

(2009) 05 MAD CK 0014

In the Madras High Court

Case No : Writ Petition No. 15508 of 2008

Major General (Retd.) H.M. Singh

APPELLANT

Vs

Union of India (UOI) and Lt. General Satwan Singh Dahiya

RESPONDENT

Date of Decision : 05-05-2009

Acts Referred:

Army Act, 1950 — Section 16A(4), 27
Army Rules, 1954 — Rule 16(A), 16(A)(4), 16(A)(5)
Constitution of India, 1950 — Article 226

Citation : (2009) 05 MAD CK 0014

Hon'ble Judges : R. Banumathi, J

Bench : Single Bench

Advocate : R. Balasubramaniam, for the Appellant; M. Ravindran, for R1 and R2 for D. Sreenivasan, CGSC, for the Respondent

Final Decision : Dismissed

Judgement

R. Banumathi, J.—Petitioner seeks Writ of Certiorarified Mandamus to quash the order declining to promote the Petitioner to the rank of Lt. General and order retiring him from service and to consider promotion of the Petitioner to the rank of Lt. General.

2. Brief facts which led to the filing of the Writ Petition are as follows:

(i) Defence Research and Development Organisation [DRDO] is a Scientific Organisation set up under the Ministry of Defence. DRDO was established to design and develop Military hardware for the country keeping abreast of the latest developments and advances in the field of Defence Sciences.

(ii) The cadre of Officers engaged in Research and Development comprises mainly of civilian Scientists recruited from the open market. Some of the service Officers have been inducted into the organisation on permanent basis and such Officers are known as "Permanently Seconded Service Officers"[PSSO]. Petitioner was one of such PSSO and he was permanently inducted into DRDO w.e.f.

25.5.1983 in the rank of Major. The terms and conditions of the Service of PSSO are governed by Government of India, Ministry of Defence OM No. Pers/18601/RD Sel Bd/7971/D(R&D) dated 23.11.1979.

(iii) As per the said OM No. Pers/18601/RD Sel Bd/7971/D(R&D) dated 23.11.1979, retirement age of all PSSOs up to the rank of Major General is 59 years subject to the reviews at the age of 54 and 57 years. Officer holding the rank of Lt. General retires on attaining the age of 60 years or on completion of 4 years tenure as substantive Lt. General whichever is earlier.

(iv) Petitioner had attained the age of superannuation on 29.02.2008. Since the proposal for his promotion to the rank of Lt. General was under consideration, Ministry of Defence approved an initial extension of service by 3 months (dated 29.02.2008) followed by another extension by one month (30.05.2008). Appointments Committee of the Cabinet (ACC) did not approve promotion of the Petitioner to the rank of Lt. General Following non-approval of proposal for promotion, impugned order No. DOP/04/48006/P/01/Rtmt dated 03.6.2008 was issued which is challenged in this Writ Petition.

3. Union of India filed counter stating that on 29.2.2008 Petitioner already retired as Major General and that while he was in extension, promotion was not possible. According to UOI, as per policy of Government appointments against such posts can be made only after the recommendations of the Selection Board are approved. Further contention of Union of India is that ACC has not approved promotion of the Petitioner and the same cannot be challenged.

4. Third Respondent who has been appointed as Lt. General has filed counter stating that on comparative assessment of the total Profile, his service records in terms of relative merit and qualifications is better than that of Writ Petitioner and therefore, he was rightly promoted as Lt. General and the Writ Petition is liable to be dismissed.

5. Challenging the impugned order, Mr. R. Balasubramaniam, learned Counsel for the Petitioner inter alia raised the following contentions:

Consideration for promotion is a fundamental right and considering Petitioner's case after delay of more than two years and holding retirement on the ground for rejection is not a fair consideration.

Even as per own admission of DRDO in the counter-affidavit [Para 10], vacancy was available from 01.01.2007 and even then for next 14 months no DPC was held and Respondents cannot take advantage of their own wrong and had DPC held in time, question of grant of extension would not have arisen and Petitioner would have been promoted in time before 28.2.2008.

6. Mr. M. Ravindran, learned Addl. Solicitor General has submitted that extension was granted to Petitioner not on the grounds of exigency but for ensuring that the procedure relating to approval of Competent Authority is completed in an objective manner. Learned Addl. Solicitor General further submitted that by

extension of service no right accrued to the Petitioner. Submitting that Department has got nothing personal against the Petitioner. The learned Addl. Solicitor General contended that ACC being a high powered committee had given valid reasons to differ with recommendations of DPC and under Article 226 of Constitution of India exercising judicial review the same cannot be interfered with.

7. Mr. Vijay Narayan, learned Senior Counsel for the 3rd Respondent submitted that recommendations by Selection Board for promoting the Petitioner was only recommendatory in nature and will not confer any right upon the Petitioner. Learned Senior Counsel further submitted that 3rd Respondent is better qualified and fulfills all eligible conditions for being promoted as Lt. General and the 3rd Respondent was rightly promoted.

8. In so far as the date of superannuation is concerned, Petitioner is governed by Army Rule 16 (A) - Paragraph 1 (a) which reads as under:

Rule 16 (A) : Retirement of Officers - (1) Officers shall be retired from service under the orders of the Central Government, or the authorities specified in Sub-rule (2), with effect from the afternoon of the last date of the month in which they -

(a) attain the age specified in Sub-rule (5), or

(3) The orders shall specify the date from which retirement shall be affected and subject to the provision of sub-rule 4 the officer shall be relieved of his duty on that date.

(4) An officer who has attained the age of retirement or has become due for such retirement on completion of his tenure, may be retained in the service for a further period by the Central Government if the exigencies of service so require.

9. Sub-rule 5 (f) (i) deals with age of retirement for the Officers which reads as under:

5 (f) (i) - permanently seconded to Defence Research and Development Organisation:

upto and including the rank of Major General or equivalent - 59 years Lieutenant General - 60 years (as provided vide Govt. of India, Ministry of Defence OM of 23 November 1998)

10. Retirement age of PSSOs upto the rank of Major General is 59 years subject to reviews at the age of 54 and 57 years. Petitioner's date of birth is 02.02.1949 and he attained age of 59 years in February 2008 and was therefore due to retire from service on 29.02.2008. ACC is the Competent Authority to approve promotion as Lt. General Meeting of Selection Board was held on 27.2.2008 i.e. two days before the date of retirement and recommendations were forwarded to ACC for approval. Pending decision of ACC, (by proceeding dated 29.02.2008) Petitioner was granted extension of service of 3 months or till requisite approval

was received whichever is earlier. As the decision of ACC was not received till 31.5.2008,(by proceeding dated 30.05.2008) Petitioner's service was further extended for a period of one month from 01.6.2008 on the same terms and conditions.

11. Grievance of the Petitioner is that even as per own admission in the counter-affidavit (Para 10), vacancy was available from 01.01.2007 and even then for the next 14 months, no DPC was held. Learned Counsel for the Petitioner would submit that had DPC been held in time, question of grant of extension would not have arisen and Petitioner would have been promoted in time before 28.2.2008. Placing reliance upon 2008 LAB IC 2577 [Jawahar Santha Kumar v. UOI and Ors.], learned Counsel for the Petitioner submitted that Respondents cannot take advantage of their own wrong.

12. Promotion to Lt. General is being considered by High Powered Committee. Appointments Committee of Cabinet [ACC] is a high power body comprising the Prime Minister, Home Minister, Minister of Dept. of Personnel and the Defence Minister. ACC has the power to accept, reject or vary the recommendation of Selection Board.

13. As such meeting of Selection Board was held on 22.7.2008 to recommend the name of suitable Officer for appointment as Lt. General from amongst the eligible rank of Major General. Selection Board considered Petitioner's name and was recommended for promotion. Appointments against the post requires approval of the ACC and the same was forwarded for approval.

14. Learned Counsel for the Petitioner contended that post was lying vacant unfilled from 01.01.2006 and there was delay of two years and two months from 01.01.2006 till 27.2.2008 on which date meeting of DPC was held.

15. Learned Counsel for the Petitioner mainly contended that consideration for promotion is a fundamental right and such consideration has to be fair, just and proper consideration. It was further argued that considering Petitioner's name two days prior to his retirement after a delay of more than two years cannot be a fair consideration and timely consideration is also a facet of fundamental right. In support of his contention, learned Counsel for the Petitioner placed reliance upon Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, ; Management of M.S. Nally Bharat Engineering Co. Ltd. Vs. State of Bihar and Others, and Lattu Mahto and Another Vs. The State of Bihar (Now Jharkhand), .

16. Learned Counsel for the Petitioner nextly contended that Petitioner was no way responsible for the delay in holding DPC and had DPC been held in time, question of grant of extension would not have arisen and Petitioner would have been promoted in time before 28.2.2008. As pointed out earlier, taking into account the nature of projects in hand, it was decided to fill up the post of Lt. General requisitioning the services of an Air Force Officer.

17. There is only one post of Lt. General authorised to DRDO. It became vacant from 01.01.2007. At that time, number of projects were in offing in DRDO - like Design Development and production of LCR, Kaveri Engine, Development of Earlier Warning System and number of projects related to upgrading of Aeronautics and E.W. system. Taking into account the nature of projects in hand and to get proper guidance, conscious decision was taken to fill up the post of Lt. General requisitioning the services of an Air Force Officer of the rank of Lt. General/equivalent to meet the organisational requirement in accordance with the power vested in him. However, on re-consideration, it was decided to fill up the post of Lt. General by promoting permanently seconded service officer to provide adequate career opportunities to them.

18. Taking into account the nature of projects in hand in deliberating whether to get Air Force Officer of the rank of Lt. General, it took some time for 2nd Respondent in convening meeting of Selection Board. As such meeting of Selection Board was held on 22.7.2008 to recommend the name of suitable Officer for appointment as Lt. General from amongst the eligible rank of Major General and Petitioner's name was recommended. Appointments against the post requires approval of ACC and the same was forwarded. As such Respondents cannot be faulted for not holding the meeting of Selection Board in 2007.

19. It is not as if the post of Lt. General was vacant from 01.01.2006 as alleged by the Petitioner. Post of Lt. General was vacated by retirement of Lt. General T.Ravindranath, was filled up by posting Air Vice Marshal R. Yadav, on tenure basis w.e.f. 29.12.2005. Air Vice Marshal R. Yadav retired from service w.e.f. 31.12.2006. Vacancy of Lt. General therefore became available only w.e.f. 01.01.2007. As pointed out earlier, taking into account the nature of projects in hand, it was decided by the 2nd Respondent to fill up this post by requisitioning the service of Air Force Officer of the rank Lt. General/equivalent to meet the organisational requirement in accordance with the power vested in DRDO. Therefore, it cannot be contended that non-holding of meeting of Selection Board was deliberate or intentional.

20. Learned Counsel for the Petitioner contended that Respondents own policy instructions given in Letters dated 10.4.1989, 25.1.1990, 13.10.1998, 01.2.1999 and 14.12.2000 mandate holding of timely DPC and Officers not to suffer due to approaching retirement and lapse. It was further argued that Minutes of Defence File, Cabinet Secretary File Noting would support the point.

21. Placing reliance upon Union of India and others Vs. N.R. Banerjee and others, , it was contended that it is mandatory duty to prepare selection list so as to afford equal opportunity to the promotee officers to reach higher positions of the service. Referring to the decision Syed Khalid Rizvi and Others and Ramesh Prasad Singh and Others Vs. Union of India (UOI) and Others, , in the Supreme Court held as under:

10. ...In Syed Khalid Rizvi v. Union of India the mandatory duty of the preparation of the select list of the officers for promotion to the All India Services has been indicated in para 35 of the judgment at p.605 thus:

We, therefore, hold that preparation of the select list every year is mandatory. It would subserve the object of the Act and the rules and afford an equal opportunity to the promotee officers to reach higher echelons of the service. The dereliction of the statutory duty must satisfactorily be accounted for by the State Government concerned and this Court takes serious note of wanton infraction.

11. It would thus be seen that the claims of the candidates eligible have to be considered for promotion objectively and dispassionately, with a sense of achieving manifold purpose - (1) affording an opportunity to the incumbent to improve excellence, honesty, integrity, devotion to public duty; (2) inculcating discipline in service; (3) afford opportunity to every eligible officer within the zone of consideration for promotion to a higher post or office; and (4) ensuring that the Committee regularly meets and considers their claim objectively, impartially with a high sense of responsibility in accordance with the procedure and finalisation of the list in advance so as to fill up vacancies arising in the year from the approved panel without any undue delay. They are salutary principles and form the purpose and the policy behind the above rules and the Government should follow them.

22. Of course promotion is a normal incidence of service. As held by the Supreme Court in Food Corporation of India and Others Vs. Parashotam Das Bansal and Others, employee of State has no fundamental right of promotion; but has a right to be considered therefor.

23. By Proceedings of the 2nd Respondent in DOP/04/48006/P/01/RTMT(i) dated 30.4.2007, Petitioner was informed that he is due to retire from service w.e.f. 29.02.2008 and the same was served upon the Petitioner. On being informed about his retirement on 29.02.2008, Petitioner could have taken appropriate legal steps to provide an opportunity of advancement. But the Petitioner remained content by sending representation to the Government.

24. If the Petitioner was aggrieved by non-holding of Selection Board as provided u/s 27 of Army Act, Petitioner could have filed statutory complaint. Having not taken any legal steps, it is too late to contend that holding of Selection Board was deliberately delayed. It cannot be contended that non-holding of Selection Board meeting was deliberate or intentional. In the circumstances, it cannot be said that Selection Board had deliberately delayed the consideration.

25. As pointed out earlier, by Proceedings dated 30.4.2007, Petitioner was informed that he is due to retire on 29.2.2008. Thereafter, Petitioner had given his representation. DPC meeting was held on 27.2.2008 and Petitioner's name was recommended. Pending approval of ACC, Petitioner was granted extension of service.

26. Learned Counsel for the Petitioner contended that having granted extension of service to the Petitioner twice - one on 29.2.2008 and second on 30.5.2008, Respondents are estopped from holding extension against the Petitioner to deny promotion. It was further contended that having given extension to Petitioner, ACC was not right in not approving the recommendation of Selection Board.

27. It was further argued that reasons for denial of promotion by ACC is contrary to his own stand in the past cases. It was further argued that the discretionary power of Government has not been properly exercised, but by considerations which could not have been lawfully taken into account. Learned Counsel for the Petitioner further argued that Petitioner was illegally and arbitrarily retired from service without implementing the recommendations of Selection Board.

28. Petitioner's name was recommended by Selection Board and the same was only recommendatory and no finality was attached to the assessment of Selection Board that recommendation of Selection Board shall be a recommendatory in nature as stipulated in Paragraph 108 of Regulation of Army on "Constitution and Duties of the Selection Board" which reads as follows:

Para 108 : Constitution and Duties of Selection Boards:

(a) ...

(b) ...

(c) ...

(d) The assessment of the Selection Board shall be recommendatory in nature and not binding until approved by the competent authority. ...[in this case the Appointment Committee of Cabinet (ACC)].

(e) The Central Government ...have the inherent power to modify, review, approve with variation or repeal recommendations of the Selection Boards.

29. As pointed out earlier, ACC is extremely high power body comprising Prime Minister, Home Minister, Minister of Dept. of Personnel and the Defence Minister and since the power of making appointments to the higher echelons of the Armed Forces is vested in this body, there is presumption that the power has been exercised properly and with utmost care and caution. Selection Board being the competent authority, it has the discretion and inherent power to accept, reject or vary the recommendation of the Selection Board.

30. Observing that selection made by Public Service Commission was only recommendatory in nature in Dr. H. Mukherjee Vs. Union of India and Others, , the Supreme Court held as under:

8. It is obvious from what we have stated above that this Court clearly observed in Jatinder Kumar case¹ that the selection made by the Commission was only recommendatory in nature and it was open to the Government to either accept the recommendation or to depart therefrom....

9. ...It seems well settled that the function of the Public Service Commission being advisory, the Government may for valid reasons to be recorded on the file, disapprove of the advice or recommendation tendered by the Commission, which decision can, if at all, be tested on the limited ground of it being thoroughly arbitrary, mala fide or capricious.

31. Reiterating that the recommendations of DPC are advisory in nature, in Union of India, etc. etc. Vs. N.P. Dhamania, etc. etc., , the Supreme Court held as follows:

18. It will be clear from the above that the recommendations of the DPC are advisory in nature. Such recommendations are not binding on the appointing authority. It is open to the appointing authority to differ from the recommendations in public interest. That is beyond doubt.

20. If the file had contained reasons something could be said in favour of the appellant. But, that is not the case here. Then the question would be whether the reasons recorded are required to be communicated to the officer concerned. Our answer is in the negative. There is no need to communicate those reasons. When challenged it is always open to the authority concerned to produce the necessary records before the court.

32. Power of judicial review under Article 226 of Constitution of India cannot be treated like an appeal. Judicial review is directed not against the decision but is confined to examination of decision making process. Assuming that the decision taken by ACC is justiciable, than it can be challenged only on the ground that it smacks of mala fides or arbitrariness. The facts do not reveal that the decision taken by ACC was either mala fide or arbitrary.

33. Though, this Court would not go into decision at all, having regard to the arguments advanced, Files were produced before the Court for perusal and I have carefully gone through the File and Note File. Para [4] of Note File reads as under:

4. In terms of the provisions of Section 16A(4) of the Army Act an officer who has attained the age of retirement or has become due for such retirement on completion of his tenure, may be retained in the service for a further period by the Central Government, if the exigencies of the service so require.

34. It is seen from Para [5] of the Note File that when proposal for grant of extension of Petitioner was put up before Raksha Mantri, no such exigency has been cited. We may usefully refer to the Note File prepared by the Cabinet Secretary put up before ACC reads as under:

5. It is evident from the above provisions that for grant of extension in service, the requirement to be fulfilled, primarily, is the exigencies of service. In the note which was put up to the Raksha Mantri soliciting approval to the proposal for grant of extension, no such exigency has been cited. The only issue that was mentioned in support of the proposal for extension was that the officer had been

recommended for promotion to the rank of Lieutenant General. This, in the background of the provisions of the Act mentioned above, is not sufficient ground for extension.

35. Note Filing also indicates that orders issued by the Dept. of Personnel and Training lay down that no promotion could be granted during the period of extension. Para [8] of Note File reads as follows:

8. The orders issued by the Department of Personnel and Training lay down that while extensions could be granted in exceptional circumstances, there can be no promotion during the period of such extension. These order apply to the civilian establishment. The instructions which apply to the Defence forces permit extension in service only if the exigencies so demand. DRDO is mainly civilian, and the Rules, as mentioned above, do not permit promotion on extension.

36. It is seen from the Note File that "instances of officers" in the Armed Forces retiring just before the vacancies coming their way and being denied empanelment are not uncommon. Note File further indicates that extensions motivated by reasons of promotion being close at hand can have repercussions. It is pertinent to note that even the Note File indicates that "instances of officers" in the Armed Forces retiring without empanelment are not uncommon. In the Note File, Para [9] is relevant in this regard. Para [9] reads as follows:

9. ...Instances of officers in the Armed Forces retiring just before the vacancies coming their way and being denied empanelment are not uncommon. Extensions motivated by reasons of promotion being close at hand can have repercussions.

In fact, Petitioner himself has pointed out that his predecessor has retired without being considered for promotion. Therefore, it cannot be contended that only Petitioner had been singled out and denied promotion.

37. From the Note Filing, it is seen that the other instances of grant of extension of service and their promotions were brought to the notice of ACC. Note Filing made clear distinction of those cases with that of the Petitioner. We may usefully refer to Para [6] of Note Filing which reads as under:

6. The Chief Controller Research & Development with whom the matter was discussed has provided copies of orders issued in the years 1995 and 1996 when officers of the rank of Major General were granted extensions. Extensions in service were granted with the approval of the Integrated Finance Division in the Ministry of Defence though approval of the finance angle is not strictly relevant to the grant of extensions. The other two instances cited are of Shri P.Venugopalan, Outstanding Scientist in the DRDL Hyderabad who was granted extension pending a decision on the question of his regular extension under FR.56 as a Scientist; and of the post retirement appointment of Vice Admiral P C Bhasin on contract basis in the ATVP. These two cases are not relevant to the case of Maj Gen Singh, presently under consideration.

38. In fact Petitioner himself has pointed out one instance Major General BS

Malik who was due for superannuation and he was promoted to the rank of Lt. General while on extension. From the Note Filing produced, it is seen that in fact such instance of Major General BS Malik was also brought to the notice of ACC and a distinction was made. Promotion of Major General BS Malik quoted by the Petitioner belongs to regular army. Perhaps, Major General BS Malik was granted extension on the ground of exigency as contemplated u/s 16A(4) of Army Act and later promoted while on extension.

39. Case of Petitioner is clearly distinguishable from instance Major General BS Malik.

DRDO is mainly civilian, and Rules do not permit promotion on extension.

Petitioner is permanently seconded service officer to DRDO and therefore, there could be no comparison with Major General BS Malik who belonged to regular army.

Service of the Petitioner was extended not on the ground of exigency; but on the ground that Petitioner has been recommended for promotion and recommendation was under consideration of ACC.

40. When the Petitioner's extension of service was not on the ground of exigency, DRDO being mainly civilian, Rules do not permit promotion on extension. ACC's action in not granting approval to the recommendation made by Selection Board is in accordance with the Rules and the same cannot be assailed. Petitioner cannot contend that he has been discriminated in not granting promotion while on extension.

41. There is no substance in the contention that Petitioner having been extended his service, he ought to have been granted promotion. Extension of service does not give rise the legitimate expectation for promotion. The extensions in tenure were given to the Petitioner to ensure that procedure relating to approval of competent authority on the recommendation of Selection Board was completed in an objective manner by following prescribed process. On culmination of process, ACC is the competent authority came to the decision not to promote the Petitioner. As such there is no incoherence and arbitrariness in the decision warranting exercise of judicial review.

42. In his official capacity as Major General, Petitioner has been in occupation of Govt. Quarters N.S/10. Vikas Nagar, Avadi and Petitioner continued to be in occupation of the quarters. Had Petitioner been promoted as Lt. General, he would have continued in service till 29.02.2008 plus six months and would have been entitled to be in occupation of quarters in that capacity. Since, Petitioner was not promoted as Lt. General, his occupation of the house in the official capacity would have been over by 29.2.2007 plus allowable time six months. By the communication dated 30.1.2009, Petitioner was asked to pay Rs. 1,12,810/- towards damage rate, electricity charges and water charges etc. from September 2008.

43. As the Petitioner has been legitimately fighting out his cause, this Court is of the view that the damage rate for the period from 04.9.2008 may not be recovered. It is observed that rent, electricity charges and water charges may be collected from the Petitioner at the official rate payable by him in his official retiral capacity.

44. In the result, the Writ Petition is dismissed. No costs.

For the reasons stated in Para [42], the damage rate for the occupation of the quarters may not be collected from the Petitioner.

It is observed that Respondents shall collect only the official rate of rent, water charges and electricity charges from the Petitioner for the period from September 2008.