

(2015) 12 DEL CK 0052

In the Delhi High Court

Case No : W.P.(C) 7500/2015, C.M. Nos. 14300-14301/2015, W.P.(C) 8458/2015, C.M. No. 18128/2015, W.P.(C) 9242/2015, C.M. No. 21165/2015, W.P.(C) 9360/2015, C.M. No. 21717/2015, W.P.(C) 9439/2015 and C.M. No. 22057/2015

K.P. Kumar and Others

APPELLANT

Vs

UOI and Others

RESPONDENT

Date of Decision : 23-12-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 311

Citation : (2016) 226 DLT 229

Hon'ble Judges : S. Ravindra Bhat and Deepa Sharma, JJ.

Bench : Division Bench

Advocate : S.S. Pandey, Advocate, for the Appellant; Vivek Goyal, CGSC, for the Respondent

Final Decision : Allowed

Judgement

S. Ravindra Bhat, J.—The writ petitioners in these batch of cases allege discrimination in matters of promotion and question a bar contained in the service conditions applicable to them; they are working as permanently "seconded" (in effect, permanently absorbed) officers in the Directorate General of Quality Assurance (hereafter "DGQA"). They were previously working as officers in the Indian Army. The bar which they are aggrieved by prohibits consideration of their cases for promotion, irrespective of their work and performance in the DGQA- it is to the effect that those permanently superseded in the Indian Army would not be considered for promotion. The petitioners complain that this is discriminatory, because their colleagues (some permanently seconded from the armed forces like them, but not superseded; and other technical personnel, who never served in the armed forces) are considered for promotion purely on the basis of their merit, ability and functioning within the DGQA rather than judged on the basis of their previous performance under other employers.

2. The Directorate General of Quality Assurance falls under the Department of Defence Production, Union Ministry of Defence. The department is headed by a Central Government Secretary ranking officer. It provides Quality Assurance (QA) for an entire range of Arms, Ammunitions, Equipments and Stores supplied to Armed Forces. Apart from quality assurance activities, the DGQA is responsible for import substitution and associates with Defence Research and Development Organisation (DRDO) in the development projects and further ensures Documentation, Codification and Standardization Action for minimizing the variety of components/equipments. The DGQA has four disciplines: (1) Armament (2) Vehicle & Engineering (3) Electronics and (4) Stores. Its functions include providing other services such as promotion of small scale industries, post-procurement services, Defect Investigations and Technical Consultancy to the users, Ministry and the users, the Central Ministry and procurement agencies. DGQA has several establishments under its control, spread all over the country where mainly the Ordnance Factories, Defence Public Sector undertakings are located.

3. Induction to the DGQA is from amongst personnel drawn from the different armed forces (Indian Army, Indian Navy and Indian Air Force) as well as other technical personnel who are or were not necessarily members of any armed force. Officers from various Armed Forces and services are initially inducted from their respective establishments, including the Indian Army into DGQA on tenure basis. They are subsequently granted permanent secondment subject to fulfillment of prescribed eligibility criteria contained in policy letters of the Union Ministry of Defense (MoD)/DGQA. Upon secondment to DGQA they are governed by the terms and conditions contained in MoD OM No. 67952/Q/DGI (Adm-4)/10412/D (Prod) dated 28.10.1978 ["1978/OM"] and MoD OM No. 21 (4)/92/D (Inspection) dated 04.05.1993. One of the conditions - spelt out in the latter circular, is that the concerned officer should not have been finally superseded" (Clause 1(b)) in the Indian Army. The consideration was also restricted; only those "officers of the rank of Major/Lt Col (including Lt Col (TS)) will be considered for permanent secondment subject to fulfilling the eligibility criteria". The 04.05.1993 circular further stated that final orders for permanent secondment could be issued only after the selected officers' willingness was obtained in writing. The officers, once permanently seconded, continue in the organization till their retirement and are included in the cadre Seniority list of Permanently Seconded Service Officers according to their dates of seniority as substantive Major, as modified based on the penalties/loss of seniority in the parent corps and would be considered for promotion to higher ranks based on availability of vacancies in respective disciplines. The condition with respect to ineligibility of officers "finally superseded" in the army was repeated in the circular issued on 22.12.1993 by the Central Government. On 13.05.1998, the Union Department of Defence Production and Supplies issued a further circular on the issue, which modified the existing regime relating to permanently seconded officers of the Indian Army, and amended the previous circular inter

alia, in the following terms:

"(a) "Officers who are finally superseded could be considered for permanent secondment but they would not be promoted in the DGQA consequent upon their permanent secondment since they are finally superseded in their parent arm/service.

(b) Officer should have a minimum of 5 years service in the DGQA Organisation and offered by M.S Branch before consideration, for permanent secondment.

(c) While on tenure in DGQA, Box Grading and grading in personnel attributes in all ACRs should not be less than 7 and grading in respect of Integrity should not be less than 8."

A new Permanent Secondment and Promotion Policy was issued by the DGQA on 16.11.2007. The same reads as follows:

"In continuation of O.M. No. 57952/Q/DGI (Adm-4)/10412/D(Prod) dated 28 Oct 1978 as amended, guidelines circulated vide reference quoted above -on the above subject are amended with immediate effect and until further orders as under:--

(a) Intake of Service Officers on tenure:--

Under Para 3(3) of the subject O.M., following para be added:--

"Officers with non-science background but possessing specialized equipment qualifications will be considered for one tenure in Armament and Stores discipline on a case-to-case basis. However, these officers will not be eligible for permanent secondment. MS Branch will make endorsement in the posting order of such officers to this effect. The number of such non-science graduates to be inducted will be decided by the DGQA as per the requirement. "

(b) Permanent Secondment :--

Para 4 of the subject O.M. be replaced as under:--

"Permanent secondment of the service officers in the DGQA organisation shall be restricted to the rank of Lt Col. Selection of officers for permanent secondment shall be made from amongst the officers in the rank of Lt Col with an upper cut off age of 44 years at the beginning of the empanelment year, i.e., the first day of April of the QASB year, who have completed at least 2 years tenure in the DGQA organisation and who possess prescribed qualifications for various disciplines enumerated in MOD OM No. 6(3)/91-D (Insp) dated 27.8.91. Military Secretary's Branch will be consulted regarding availability of officers recommended for permanent secondment. Final orders for permanent secondment shall be issued only after the selected officer's willingness has been obtained in writing. Officers once permanently seconded will continue in the organisation till their retirement in due course and will be considered for promotions in higher grades against their vacancies. In case Army is not able to

spare officers in the rank of Lt. Col with the requisite qualifications for permanent secondment, the Government reserves the right to induct officers into DGQA organisation from the civilian scientific stream"

(c) in para 5(b), under the heading "PROMOTIONS", item 5(b)(i)(aa) to be deleted....

....Rest of the entries will remain unchanged."

The effect of the above office memorandum (hereafter "OM/2007") was that:

"(a) Permanent Secondment will be restricted to the rank of Lieutenant Colonel.

(b) Upper cut off age for consideration for permanent Secondment will be 44 years, as on 1st April of the year in which the officer is being considered, after completion of two years of tenure.

(c) Officers once permanently Seconded will continue in the organisation till they retire and will be considered for promotion to higher grades against their vacancies."

4. The office memorandum dated 23.04.2010 is the one in issue in this case. It sought to amend the existing instructions pertaining to conditions for permanent secondment to the DGQA. The material part of the said office memorandum ("OM/2010" or "impugned memorandum") reads as follows:

"a) On the orders of Central Govt., Special Merit Board has been discontinued by the Army since 2006. Consequently non-empanelled (superseded) will not be considered for grant of permanent secondment in DGQA.

(b) Non-empanelled Officers (Lt Cols) who have been granted permanent secondment in the DGQA in the past will be granted only one promotion to the next higher rank of Col (TS) on completion of 26 years of service. However, such officers in DGQA can retire, as per norms applicable to Permanent Secondment Service Officers in DGQA. An option will be given to such officers, if so desirous, for reversion to the Army for their further management. This clause will also be applicable to those non-empanelled officers who have been granted the rank of Colonel in DGQA.

(c) OM No. 6/1/2007/D(QA) dated 16 Nov 2007 will be made applicable prospectively for officers inducted on tenure after 16 Nov 07."

5. On 12.05.2011, yet another office memorandum was issued (hereafter "OM/2011"). This redefined the eligibility criteria for permanent secondment and inter alia, stated as follows:

"1. The following criteria will henceforth be adopted for grant of tenure & permanent secondment to service officers of the rank of Lt Col (Substantive) in DGQA

(a) Tenure...

(b) Permanent Secondment

QRs

(i) Offrs of the rank of Lt Col (Substantive) only will be considered for grant of Permanent Secondment.

(ii) Officer should have minimum of two years of regular service from the date of reporting to DGQA organisation before being considered by QASB for grant of Permanent Secondment.

(iii) Officers should not have been finally superseded as on the date of acceptance by DGQA on tenure (the date of approval of board proceedings for acceptance of officers on tenure by DGQA).

(iv) Mean value of all box grading for "seven years should not be less than "7" including ACRs earned in DGQA.

(v) Mean value of box grading in 3 Mandatory Qualities (LOYALTY [sic], DECISIVENESS & DEPENDABILITY) should not be less than "7" and in respect of INTEGRITY should not be less than "8".

(vi)..."

6. The Central Government in the meanwhile, had constituted a committee known as Ajay Vikram Singh Committee for improving the service conditions of the Officers of the Army, Navy and Air Force. Its recommendations were submitted to the Central Government; they were accepted by order dated 16.12.2004. In terms of the said recommendations the rank of Lt Col was made a time bound Rank on completion of 13 years of service. The other change introduced was the system of Special Merit Board by which the Officers who were earlier finally superseded were to be considered by the "Special Merit Board" (SMB). In 2005 and 2006, several officers were considered against the earmarked vacancies by the SMB in Army and were also promoted. The SMB system was stopped by the Army HQ by order dated 16.01.2007 and this fact was duly brought to the notice of the all concerned including the DGQA.

7. All the petitioners are permanently seconded Indian Army personnel. Their particulars are stated in a tabular form, below:

8. The petitioners challenge OM/2010 to the extent it bars promotion of permanently superseded officers, inducted into the DGQA on permanent secondment, staying the effect of the OM of 16.11.07. They state that the OM resulted in preparation of gradation lists where they were shown as ineligible for promotion. They submit that others, from the Indian Army were promoted on the basis of their performance in the DGQA, whereas they were overlooked for promotion. This, it is submitted, creates a class within a class of permanently seconded officers. Whereas one class is assessed on the basis of their merit, work and performance, the others i.e. the petitioners- who perform the same work and discharge the same duties, are not assessed for the worth of their

work, but barred from consideration. This results in invidious discrimination. Once officers are permanently seconded from a Force such as the Indian Army, they lose their birthmark and have to be treated at par with like officers, recruited from the same source, i.e. the same force. Counsel relied on the judgment reported as *Roshan Lal Tandon Vs. Union of India (UOI)*, where it was held as follows:

"At the time when the petitioner and the direct recruits were appointed to Grade "D", there was one class in Grade "D" formed of direct recruits and the promotees from the grade of artisans. The recruits from both the sources to Grade "D" were integrated into one class and no discrimination could thereafter be made in favour of recruits from one source as against the recruits from the other source in the matter of promotion to Grade "C". To put it differently, once the direct recruits and promotees are absorbed in one cadre, they form one class and they cannot be discriminated for the purpose of further promotion to the higher grade "C". In the present case, it is not disputed on behalf of the first respondent that before the impugned notification was issued there was only one rule of promotion for both the departmental promotees and the direct recruits and that rule was seniority-cum- suitability, and there was no rule of promotion separately made for application to the direct recruits."

9. It is further submitted that the Petitioner's discrimination is further highlighted by the fact that OM/2011 merely places an embargo on the acceptance of finally superseded officers as on the date of acceptance of their tenure and not as on the date of their permanent secondment. In other words, there is no bar for the permanent secondment of finally superseded officers. Once they are so inducted, there is no further bar for their promotion within DGQA. Since the said OM/2011 applies prospectively in terms, existing permanently seconded officers who were finally superseded are not allowed promotions, unlike those who join after issue of OM/2011, i.e. after 12.05.2011. It is submitted that this amounts to overclassification and is impermissible by reason of Article 14 of the Constitution since it treats equals unequally.

10. Mr. Pandey, learned counsel, further highlights that the DGQA had granted permanent secondment to 6 finally superseded officers, at least 5 of whom were promoted to the post of Brigadier, despite their having been finally superseded in the Indian Army. The information in respect of each such officer is provided in Ground I in support of W.P.(C) 7500/2015.

11. The respondents, including DGQA submit that finally superseded officers were treated as ineligible by virtue of the OM dated 04.05.1993. Thereafter this condition remained and by and large officers who were not finally superseded, used to be considered for and permanently seconded to the organization. The respondents also submit that such permanently superseded officers are treated alike in both Army and the DGQA and the fact that they do not receive promotion beyond a particular grade does not amount to hostile discrimination. It is contended that the barrier to promotion of such category of personnel cannot be

challenged because the condition was part of the Central Government's policies, since 1998. The mere fact that the 2007 policy relieved or relaxed the prohibition against promotion of such officers did not mean that they acquired a vested right or interest. Promotional opportunities are mere chances, subject to change by a valid policy evolved by every public employer. It is not as if any petitioner's promotion to any post or rank is sought to be taken away or impaired.

12. It was highlighted during the hearing that mere chances of promotion (in the absence of an actual order of promotion) are expectations which cannot be enforced and the taking away of which is not capable of judicial review, being a matter of pure policy. DGQA's functions and operational efficiency dictated the policy to deny promotion to permanently superseded officers (of the Indian Army) who were seconded permanently to it. Such being the case, the court should be slow in holding it to be discriminatory. Even otherwise, submitted counsel, there is a valid and rational nexus between the larger interests of efficiency and the intelligible differentia between officers not finally superseded in the army and those who were, for the purpose of promotion in DGQA. The rationale for providing promotional avenues for finally superseded officers, no longer existed once the AVS recommendations and report were retraced.

The relevant office memoranda

13. The relevant extract of the Office Memorandum of 28.10.1978 is as follows:

"PROCEDURE FOR INTAKE OF SERVICE OFFICERS IN QUALITY ASSURANCE ORGANIZATION OF THE MIN. OF DEF. AND TERMS AND CONDITIONS OF SERVICE OF THOSE PERMANENTLY RETAINED

XXXXXX XXXXXX XXXXXX

(4) PERMANENT SECONDMENT

..... Final orders for permanent secondment shall be issued only after the selected officer's willingness has been obtained in writing, officers once permanently seconded will continue in the organization till their retirement in due course and will be considered for promotions in higher grades against their vacancies. This is in supersession of the instructions contained in the O.M. No. 6(1)/84/D (Insp) dated 05 July 1984.

(5) (a) AGE OF COMPULSORY RETIREMENT

XXXXXX XXXXXX XXXXXX

(b) PROMOTIONS

(i) Acting ranks

(aa) Promotions from Captain to A/Major will be approved by the Director General of Quality Assurance for officers of Quality Assurance Organisation.

(bb) Selection for promotion to Acting rank of Lt. Col/equivalent and above from

amongst permanently retained officers, will be made by the Quality Assurance Selection Board in acceptance with vacancies and according to rules of eligibility as issued by Govt. for service officers and such other rules made for permanently retained officers from time to time.

(ii) SUBSTANTIVE RANKS

Rules regarding eligibility for promotion to substantive ranks of Lt. Col/equivalent above by selection will be as under:--

14. The Ministry of Defence OM No. 21(4)/92/D (Inspection) dated 04.05.1993 was then issued. One of the conditions - spelt out in this Memorandum, is that the concerned officer should not have been "finally superseded" (Clause 1(b)) in the Indian Army. The consideration was also restricted to those "officers of the rank of Major/Lt Col (including Lt Col (TS)) will be considered for permanent secondment subject to fulfilling the eligibility criteria". The 04.05.1993 OM also stipulated that final orders for permanent secondment could be issued only after the selected officers' willingness was obtained in writing. The officers once permanently seconded continue in the organization till their retirement and are included in the cadre Seniority list of Permanently Seconded Service Officers according to their dates of seniority as substantive Major, as modified based on the penalties/loss of seniority in the parent corps and would be considered for promotion to higher ranks based on availability of vacancies in respective disciplines. The existing Office Memorandum were amended on 13.05.1998 (No. 6(2)/97/D(QA)). The said 1998 memorandum to the extent relevant is extracted below:

"New Delhi, the 13th May, 1998

OFFICE MEMORANDUM

Subject:-- Guidelines for permanent secondment of service officers of the rank of Major and Lt. Col. In the DGQA organization - amendment regarding.

In supersession to O.M. of even number dated 18th Nov. 1997 on the subject mentioned above and as decided in 2(97) & 3(97) meetings of the QASB held on 1.9.97 and 18.12.97 and as approved by R.R.M. Para 1(b) of the guidelines circulated vide reference quoted above on the above subject is amended as under:--

(a) "Officers who are finally superseded could be considered for permanent secondment but they would not be promoted in the DGQA consequent upon their permanent secondment since they are finally superseded in their parent arm/service."

XXXXXX XXXXXX XXXXXXXX"

15. The situation changed on 16.11.2007, when OM/2007 was issued:

"New Delhi, the 16th November 2007

OFFICE MEMORANDUM

Subject:-- Guidelines for Induction and Permanent Secondment of Service Officers of the rank of Lt. Col. in the DGQA Organisation, reg.

In continuation of O.M. No. 67952/Q/DGI (Adm-4)/10412/D(Prod) dated 28 Oct 1978 as amended, guidelines circulated vide reference quoted above on the above subject are amended with immediate effect and until further orders as under:--

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(c) In para 5(b), under the heading "PROMOTIONS", item 5(b)(I)(aa) to be deleted.

(d) Under item 5(b)(ii) under heading "SUBSTANTIVE RANKS", the entry "From Maj/equivalent to Lt. Col./equivalent" to be deleted.

XXXXXX XXXXXX XXXXXX"

16. It is in this background that the impugned memorandum of 23.04.2010 was issued. The same reads as follows:

"No.6(1)/2007/D(QA) Government of India Ministry of Defence Department of Defence Production

New Delhi, the 23rd April, 2010

OFFICE MEMORANDUM

QUALITATIVE REQUIREMENTS (QRs) FOR PERMANENT SECONDMENT

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(b) Non-empanelled Officers (Lt. Cols) who have been granted permanent secondment in the DGQA in the past will be granted only one promotion to the next higher rank of Col. (TS) on completion of 26 years of service. However, such officers in DGQA can retire, as per norms applicable to Permanent Secondment Service Officers in DGQA. An option will be given to such officers, if so desirous, for reversion to the Army for their further management. This clause shall also be applicable to those non-empanelled officers who have been granted the rank of Colonel in DGQA.

(c) OM NO. F.6(1)/2007/D(QA) dated 16 Nov 2007 will be made applicable prospectively for officers inducted on tenure after 16 Nov 07.

XXXXXX XXXXXX XXXXXX"

17. Subsequently the OM of 12.05.2011 was issued. To the extent it is relevant, the same is extracted below:

"No.28(2)/2011/D(QA) Government of India Ministry of Defence Department of Defence Production

New Delhi, the 12th May, 2011

OFFICE MEMORANDUM

QRs FOR TENURE & PERMANENT SECONDMENT OF SERVICE OFFICERS OF THE RANK OF LT. COL. (SUBSTANTIVE) IN DGQA ORGANISATION

XXXXXX XXXXXX XXXXXX

(b) Permanent Secondment

QRs

(i) Offrs of the rank of Lt. Col. (Substantive) only will be considered for grant of Permanent Secondment.

(ii) Officer should have minimum of two years of regular service from the date of reporting to DGQA organisation before being considered by QASB for grant of Permanent Secondment.

(iii) Officers should not have been finally superseded as on date of acceptance by DGQA on tenure (the date of approval of board proceedings for acceptance of officers on tenure by DGQA)

XXXXXX XXXXXX XXXXXX"

18. It can be seen from the above extracts of various circulars and Office Memorandum that firstly at the inception - (refer to para 4 of the Office Memorandum dated 28.10.1978), officers permanently seconded could be considered for promotion in higher grades against their vacancies. Right up to 04.05.1993, there was no prohibition with respect to absorption of those officers who were finally superseded from being considered for permanent secondment. Likewise, even with effect from 04.05.1993, those who were permanently seconded did not face any barrier in promotion - either based upon their past service in the Indian Army or in terms of the limitation for promotion. The bar for promotion of permanently and finally superseded officers, so to speak, was introduced for the first time with effect from 13.05.1998.

19. The bar or barrier precluding finally superseded officers from entry and further promotion was lifted on 16.11.2007. The Indian Army acknowledges as much when it says, "it is true that O.M. dated 16.11.2007 does not have any ineligibility clause for final supersession." (para 15 of the counter affidavit.). Refer para 19:

"Since after implementation of AV Singh Committee recommendations, the finally superseded officers in the Army had an opportunity to get promoted to the rank of Colonel (by Selection). The DGQA also permanently seconded permanently superseded officers. The petitioner is one such beneficiary of such relaxation. However, when the SMV provision of AVSE report was withdrawn by the Army, the finally superseded officers or officers promoted to the rank of Colonel under SMV provision of AVSE recommendations were to be given only one additional

rank. "

20. The DGQA also took a similar action to grant only one promotion to such officers the order for which came into force through GOI/MOD OM dated 23.04.2010. The last Office Memorandum dated 23.04.2010 states that non-empanelled officers granted permanent secondment in DGQA would be granted only one promotion to the next rank of Col(TS). In effect, qualitatively this restored the barrier which had hitherto existed since 13.05.1998. The net result of this discussion is that for the period between 16.11.2007 and 23.04.2010, finally superseded officers not only could but were permanently seconded to the DGQA; there was also no barrier to their promotion either to the rank of Col (TS) or any higher rank. The petitioner in W.P.(C) 7500/2015 has given several instances of individuals promoted not only to the rank of Colonel but even to the rank of Brigadier. Refer Ground I - the respondents have not denied this.

21. The current position - evident from the latest circular of 12.05.2011 is that the threshold of officers not having been finally superseded is applied only to those who are not "finally superseded" as on the date of acceptance by DGQA on tenure (the date of approval of Board proceedings for acceptance of officers on tenure by DGQA. Now this condition is in para 1(b)(3). If one juxtaposes this with the eligibility for permanent secondment, i.e. a "minimum of two years of regular service from the date of reporting to DGQA organization before being considered by QASB for grant of permanent secondment", it is quite evident that the disqualification of final supersession does not operate or apply quite the same way it did earlier. Earlier, officers who were finally superseded at the time of consideration were not eligible for permanent secondment. Now, such bar of final supersession applies only as on the date of acceptance by DGQA on tenure. In other words, at the entry point, i.e. the first temporary tenure of an officer, he is not permanently superseded, he can be given temporary tenure. However, either during the tenure or thereafter, if he is finally superseded, that per se would not be a bar for his consideration for permanent secondment. Likewise, there is no bar to promotions of those permanently seconded and who are finally superseded. This in effect means that after 12.05.2011, promotions of those who might have been finally superseded, is possible within the DGQA.

22. From the above discussion, it is apparent that the DGQA has not applied a uniform rule of "no promotion" to those finally superseded in the Indian Army. The disqualification of those finally superseded officers permanently seconded from the Indian Army was introduced for the first time with effect from 13.05.1998. Admittedly, this bar was lifted on 16.11.2007. The ostensible rationale for the later move was the acceptance of the AVS report which had assured time-bound promotion to the rank of Colonel (Time Scale) through Special Merit Board (SMB). The DGQA now says that with the removal of SMB procedure, a decision was taken to align its policies with that of the Indian Army - in turn meaning that permanently seconded officers who were finally superseded would not be henceforth promoted above the rank of Colonel (Time

Scale). However, even that logic fails now with the introduction of the circular dated 12.05.2011 which allows one category of finally superseded officers to yet be permanently seconded; this circular clearly omits the bar on promotion (which had been conditionally reintroduced with effect from 23.04.2010). That the 12.05.2011 criteria replaced the earlier regime is clear from para 1 which states that the following criteria will henceforth be adopted for grant of permanent secondment in DGQA. However, the effect of this is sought to be, at the same time, taken away so far as the serving DGQA erstwhile Indian Army officers are concerned by para 3 which states as:

"these revised criteria will be applicable to all service officers inducted into DGQA on tenure prospectively from the date of this OM. In the interim period, QASB will be held as per policy in vogue."

In other words, the removal of the bar for promotion is made applicable only to those inducted pursuant to the QASBs held after 11.05.2011.

23. The above discussion would immediately show that within finally superseded officers who are permanently seconded to the QASB, there are two classes: (1) those inducted between period 16.11.2007 and 23.04.2010; and (2) those inducted after 12.05.2011. So far as the former category goes, promotion is not granted beyond the post of rank of Colonel (TS). However, so far as the category 2 goes, there appears to be no such bar.

24. The DGQA was constituted or set-up as an independent organization under the Ministry of Defence Production with a specific mandate, i.e. dealing with technical matters and examining the issue of merit substitution in regard to requirements of armed forces. It is staffed from employees from various streams - Indian Army, Indian Air Force and Indian Navy. Besides, it is also manned by other civilian personnel with engineering or scientific background. The various disciplines that the 1978 memorandum envisions are vehicles, engineering, equipment, armament and stores. The personnel deployed or sent on initial tenure and later permanently seconded (from the Indian Army) have to possess specific qualifications. Para 5(b)(b) of the 1978/OM specifically spelt out the eligibility for promotion, i.e. through selection. The salient differences between service in the parent force (Army, Air Force or Navy) on the one hand and service after permanent secondment on the other is that the age of compulsory retirement is 59 years for all officers up to the rank of Major General. Ordinarily DGQA officials after their permanent secondment are not expected to be active armed force personnel. In the case of Indian Army, the provisions of the Army Act apply only so far as matters of discipline are concerned. With respect to conditions of service, the provisions applicable to Indian Army officers do not apply. On the other hand, the policies evolved by the Central Government and made applicable to the DGQA are applicable.

25. This was a finding of the Armed Forces Tribunal after the decision of the Supreme Court in Col. G.S. Grewal in its order dated 24.07.2015 in Lt. Gen (R)

S.S. Dahiya v. UOI [O.A. No. 483/2013 and connected cases]. A three member Bench of the AFT stated as much:

"31. Therefore, the answer to question No. 1 is that the Army personnel even after permanent secondment to DRDO or DGQA remained subject to Army Act, 1950 and Army Rules, 1954 for limited purpose to the extent prescribed by law. Such personnel are not subject to provisions of the Army Act and the Rules framed thereunder and DSR for the Army."

26. If one recounts the history of setting up of the DGQA, the objectives which it is expected to fulfil and the previous conditions for permanent secondment, it is evident that for a 20 year period between 1978 and 1998, there was no bar to the promotion of Indian Army officers permanently seconded to the DGQA and who had been finally superseded. The bar, so to speak, existed initially and in the first instance, for the period between 1998 and 16.11.2007. It was relieved for the period between 16.11.2007 and 23.04.2010. The bar was reintroduced on the latter date and has again been altered with effect from 12.05.2011. Thus, it is not open to the Indian Army to argue that for historical reasons, those finally superseded officers who were permanently seconded were never eligible for promotion. Even for the period between 16.11.2007 and 23.04.2010, the petitioners have, i.e. the period when there was no bar, the petitioners have shown instances of promotion to the rank of Brigadier, the latest being in 2013.

27. That the bar to promotion of finally superseded officers applies in a very strange manner as on date is evident from the fact that the eligibility for further promotion of such finally superseded officers (who might have been finally superseded after their initial temporary tenure) is made possible prospectively for those permanently seconded after 12.05.2011. However, in respect of those identically situated, finally superseded officers who are permanently seconded before 12.05.2011, the promotion is allowed only up to the rank of Col (TS). This clearly is an over-classification as it results in invidious discrimination of individuals falling within the same class, i.e. finally superseded officers.

28. Coming back to the question of denial of promotion, as observed earlier, the instructions formulated for the last 37 years do not show a uniform picture. On the contrary, what is shown is that of a total of 37 years, the barrier against promotion of finally superseded officers existed for the 9 year interval between 1998 and 16.11.2007 and thereafter in a qualified manner between 23.04.2010 and 12.05.2011, i.e. about 10 years. The Supreme Court in Grewal (*supra*) held that the phenomenon of final supersession was described as the non-promotion of an officer to a higher rank after three specific instances when his name is considered. The Supreme Court clarified that such final supersession is not a reflection on the merit, ability or worth of the officer who might be able, competent and qualified:

"5. After considering the case of an army personnel for promotion to the higher rank, there can be suppression on merits. However, sometimes, even if the

officer is found to be meritorious and fit for promotion he would still not be able to enjoy promotion because he is lower in the seniority and the number of posts available in higher position is filled which are filled or occupied by personnel above his seniority. Non-inclusion for these reasons is also acknowledged as supersession. Therefore, after failing three chances in the rank of Major the rank of Lieutenant Colonel, if an officer is superseded even for one or sufficient number of vacancies in the higher rank, such an officer would still be labelled what is termed as finally superseded."

29. To illustrate, in a particular promotional Board exercise (in the Indian Army), which might consider names for two posts with a zone of consideration of 1:5 (i.e. consider 10 officers' records) the individual may be found sufficiently merited but placed at No. 3 in the panel because of his seniority. He would be superseded. If such a process is repeated two more times, he is deemed finally superseded. That under no circumstances would otherwise be a reflection on his merit is therefore, self-evident or clarified in Grewal (supra).

30. The corollary to the above discussion is that officers permanently seconded to the DGQA are expected to discharge functions quite differently from what is expected of Indian Army officers in the normal line of their duties - even technical and engineering personnel. They function like their colleagues from other forces and colleagues drawn from civilian streams in their technical disciplines with identical objectives that are expected to be fulfilled by DGQA. Therefore, the "throw back", or reference or linkage with the past service or the past performance (especially final supersession) in the Indian Army is not only inappropriate but perhaps irrelevant. Whilst the compulsions of a force with a cadre that tapers in a pyramidal manner to consider those fittest for career progression are understandable yet at the same time this consideration cannot apply to an organization with different avowed objectives whose personnel are drawn from similar technical backgrounds but from diverse organizations. The second aspect is that in the case of personnel in the DGQA who are drawn from the Indian Army but are not finally superseded, what is considered relevant for promotion is their performance in the post manned by them in the DGQA. However, in the case of Indian Army personnel, with identical background perhaps in the same discipline, with similar or better performance but who were finally superseded earlier, performance on the job is deemed irrelevant and past inability to be promoted is the sole disqualifying criteria.

31. The previous discussion would sharply focus on a singular feature, i.e. that the DGQA officer's promotional prospect does not depend on his performance within that organization but whether he was finally superseded because of Indian Army compulsions sometime back before he was permanently seconded. In other words, for those finally superseded in the Indian Army, but have made their way as DGQA officers (on permanent secondment) their performance is not deemed relevant at all; they bear the stamp of finally superseded officers of the Indian Army, based on their treatment which may not be a reflection of their merit. But

others are judged or considered for promotion on the basis of their contemporaneous performance and record in the DGQA.

32. In *The State of Jammu and Kashmir Vs. Shri Triloki Nath Khosa and Others*, , the Supreme Court considered the validity of a rule that prescribed that degree holders only, in the cadre of Assistant Engineers were eligible to be considered for promotion to the cadre of Executive Engineers while the diploma holder Assistant Engineers were ineligible for such promotion. The Constitution Bench of the Supreme Court repelled the challenge and held that though the persons appointed directly and by promotion were integrated into a common class of Assistant Engineers, they could, for the purpose of promotion to the cadre of Executive Engineers, be classified on the basis of educational qualifications. *Mohammad Shujat Ali and Others Vs. Union of India (UOI) and Others*, , is another Constitution Bench judgment of the Supreme Court which observed that for promotion to a higher post, discrimination based on educational qualifications not obligated by the nature of duties or responsibilities of the higher post would violate Article 14 of the Constitution. In *Roop Chand Adlakha and Others Vs. Delhi Development Authority and Others*, , the Court noted of *Triloki Nath Khosa's* case (supra) and *Mohd. Shujat Ali's* case (supra) and stated that:

"7..... If the differences in the qualification has a reasonable relation to the nature of duties and responsibilities, that go with and are attendant upon the promotional-post, the more advantageous treatment of those who possess higher technical qualifications can be legitimized on the doctrine of classification. There may, conceivably, be cases where the differences in the educational qualifications may not be sufficient to give any preferential treatment to one class of candidates as against another. Whether the classification is reasonable or not must, therefore, necessarily depend upon facts of each case and the circumstances obtaining at the relevant time."

P. Murugesan and Others Vs. State of Tamil Nadu and Others, , was a case where the court upheld the validity of the rule prescribing the ratio of 3:1 between graduates and diploma holders in promotion as also the longer qualifying period for service for diploma holders. The Court observed as follows:

"14. This decision clearly supports the appellant's contention and goes to sustain the validity of the impugned amendment. If the diploma holders can be barred altogether from promotion, it is difficult to appreciate how and why is the rule-making authority precluded from restricting the promotion. The rule-making authority may be of the opinion, having regard to the efficiency of the administration and other relevant circumstances that while it is not necessary to bar the diploma holders from promotion altogether, their chances of promotion should be restricted. On principle, there is no basis for the contention that only two options are open to a rule-making authority - either bar the diploma holders altogether or allow them unrestricted promotion on par with the graduates."

These cases therefore highlight that educational qualifications or experience based criteria can form legitimate grounds of differentiation of public employees for the purpose of promotion. Roshanlal Tandon (*supra*) cited by the Petitioners establishes that differentiation based on origin of the employee or officer (i.e. previous post or employment) cannot be the basis of valid discrimination.

33. In *State of Gujarat and Another Vs. Raman Lal Keshav Lal Soni and Others*, the issue was as to the validity of a Gujarat enactment which, inter alia, divested the right of Panchayat Service employees, who had been encadred as State civil servants. The rationale was that before encadrement, they were not State employees and did not possess that status and that the Act merely reverted to the previous position. The Supreme Court held the enactment to be discriminatory:

"Now, in 1978 before the Amending Act was passed, thanks to the provisions of the Principal Act of 1961, the ex-municipal employees who had been allocated to the Panchayat Service as Secretaries, officers and servants of Gram and Nagar Panchayats, had achieved the status of government servants. Their status as Government servants could not be extinguished, so long as the posts were not abolished and their services were not terminated in accordance with the provisions of Art. 311 of the Constitution. Nor was it permissible to single them out for differential treatment. That would offend Art. 14 of the Constitution. An attempt was made to justify the purported differentiation on the basis of history and ancestry, as it were. It was said that Talatis and Kotwals who became Secretaries, officers and servants, of Gram and Nagar Panchayats were Government servants, even to start with, while municipal employees who became such secretaries, officers and servants of Gram and Nagar Panchayats were not. Each carried the mark or the "brand" of his origin and a classification on the basis of the source from which they came into the service, it was claimed, was permissible. We are clear that it is not. Once they had joined the common stream of service to perform the same duties, it is clearly not permissible to make any classification on the basis of their origin. Such a clarification would be unreasonable and entirely irrelevant to the object sought to be achieved."

The Court also held that the enactment was also discriminatory since it was retrospective:

"The legislature is undoubtedly competent to legislate with retrospective effect to take away or impair any vested right acquired under existing laws but since the laws are made under a written Constitution, and have to conform to the do's and don'ts of the Constitution neither prospective nor retrospective laws can be made so as to contravene Fundamental Rights. The law must satisfy the requirements of the Constitution today taking into account the accrued or acquired rights of the parties today. The law cannot say, twenty years ago the parties had no rights, therefore, the requirements of the Constitution will be satisfied if the law is dated back by twenty years. We are concerned with today's rights and not yesterday's. A legislature cannot legislate today with reference to

a situation that obtained twenty years ago and ignore the march of events and the constitutional rights accrued in the course of the twenty years. That would be most arbitrary, unreasonable and a negation of history."

34. There is also a body of judicial authority in support of the proposition that with the passage of time a legislation which was justified when enacted may become arbitrary and unreasonable with the change in circumstances.¹ The proposition was articulated as follows, in H.H. Shri Swamiji of Shri Admar Mutt etc. (see foot note 7):

"there is a firm foundation laid in support of the proposition that what was once a non-discriminatory piece of legislation may in course of time become discriminatory and be exposed to a successful challenge on the ground that it violated Article 14 of the Constitution."

The proposition was applied also in *Malpe Vishwanath Acharya v State of Maharashtra* 1998 (2) SCC 01.

35. In the present case, the impugned condition in the OM of 23.04.2010 that finally superseded officers seconded permanently from the Indian Army, cannot be considered for promotion beyond a particular rank, smacks of discrimination. As discussed earlier, neither is there any consistent history of such bar (for 20 years there was no such bar, till 1998; the bar was in place till 16.11.2007 after which it was lifted, and reintroduced by the impugned condition) nor does the rationale, i.e. that Army officers finally superseded are not promoted, have any nexus with the object sought to be achieved, i.e. ensuring that the most merited are promoted based on their performance. After permanent secondment, officers from different forces do not return, except when asked under emergencies; therefore, their performance is to be seen on the basis of the discharge of duties in the DGQA. The respondents do not deny that such consideration does take place for all officers, other than those who were finally superseded in the Indian Army. This in effect would be that even if such category of persons (finally superseded officers working in the DGQA) outshine others in their job, consistently they would nevertheless continue to be in a limbo. This is neither conducive to the object of promoting merited officers, nor sub-serve public interest, because it treats such officers (finally superseded officers of the Indian Army) as virtual pariahs or outcastes, placing them in the limbo so far as promotion is concerned. Clearly, the condition is discriminatory and violates Article 14 of the Constitution of India; it is deleterious to public interest in efficiency.

36. In view of the foregoing reasons, in respect of the first sentence of the clause (b) of impugned memorandum of 23.04.2010 to the extent it is in operation in respect of permanently seconded officers in DGQA who were finally superseded, (that "Non-empanelled Officers (Lt Cols) who. have been granted permanent secondment in the DGQA in the past will be granted only one promotion to the next higher rank of Col (TS) on completion of 26 years service..") the doctrine of

severability is hereby applied. Consequently the said part of the impugned memorandum dated 23.04.2010 is hereby declared void and inoperative. The respondents are, consequently, directed to take action and set up review QASB in respect of the petitioners in these cases, to appraise and consider their cases for promotion on all those dates they would otherwise have been eligible for consideration for promotion(s) to higher posts or grades. The exercise shall be completed within three months and the results made known to the petitioners on or before the end of that period.

37. The Court is of the opinion, therefore, that assuming that there is a rationale for the differentiation between finally superseded officers and those who are not (given that such differentiation was made since 1993) it bears no rational nexus with the interest in promoting best officers. Here, the Court also recollects the decision in Roshanlal Tandon (supra) which holds that when officials enter a cadre or service from two different streams they cannot be treated differently for purposes of promotion. Mohd. Shujat Ali (supra) is a case which emphasises that qualification based promotional criteria should have nexus or bearing with responsibilities attached to the higher post. In the present case, the differentiation between two officers is solely dependent upon whether they were finally superseded in the Army. Given that army service and DGQA service are different in content, this criterion is wholly arbitrary and bears no nexus with the object of promotion of deserving officers.

38. What is in issue is not a mere chance of promotion but a barrier or bar to some officers who function in DGQA. The content of their duties is no different from others. Consequently, the respondents' submission that the impugned condition merely deals with chances of promotion is insubstantial. Such a bar has to withstand the scrutiny of Article 14, since other officers in the DGQA are entitled to be considered for promotion.

39. The writ petitions are allowed in the above terms; there shall be no order as to costs.

1State of Madhya Pradesh v. Bhopal Sugar Industries (1964) 6 S.C.R. 846; Narottam Kishore Dev Varma and Ors. v. Union of India and Anr. (1964) 7 S.C.R. 55 ; H.H. Shri Swamiji of Shri Admar Mutt etc. v. The Commissioner, Hindu Religious & Charitable Endowments Department and Ors. (1980) 1 S.C.R. 368 ; Motor General Traders and Another Vs. State of Andhra Pradesh and Others, .