
(1991) 10 AHC CK 0015

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 6228 of 1985

Major A.S. Grewal

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 25-10-1991

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (1991) 2 AWC 276

Hon'ble Judges : S.R. Singh, J

Bench : Single Bench

Advocate : Sushil Harkauli, for the Appellant;

Final Decision : Dismissed

Judgement

S.R. Singh, J.—By means of this petition under Article 226 of the Constitution of India, the Petitioner has prayed for a writ of mandamus commanding the Respondents to reconsider him for promotion to the rank of Lt. Colonel treating him as a fresh case for promotion ignoring the earlier rejections by the Selection Boards.

2. The facts necessary to highlight the controversy involved in the present case are these. The Petitioner was commissioned into the Army on 17-12-1961. He was promoted to the regular rank of Major in the year 1971. He was considered for further promotion to the rank of Lt. Colonel in September 1976, April 1978 and February 1980 but each time he failed to get promotion, it is alleged, on the ground of certain remarks in his Annual Confidential Report pertaining to the year 1973-74. Representation against the said adverse entry in his Annual Confidential Report 1973-74 was however, allowed on 25-8-1982 and therefore due to change in over-all record of service occurring on account of expunction of the adverse entry pertaining to the year 1973-74 in his Annual Confidential Report, he was granted opportunities by way of special review, the first of which to a place in December 1982, the second in March 1983 and the third in October 1984, but again he came a cropper in order to get promotion to the rank of Lt.

Colonel. Aggrieved, he has come up to this Court under Article 226 of the Constitution seeking the reliefs stated supra.

3. I have heard Sri Ashok Bhusan, learned Counsel appearing for the Petitioner and also Sri Vinod Kumar Singh, Learned Senior Standing Counsel appearing for Union of India-Respondent.

4. Learned Senior Standing Counsel for Union of India has raised a preliminary objection as to the maintainability of the writ petition on the ground that a similar writ petition filed by the Petitioner in Delhi High Court on 16-5-1984, was dismissed on 18-12-1984. His contention further is that the Petitioner was finally rejected for promotion by the Special Review Board in October 1984 and his writ petition was dismissed by the Delhi High Court in December 1984, and therefore, he ought to have prayed for the reliefs sought in the instant petition in the writ petition, which he had filed in the Delhi High Court and since he did not do so, the present writ petition is barred by the principles of constructive resjudicata To meet this objection, the learned Counsel for the Petitioner tiled a supplementary affidavit annexing thereto a copy of the writ petition filed in the Delhi High Court, a perusal of which show the following relief were prayed for by the Petitioner in the said writ petition:

(a) Issue a writ of certiorari and/or any other appropriate writ, order, or direction quashing/setting aside the impugned Annual Confidential Report for the year 1973-74 initiated on the Petitioner by the Initiating Officer Lt. Col (Brig) B.S. Dagar VSM (Respondent No. 4) and consequently quash the Military Secretary's Branch, Army HQs Respondent No. 3 letters not approving the Petitioner for selection to the rank of Lt. Col and above.

(b) Issue a writ of Mandamus and/or any other appropriate writ, direction or order directing the Respondents to forthwith include the name of the Petitioner in the next Selection Board at MS Branch, Army Head quarter, for promotion to the rank of Lt. Col. giving him the usual three chances i.e. one fresh Selection Board and two Review Selection Boards and to grant him his seniority as if he was selected for promotion to the rank of Lt. Col in the fresh selection board which took place for him in September 1976 or in the Review Selection Boards which took place in the years 1976-77 and 1977-78 as the case may be.

(c) To grant any such other further relief that this Hon''ble Court may deem fit and proper;

and

(d) the cost of the petition be awarded to the Petitioner.

It is evident that the principal relief sought by the Petitioner in the writ petition filed before the Delhi High Court was for a writ of certiorari quashing the impugned Annual Confidential Report for the year 1973-74. Relief (b) sought in the said writ petition was for a mandamus directing the Respondent to include the Petitioner's name in the next Selection Board of MS Branch Army

Headquarter for promotion to the rank of Lt. Col giving him the usual three chances. The facts stated hereinbefore reveal that the adverse remarks in 1973 ACR 74 stood expunged on 25-8-1982 and the Petitioner was granted three special review. The relief (b) sought in the writ petition filed before the Delhi High Court is identical to the Relief (i) sought in the present petition which is quoted below for ready reference:

to issue a suitable writ, order or direction in the nature of mandamus directing the Respondents to reconsider the Petitioner for promotion to the rank of Lt. Col treating him as a fresh case for promotion in accordance with the guidelines laid down for the said promotion ignoring the earlier rejection of the Petitioner.

It thus, transpires that the reliefs sought by means of the writ petition filed by the Petitioner in Delhi High Court though not verbatim and literatim the same, were wide enough to include the reliefs sought/claimed in the present petition. The adverse remarks made in the Annual Confidential Report 1973-74 were expunged by order dated 25-8-1982 and the writ petition was filed in the Delhi High Court on 16-5-1984, it remains inexplicable as to why a relief for quashing the remarks in the Annual Confidential Report 1973-74 was made in the writ petition tiled before the Delhi High Court. However, dismissal of the writ petition by the Delhi High Court implies that the Petitioner's claim for being considered as a fresh case for promotion, was not accepted by the Delhi High Court. Similar grounds taken in the present writ petition are therefore not tenable in law, in as much as the Petitioner ought to have amended his petition filed in the Delhi High Court suitably so as to include therein the relief sought in the present petition. I therefore, find substance in the preliminary objection raised on behalf of the Respondent in the present petition. However I would like to deal with the point raised on merits as well.

5. The learned Counsel for the Petitioner has contended before me that after the expunction of the adverse remarks from his Annual Confidential Report 1973-74, the Petitioner ought to have been treated as a fresh case for promotion and not merely a case for review and further that non-consideration of Annual Confidential Report for the years subsequent to the year 1978-79 upto the period his case was being considered by the Special Review Board, has vitiated the decision of the Special Review Board refusing to promote the Petitioner to the rank of Lt. Col. The rival contention made before me by the learned Counsel for the Union of India, is that since the Petitioner was given a special review due to change in his over-all record of service on account of expunction of the adverse remarks from the Annual Confidential Report pertaining to the year 1973-74 he was not entitled to be taken as a fresh case for promotion and further that it being a case of review the Petitioner was not entitled to be considered for promotion in the light of Annual Confidential Reports pertaining to the years subsequent to the year 1978-79 upto the time when his matter was up before the Special Review Board on three occasions as stated hereinbefore.

6. In order to appreciate the controversy as one in the present case, a bird's eye

view of the relevant provisions governing promotion to the rank of Lt. Col, would be necessary. It is not disputed before me that all promotions to the rank of Lt. Col and above are made by selection carried out by convening of duly constituted Selection Board under the Authority of the Government and while assessing the officers suitability and fitness for promotion, his over-all record of service in general and his performance in the existing rank with particular reference to the command of troops, his potential for higher command, employability in various facets of army administration are the relevant factors to be kept in view by the Appropriate Selection Board. Army Instruction No. 30386/MS (X) Army HQs. Military Secretary's Branch 9th March 1965 annexed as Annexure CA 2 to the counter affidavit, lays down the manner of grading of the officers who come up for consideration for promotion before the Selection Boards. It provides that within each batch of officers selected for promotion to higher acting rank, substantive promotion to corresponding rank will be made in order of seniority in the particular selection grading ("A" or "B"), subject to the following conditions:

(a) Where officers graded fit for promotion cannot be promoted to acting rank strictly in order of seniority for administrative or Military reasons, the substantive seniority of the senior one, if promoted later, will be safeguard. The safeguarding will not extend beyond two years if the officer is in India and three years if he is in an overseas assignment.

(b) Where an officer is grade "D" (Defer), his substantive seniority will be protected only if he earns a selection grading ("A" or "B") in the next assessment.

(c) Where an officer is initially graded "R" (Unfit for promotion to the next Higher rank at present) and earns a selection grading ("A" or "B") subsequently, he will take substantive seniority after officers who were approved for promotion in the preceding batch.

According to the said Army instructions dated 9th March, 1965, grade "A" means fit for accelerated promotion to the next rank and is awarded only in exceptional cases, where an officer's performance and record has been outstanding. Grade "B" stands for promotion of an officer in his turn to the next higher rank while grade "D" means "Defer" consideration of the case till next assessment by the Board and is awarded for administrative and military reasons and equitable assessment by the current Selection Boards has not been possible. As a matter of fact, officers who do not have adequate report in a criteria appointment covering a minimum period of 20 months are graded "Defer" and their seniority is protected, if they are approved in any of the subsequent considerations on earning the requisite reports in criteria appointment. Grade "R" means Unit for promotion to the next higher rank at the present and the cases of the officers coming in such grade, for re-assessment after the next Annual Confidential Report after a special report, if the Selection Boards calls for one, Grade "U" means unfit for promotion to the next higher rank and is awarded where an officer continued to be graded "R" on assessments made on his next two Annual

Confidential Reports. The members of the Selection Boards base their assessment, as stated hereinbefore, on the over-all record of service of the officer, which includes his performances in various appointments particularly in criteria appointment, performance in "war", course results, potential for employability, disciplinary background, honors and awards and relative batch merit. According to paragraph 68 of the MS Branch Policy Compendium Army HQs 1986, an officer is given three normal considerations for promotion by selection to the next higher rank. These are: initial consideration, first review and final review. Initial consideration is given with all the reports upto the including the cut; off year on record. Cut off year refers to the reporting year of the last report which is taken into account by the Selection Board while considering an officer for promotion to the next higher rank. For each successive consideration i.e. First Review and Final Review, an additional report covering the complete or part of the next reporting year is a mandatory requirement. Officers not approved in the Final Review and finally superseded and become ineligible for any further consideration for promotion by Selection. However, according to paragraph 69, under certain circumstances, cases of officers for promotion may be reviewed under the direction of the competent authority wherein the definite grading awarded to them in any of the considerations may either be annulled or changed to "withdrawn" thus making them eligible for the grant of corresponding number of substitute considerations. Any such or other consideration, other than the three normal considerations, is known as a "Special Review, vide paragraph 70 of the Compendium" According to paragraph 71 of the Compendium special review may be granted for the following reasons:

- (a) "Change in overall record of service;
- (b) "Drop in Performance" after the officer has been approved for promotion by the Competent Authority;
- (c) For the regrant of acting rank of Lt. Col and Col relinquished on administrative or disciplinary grounds under the provisions of para 7 of Appendix "A" to SAI 1-8-74;
- (d) For physical promotion of officers in low medical classification (L/C) who have already been approved for promotion, such considerations are known as "Special Review (Medical).

According to paragraph 74 of the Compendium a change in over all record of service may occur due to any of the following reasons--

- (a) Expunction of remarks including figurative assessment in any of the reports which were considered by the Selection Board;
- (b) Setting aside or remission of punishments or censures which were operative at the time of screening of an officer's case;
- (c) Partial or complete setting aside of any report which were considered by the Selection Board;

(d) Availability of any new material related to the aspects in Para 73 above which, for some reasons, could not be present to the Selection Board during the consideration of an officer's case.

A conspectus of the above provisions would reveal that expunction of adverse remarks from the Annual Confidential Report 1973-74 resulted in a change in the overall record of service, which necessitated giving of three special review to the Petitioner for the purpose of assessing his suitability for promotion to the rank of Lt. Col. The first review took place in December 1982, the second in March 1983 and the third in October 1984 but the Petitioner could not earn promotion. The Petitioner's case therefore was one of special review and he cannot claim to be considered as afresh candidate. No Officer is entitled to be given more than three considerations for promotion to the higher rank except where due to change in over all record of service or other reasons specified in paragraph 71 quoted hereinbefore. Consideration by special review is not meant for consideration as a fresh candidate for that would be discriminatory and violative of Article 14 of the Constitution. The Special review Board had to consider the Annual Confidential Reports and the performance of the Officer upto the cut off year as is claimed in paragraph 68 of the Policy Compendium. Subsequent improvement and performance of an officer, is of no avail to him for the purposes of promotion to the higher rank for the reasons that an officer not approved in the final review is "finally superseded" and become ineligible for any further consideration or promotion by selection. Special review is not meant to cover the performance and improvement of an officer subsequent to his being found not fit for promotion in the final review. It is only meant to do justice to an officer due to change in overall record of service which may occur due to reasons specified in paragraph 74 of the Policy Compendium, for example, expunction of remarks including figurative assessment in any of the reports which were considered by the Selection Board. Accordingly in my considered view, the Petitioner was not entitled to either claim consideration as a fresh case due to expunction of the adverse remarks from Annual Confidential Report 1973-74 or to claim consideration of his Annual Confidential Reports and other improvements subsequent to the year 1978-79 upto which year his Annual Confidential Reports and performance were taken into account at the final review in February 1980 when the Petitioner was not approved for promotion. It may be pertinent to notice that Annual year begins from 1st of June every year and ends on 31st of May next year. Accordingly, when the Petitioner was considered in the final review in February 1980, Annual Confidential Reports upto 1978-79 alone were relevant, for 1978-79 was the last reporting year, in that the annual year beginning from 1st of June 1979 completed on 31st May 1980 but the Board had its meeting in February 1980 and therefore, the last reporting year was 1978-79. It is true that when the Petitioner was not approved for promotion in the final review i.e. in February 1980, the adverse remarks in the Annual Confidential Report 1973-75 were very much there and these were expunged only on 25-8-1982 entitling the Petitioner for special review which was given to him; first

in December 1982. And then in March 1983 and lastly in October 1984, but it being a case of special review, the special review Board had no jurisdiction to take into consideration the Annual Confidential Reports and other performance and improvements of the Petitioner subsequent to 1978-79. If the Petitioner's Annual Confidential Reports, performance and improvements subsequents to 1978-79 are taken into consideration, that would amount to giving him more than three considerations which would be discriminatory and violative of Article 14 of the Constitution.

7. Having regard to the above discussion, I find that the submissions advanced by the learned Counsel for the Petitioner are shorn of merits. No other points were pressed before me.

8. In the result, the petition fails and is dismissed. In the facts and circumstances of the case, the parties are directed to bear their own costs.