from one post to another because all the posts are of same status and an officer in one post does not have to report to his equal in the other post. In the present case, however, we find that though Dgafms, who is of the rank of Lt. Colonel does not report to Dgms (Army) the officer in the post of Commandant Armed Service Medical College who is also of the rank of Lt. Colonel in third tier reports to Dgms (Army). This clearly shows that all the seven Lt. Colonels though are of the same rank there is an internal seniority maintained in the cadre. Because naturally a senior man in the same rank cannot be required to report to a man junior in service. The respondents have not denied the various distinctive features of the post of Dgms (Army) Thus, though the emoluments are the same, there can be no doubt that status and responsibility of Dgms (Army) is higher. In fact, that is one of the reasons why the respondents do not want to appoint an officer with short tenure to this post. We, Therefore, have no hesitation in coming to the conclusion that it is not a matter of mere posting. In Vice Chancellor, Lalit Narain Mithila University v. Dayanand Jha (Supra) it was held by the Hon''ble Supreme Court that the equivalence of the pay scale is not the only factor in judging whether the post of Principal and that of Reader are equivalent posts. The real criteria to adept is whether they should be regarded of equal status and responsibility. In the present case, the respondents have neither denied in their counter-affidavit nor the record indicates otherwise that the post of Dgms (Army) carriers higher status and responsibility than the post the petitioner is occupying presently.

(10) Further more since it is not disputed before us that in the post other officers with less than one year''s tenure had held the post of Gdms (Army) Dgms (Air Force) and Dgms (Navy), denial of the post to the petitioner on that ground can not be sustained unless the respondents have as a matter of policy decided that in future also no officer with less than one year''s service will be selected for the post of Dgms (Army) We suggested to the learned counsel for the respondents that in case such a policy decision is taken a categorical statement in that regard be made by way of an affidavit. He sought time to seek instructions in this regard, however, later, on instructions he expressed his inability to do so. Rather he submitted that it can be stated on oath that in future no person with less than one year''s service will not be appointed.

(11) We felt that it may not be necessary for us to interfere as there is a clear cut policy framed by the Authorities and the Government, however since no such categorical statement is forthcoming, the denial of the said post to the petitioner, on that ground, to our mind is unjustified. Certainly they can not be a policy only for one individual. The petitioner can not be deprived of the posting which admittedly is higher in status and responsibility at the concluding stage of his career unless a policy decision is taken. The respondents have no denied that the

petitioner is a first class officer and always had an immaculate record of service and have not put forward any other reason for not selecting him to the post of Dgms (Army) We may refer to the judgment of the Supreme Court in Prithi Pal Singh Bedi V. Union of India (Supra) wherein the apex Court held that the persons subject to Army Act do not cease to be citizens and are equally entitled to the protection of their fundamental rights under Articles 14 and 16 of the Constitution of India. The Supreme Court observed that:

"RELUCTANCE of the apex Court more concerned with civil law to interfere with the internal affairs of the army is likely to create a distorted picture in the minds of the military personnel that persons, subject to Army Act are not citizens of India. It is one of the cardinal features of our Constitution that a person by enlisting in or entering armed forces does not cease to be a citizen so as to wholly deprive him of his rights under the Constitution..."

(12) The petitioner has a distinguished long career in the Army and there is no complaint about his ability and efficiency. It will be wrong to deny him a position of higher status and responsibility as there are the just expectation of an officer who is ripe for superannuation.

(13) In view of the above this petition deserves to be allowed. We direct the respondents to appoint the petitioner on the post of Dgms (Army) and grant him consequential benefits in this regard. There shall be no order in to costs.