

(1999) 03 DEL CK 0075

In the Delhi High Court

Case No : C.W.P. No. 309 of 1999

Maj. Gen. (Dr.) C.M. Khanna

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 22-03-1999

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1999) 79 DLT 466

Hon'ble Judges : K. Ramamoorthy, J

Bench : Single Bench

Advocate : R.M. Bagai, for the Appellant; Rakesh Tiku, for the Respondent

Final Decision : Allowed

Judgement

K. Ramamoorthy, J.—The writ petitioner has challenged the order dated 11.1.1999 in and by which the petitioner was retired from service w.e.f. 11.1.1999. On that day, the petitioner was working as Brig (L/Maj General), The petitioner had rendered 36 years of service in the Indian Army as a Doctor and he was to retire from 30.6.1998 on attaining the age of superannuation. On 19.6.1997 the Ministry of defense issued proceedings relating to the retirement of service officers permanently seconded to DRDO (Department of Research & Development Organisation). The same reads as under:

"1. I am directed to intimate that the following officers permanently seconded to DRDO will retire from Army Service with effect from the dates mentioned against them on attaining the age of superannuation :

(a) Maj Gen KC Agrawal IC-14362, Engrs Adviser, Engg Systems DRDO HQ, New Delhi. 31.7.98

(b) Maj Gen A Mehta IC-14874, EME OSD, DRDO HQ, New Delhi. 30.11.98

(c) Maj Gen VN Karande IC-16461, EME VRDE, Ahmednagar. 31.12.98

(d) Brig TR Marwa IC-19815, EME CVRDE, Avadi, Madras 31.1.98

(e) Brig KV Malhotra IC-18364, Arty DSC, Delhi. 30.11.98

(f) Brig IT Das IC-17906, EME R& DE (E), Pune 28.2.98

(g) Brig (L/Maj Gen) CM Khanna MR-1964, AMC INMAS, Delhi 30.6.98

2. The officers are eligible for encashment of leave up to a maximum of 240 days including annual leave to their credit on the date of retirement in terms of Ministry of defense letter No. F.14(3)/88/D(AG) dated 30th Dec., 91 and 10th Jan. 92. Instructions for officers proceeding on retirement are contained in AO 209/76.

3. It is confirmed that no disciplinary/vigilance case is pending/contemplated against these officers.

4. Please acknowledge."

On 13.5.1998 the Government of India in general had decided to increase the age of officers. On 26.6.1998 the Director (Personnel), R&D Headquarters issued the proceedings permitting the officers who would retire to continue in service and the same reads as under:

"The issue of review of retirement age in respect of service officers permanently seconded to DRDO is under consideration. Pending a final decision on the revised superannuation of service officers by the Ministry of defense, in the interim, it has been decided to defer the retirement of permanently seconded service officers in DRDO due for retirement on 30th Jun. 98, till final orders are issued on the subject (.). The following categories however are not covered by these orders:

(a) those proceeding on voluntary retirement;

(b) those seeking retirement on compassionate grounds;

(c) those who have already retired on the date of issue of these orders;

(d) those under orders of retirement as a result of Review as provided in the existing Government orders;

(e) those who are on extension in service beyond the stipulated age of retirement on the date of issue of these orders, as per existing instructions."

The petitioner was continued in service. On 11.1.1999, as referred to above, the order was issued and the same is as under:

"References:

(i) DRDO HQ LETTER 86782/RIMI/ RD/Pers-4 dated 19.6.97.

(ii) DRDO HQ letter No. 18601/RD/ Pers-4 dated 26.6.98.

(iii) Orders of the Hon"ble High Court of Delhi dated 31.7.98 in the CWP No. 3302/98.

(iv) GOI/Min of Def letter 18601/RD/Pers-4/4737/D(R&D) dated 23.11.98.

(v) Orders of the Hon"ble High Court of Delhi dated 8.1.99 in CWP No.3302/ 98 and 2263/98.

2. The Competent authority has approved the retirement of Brig (L/Maj Gen) CM Khanna (MR 1964) from service w.e.f. 11th Jan. 99 (AN)."

2. The learned Counsel for the petitioner Mr. R.M. Bagai submitted that the services of the petitioner had been very good and there was absolutely no blemish- (sic)54 and 57 his case was reviewed and all of a sudden petitioner was retired from service on 11.1.1999. According to the learned Counsel for the petitioner, he can be retired from service on attaining the age of 59 years. In the counter filed by the respondents, it is stated that after the proceedings were issued on 26.6.1998, on 23.11.1998 the Government of India (Ministry of defense) had issued proceedings providing the terms and conditions of service of armed forced officers permanently seconded to DRDO. The same reads as under:

"I am directed to refer to the Government of India, Ministry of Personnel, Public Grievances & Pensions (Deptt. of Personnel & Training) OM No. 25012/ 2/97= Estt. (A) dated 13th May, 98 regarding raising of age of retirement and to say that the President is pleased to amend the age of compulsory retirement/ review for continuation in service in respect of Armed Forces Officers permanently seconded to DRDO as laid down in paras 7 and 8 of Government of India, Ministry of defense OM No. 18601/RD Sel BD/7971/D(R&D) dated 23rd Nov., 79 is given below:

Reconstruct Para 7 as under :

"The age of compulsory retirement will be 59 years for all officers up to the rank of Maj Gen/Eqvt with reviews at 54 and 57 years to determine the suitability of an officer for continuation beyond that age. Officers considered not suitable for continuation in service, as a result of any of these reviews, will be retired on attaining the age of 54 years or 57 years as the case may be. The review will be carried out by the DRDO Selection Board well in advance of the officers attaining the age of 54 years and 57 years and criteria for the review will be laid down by the Selection Board. The officers also will have the reciprocal right to seek voluntary retirement on attaining the age of 54/57 years"

Reconstruct Para 8 as under :

"An officer holding the rank of Lt General/Eqvt will retire on attaining the age of 60 years or on completion of 4 years tenure as Substantive Lt General, whichever is earlier.

2. These orders will be effective from the date of issue. Cases of officers due for review be assessed for continuation beyond 54/57 years at the earliest Cases of officers already decided will not be re-opened.

3. This issues with the concurrence of the Ministry of defense (Finance) vide their

UO No. 1923-A/IF (R&D) dated 23.11.98."

According to the respondents in the counter as per the above proceedings the case of the petitioner was considered and it was decided not to extend his services and, Therefore, the order was passed on 11.1.1999. Its is stated in paragraph 6 of the counter:

"That in reply to paras 5 and 6 it is submitted that Department of Personnel and Training Office Memorandum No. 25012/2/97-Estt(A) dated 13.5.98 referred to by the petitioner extending the date of retirement from 58 to 60 years is not applicable to the petitioner who is a permanently seconded Army Officer in DRDO who is governed by separate terms and conditions of service set out in order dated 23.11.79 as amended from time to time. It is submitted that in respect of Notification dated 13.5.98 respondent DRDO had issued order dated 23,11.98 and as per that order, retirement age of the service officers permanently seconded to defense Research & Development Organisation had been enhanced by 2 years subject to reviews at the age of 54 and 57 years by a duly constituted Selection Board to assess the officers for continuance in service beyond the above said age.

It is submitted that the petitioner's case was reviewed in compliance with the above said order dated 23,11.98 on 24,11.98 and 27.11.98 Along with other officers; and after review by the Selection Board, petitioner was retired on 11.1.99. The petitioner had only a right of being considered. Accordingly he was considered and was not found fit. This decision is not ordinarily questionable in writ jurisdiction. The High Court under Article 226 of the Constitution of India does not exercise any appellate jurisdiction against the recommendations of a duly constituted Selection Board."

3. Nothing is mentioned in the counter mentioning what are the criteria adopted by the Selection Board in reviewing the case of the petitioner and other officers similarly situated. It is also not stated what were the criteria adopted when the case of the petitioner was considered and as to how in the light of the decisions taken earlier by the Selection Board the Selection Board now could adopt any different criterion for determining the suitability. The learned counsel for the respondents Mr. Rakesh Tikku produced the records and one tabular statement was given and submitted that the Selection Board had continued the services of the officers who had secured an average of 80%. The tabular statement shows die analysis of the ACRS. It is as under:

S. No.	IC No.	Rank & Name	1993	1994	1995	1996	1997	Average Grading
--------	--------	-------------	------	------	------	------	------	-----------------

1.	MR-1964	Brig (L/Maj Gen)	80%	* 78%	73%	77%	75%	77%
----	---------	------------------	-----	-------	-----	-----	-----	-----

CM Khanna, AMC 84%#

2.	IC-14362	Maj Gen	90%	90%	VG	VG	No output	-
----	----------	---------	-----	-----	----	----	-----------	---

KC Agarwal, Engrs

3. IC-14874 Maj Gen 80% 80% 80.5% 85% VG

A MehTa, EME

4. IC-18364 Brig 76% 80% 85% 80% 85% 81.2%

KV Malhotra, Arty

5. 8232 Air Cmde 87% 86% 80% 82% 83% 83.6%

BS Sihota, AE(M)

6. IC-16461 Maj Gen 87% \$ 87% 85% 82% & Excellent

VN Krande, EME 82% @ 84% +

* 4/93 to 12/93 \$ 1/93 to 4/93

1/93 to 3/93 @ 5/93 to 10/93

& 1/96 to 25/6/96

+ 26/6/96 to 12/96

4. In the counter nothing has been stated by the respondents as mentioned above. While reviewing the case of the petitioner the respondents are bound to see the suitability on objective considerations in the light of Article 16 of the Constitution of India. The respondents had not considered the case of the petitioner in the light of the constitutional mandate. It was not the question for selecting a personnel for a particular post out of the candidates available. Here was a case of the suitability of the person to continue who had been found very much fit twice by the Selection Board.

5. The petitioner has been put on the average of 77% and that is not an average which could be ignored by the respondents. In my view, the respondents had not acted as persons properly instructed in law would act.

6. The learned Counsel for the petitioner Mr. Bagai relied upon the judgment of the Supreme Court reported in U.P. Jal Nigam and others Vs. Prabhat Chandra Jain and others, submitted that the respondents had by taking the view that the petitioner is not fit to continue down graded his position and no opportunity was given to the petitioner to explain his position. According to the learned Counsel Mr. Bagai the view taken by the Selection Board would amount to an adverse entry against the petitioner. He relied upon para 3 of the judgment. The same is as under:

"We need to explain these observations of the High Court. The Nigam has rules, whereunder an adverse entry is required to be communicated to the employee concerned, but not downgrading of an entry. It has been urged on behalf of the Nigam that when the nature of the entry does not reflect any adverseness that is not required to be communicated. As we view if the extreme illustration given by the High Court may reflect an adverse element compulsorily communicable, but

if the graded entry is of going a step down, like falling from "Very good" to "good" that may not ordinarily be an adverse entry since both are a positive grading. All what is required by the Authority recording confidential in the situation is to record reasons for such down grading on the personal file of the officer concerned, and inform him of the change in the form of an advice. If the variation warranted be not permissible, then the very purpose of writing annual confidential reports would not be frustrated. Having achieved an optimum level the employee on his part may slacken in his work, relaxing secure by his one time achievement. This would be an undesirable situation. All the same testing of adverseness must, in all events, be not reflected in such variations, as otherwise they shall be communicated as such. It may be emphasised that even a positive confidential entry in a given case can perilously be adverse and to say that an adverse entry should always be qualitatively damaging may not be true. In the instant case we have seen the service record of the first respondent. No reason for the change is mentioned. The down grading is reflected by comparison. This cannot sustain. Having explained in this manner the case of the first respondent and the system that should prevail in the Jal Nigam, we do not find any difficulty in accepting the ultimate result arrived at by the High Court."

7. Mr. Rakesh Tikku, the learned Counsel for the respondents, submitted that writing ACR with reference to an officer while in service and determining the suitability of an officer for continuing as per the rules is different and there is no adverse entry against the petitioner and, Therefore, the principle laid down by the Supreme Court in the above case would not apply.

8. In my view, the respondents had acted contrary to and had infringed the Fundamental Rights of the petitioner who had served the department for 36 years with good record of service. The view of the Selection Board would amount to down grading the petitioner and when no reasons have been given in the counter affidavit and the records produced do not show consideration of the case of the petitioner in the light of the Fundamental Rights of the petitioner, the petitioner in law is entitled to continue until he attains the age of superannuation, as extended by the Government of India.

9. Accordingly, the order dated 11.1.1999 stands quashed. The respondents shall permit the petitioner to continue in service and appropriate order shall be passed by the respondents in this case on or before 31.3.1999. The writ petition stands allowed. There shall be no order as to costs.