
(2000) 05 DEL CK 0063
In the Delhi High Court
Case No : CWP. No. 863 of 1983

Major Joginder Singh Gill

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 26-05-2000

Acts Referred:

Citation : (2000) 4 AD 698

Hon'ble Judges : A.K. Sikri, J

Bench : Single Bench

Advocate : Mr. J.N. Aggarwal, Major P.P. Singh and Mr. M.K. Jha, for the Appellant; Ms. Nandini Ramachandran, for the Respondent

Judgement

A.K. Sikri, J.—The petitioner is Ex-serviceman who retired from Army as Major. However, the grievance of the petitioner in this writ petition which was filed in May, 1983 just before his retirement is that Respondents 5 to 28 were wrongly given seniority above the petitioner and further that respondents 29 to 31 were promoted to the rank of Lt. Col. denying the same to the petitioner. He, accordingly, has claimed grant of seniority above these respondents as well as his promotion to the rank of Lt. Col. The controversy has the following factual background:

2. The petitioner joined Army as an "other rank" on 24.4.1950. He was granted Emergency Commission in 1962 as per Army Instruction 9/S of 1962 and thereafter underwent OTS Training for 6 months at Poona between April, 1963 to October, 1963. In 1965 Government of India had decided to grant Permanent Commission to Emergency Commissioned Officers vide A1 13/S of 1965. Para-11 of this Army instruction dealt with the seniority which was to be granted to such officers on grant of Permanent Commission to them and laid down that for purposes of seniority "Officers would be granted ante date equivalent to the Full Pay Commissioned service as an Emergency Commissioned Officer less the period by which the training undergone by these officers before the grant of Emergency Commission falls short of 2 years". Petitioner was granted Permanent

Commission on 1.5.1968 and as per Para-11 of Army Instruction 13/S/65 he was given seniority above respondents 5 to 31. On 15.3.1969 amendment to AI 13-S/65 was issued which was implemented retrospectively and because of this petitioner became junior to the respondents 5 to 31.

3. Thereafter Army Instruction 13/S/65 was again amended on 18.9.71 which had the same effect as amendment of 1969. But this amendment was kept in abeyance which decision was conveyed by Circular dated 2.8.80. However, thereafter Army Head Quarter conveyed decision on 25.3.82 on the question regarding seniority of Permanent Commissioned Officers and stated as under in Para-2 thereof:

"The validity of grant of antedate to non regular officers (ECOs/SSCOs) who have since been granted permanent Commission has been examined at Army Headquarters in its entirety. It has been decided that such officers who were granted non-regular commissions prior to October, 1974 and have obtained NCC "C" and "D" Certificates (Army Wing) will be eligible for grant of 6 and 12 months antedate seniority respectively, after initial adjustment of seniority as per Army Instructions 12/S/65 and 3/S/70".

4. The effect of this decision was that respondents 5 to 29 became senior to the petitioner. Petitioner, accordingly, submitted statutory complaint on 25.8.82 to the Government against the aforesaid decision and granting seniority to respondents 5 to 29 over the petitioner which was, however, rejected by the Government vide communication dated 10.2.83.

5. It may be mentioned at this stage that in August, 1981 turn of the petitioner and other commissioned officer in his batch for consideration for promotion to the rank of Lt.Col. came. However, the name of the petitioner was deferred due to non-receipt of command report. On 15.5.82 promotion of the petitioner to Lt.Col. was approved. By December, 1982, all the officers senior to the petitioner on the approved list were promoted. Thereafter, on 23.3.1983 respondents 29 to 31 were also given promotion. Petitioner felt aggrieved as according to him respondents 29 to 31 were junior to the petitioner and could not be promoted ignoring the petitioner. Therefore, he made representation dated 31.3.1983 to GOC, HQ, PH & HP Area, Ambala Cantt. However, no reply was received and on 12.4.1983 he made another detailed representation. When this representation also did not evoke any response and petitioner was retiring in June, 1983, he filed the present petition in May, 1983 claiming seniority as well as promotion to the post of Lt.Col.

Re: Seniority:

As is clear from the amendment to Army Instruction 13/S/1965 by amending Para 11 thereof, officers were granted an ante date equivalent to full pay commissioned service as an Emergency Commissioned Officers less the period by which the training undergone by these officers before the grant of Emergency Commission falls short of normal prescribed period of training for a particular

type of entry. Because of this, those who were the holder of C & D Certificates became entitled to count the period spent on aforesaid NCC Training. Since respondents 5 to 29 had undergone this Training, on counting this period, they became senior to the petitioner. This action of the respondents is challenged by the petitioner on the ground that conditions like seniority and promotion are conditions of service and, Therefore, cannot be amended/modified with retrospective effect. Moreover, Army Instruction 13/S of 1965 was administrative in nature and for this reason also it could not have been amended retrospectively. In 1965 when options were given as per Army Instruction 13/S of 1965, it was this Army Instruction which was enforced and it was on the basis of this Army Instruction that the petitioner was granted Permanent Commission on 1.5.1968 and seniority determined on this basis. Any amendment made after 1.5.1968 could not affect him. It was further submitted that such an action of the respondents was even otherwise arbitrary inasmuch as petitioner was granted Emergency Commission in 1962 and his 12/13 years service prior to that when he joined Army as an other rank was not given any consideration whereas on the other hand by this amendment in 1969 holders of C & D category Certificates of NCC were given the benefit. Therefore, the petitioner submitted that such a decision of the respondents was clearly arbitrary and in any case could not be applied retrospectively. The petitioner had acquired vested right in his seniority as on 1.5.1968 by treating the petitioner senior to respondents 5 to 29 which could not be taken away by making amendment in the Army Instruction retrospectively. The petitioner in support of his submissions relied upon the following judgments:

1. Vinod and Yadav and others Vs . State of Bihar and others .
2. The State of Punjab and others Vs. Kailash Nath 1989 (1) SLR 12.
3. Ex-Major N.C. Singhal Vs. Director General Armed Forces Medical Services, New Delhi and Another, .
4. K. Ravindranath Pai and another Vs. State of Karnataka and another, .
5. Jagdish Ram and Ors. Vs. State of Himachal Pradesh and Ors. 1971(1) SLR 457.
6. Shanker Lal Verma and others Vs. The Rajasthan State Electricity Board 1999(2)SLR 383.
7. Chairman, Railway Board and others Vs. C.R. Rangadhamaiah and others, .

On the other hand, Ms. Nandini Ramachandran, learned counsel appearing for the respondents submitted, in the first instance, that the petition filed by the petitioner was liable to be dismissed on the ground of laches and delays. It was her submission that Para-11 of Army Instruction 13/S/65 was amended on 15.3.69 as per which seniority of the officers was fixed and respondents 5 to 29 became senior to the petitioner. Petitioner filed the petition only in the year 1983 that is more than 14 years after the said amendment. It was submitted that once

the seniority was fixed on the basis of this amendment in the year 1969 and respondents 5 to 29 became senior to the petitioner, this position in the seniority prevailed thereafter for all these years and it was not open to the petitioner to seek unsettling of this seniority position by filing this petition after number of years. Another preliminary submission raised by the respondents was that in any case the prayer of the petitioner challenging amended Army Instruction dated 15.3.1969 had become infructuous because the said Instruction was no longer in force and was superseded by yet another amendment in the year 1971 and in any event even this challenge to amendment in the year 1971 was also liable to be dismissed on account of laches. On merits, it was submitted that on 15.3.69 an amendment was made to para 11 of AI 13/S/1965, the effect of which was that the period of ante date for the purposes of seniority and promotion was to be calculated by deducting from the full pay commissioned service, the period by which the training actually undergone fell short of the prescribed period of training. The effect of this was that in the case of the petitioner he was given an ante date of 1 and 1/2 years (2 years prescribed training period 6 months of training undergone) whereas in the case of respondents 5 to 31 (except 9) who were holders of NCC "C" Certificates for whom the prescribed period of training was 18 months, they were given an ante date of the one year. (18 months prescribed training period minus 6 months of training undergone). Similar was the case of respondent No. 9 who was an EX TA Officer possessing technical qualification. Thus after 15.3.1969 respondents No. 5 to 8 and 10 to 31 and respondent No. 9 became senior to the petitioner by virtue of their holding an NCC "C" Certificate and being an EX TA officer respectively. Subsequently on 25th March, 1982 it was decided to grant 6 and 12 months ante date seniority to NCC "C" and "D" certificate holders respectively, after initial adjustment of seniority as per AI 13/S/65 and 3/S/70. In March, 1982, the petitioner was considered for promotion to the rank of Lt. Col. by a Selection Board which approved his case for promotion and he was placed at S. No. 34 in the seniority panel of the Majors approved for promotion. However, for the following reasons he was not promoted: Promotions to the rank of Lt. Col. were made on the basis of seniority and the vacancies available. As such the petitioner could only be promoted upon the availability of a vacancy after the officer immediately senior to him on the seniority panel was promoted. Since the Major immediately senior to him on the seniority panel was promoted in May, 1983 earliest that the petitioner could be promoted was in May, 1983. However, in May, 1983 the petitioner had only two months of service left and as per the policy he could not be promoted unless he could serve for four months in the next higher rank. Furthermore it was felt that it would not be in the organizational interest that the petitioner was promoted, since if he was promoted, the same would be effective only once he had been relieved from his first appointment moved to the new station and assumed charge on promotion the whole procedure would have given him barely one month in the next rank. As such it was submitted that the petitioner was not given a promotion on account of the policy in force, in the absence of any vacancies earlier than May, 1983 and in the interests of the

organization the next unit to which the petitioner might have been posted to serve upon promotion".

6. In order to appreciate the nature of controversy involved in this case, let us first examine the provisions of Army Instructions 13/S/65 as per which seniority of the officers was to be fixed and the amendment made in para-11 of these instructions. Para-11 of A1 13/S/65 as existed prior to amendment reads as under:

11. "The previous full pay commissioned service as an Emergency Commissioned Officer will reckon for increments of pay and pension. For the purposes of seniority and promotion (both substantive and acting) Officers will be granted an antedate equivalent to the full pay commissioned service as an Emergency Commissioned Officer less the period by which the training undergone by these officers before the grant of Emergency commission falls short of two years. No credit will be given for any period of relegation at the OTS/IMA or periods of absence other than authorised leave in reckoning the period of training of Emergency Commissioned Officers. The actual period of antedate will be specified in each case by M.S. Branch in the orders regarding the grant of Permanent Commission to the officer.

ANTE DATE.

12. An ante date of 2 years for the purposes of seniority and promotion will be granted to those officers who possessed technical qualifications, prior to commissioning, as laid down in AI 126/51, after the seniority of an officer has been fixed under para 11 above".

7. Amended para-11, after its amendment on 15.3.69 reads as under:

"11. The previous full pay commissioned service as an Emergency Commissioned Officer will reckon for increments of pay and pension. For the purposes of seniority and promotion (both substantive and acting), officers will be granted an antedate equivalent to the full pay commissioned service as an Emergency Commissioned Officers less the period by which the training undergone by these officers before the grant of Emergency Commission falls short of normal prescribed period of training for a particular type of entry except that the above deduction in service will not apply vis-a-vis non-regular officers. No credit will be given for any period of relegation at the OTS/IMA or periods of absence other than authorised leave in reckoning the period of training of Emergency Commissioned Officers. The actual period of ante- date will be specified in each case by MS Branch in the orders regarding the grant of Permanent Commission to the Officer".

This Para which was again amended in 1971 after this amendment reads as under :

"The previous full pay commissioned service as an Emergency Commissioned Officer will reckon for increments of pay and pension. For the purposes of

seniority and promotion (both substantive and acting) officers will be granted an antedate equivalent to the full pay commissioned service as Emergency Commissioned Officer less the period of shortfall in their training to be arrived at by deducting the period of training prescribed for grant of Emergency Commission from that prescribed for a particular type of PC entry. The aforesaid deducted service will, however, be restored while determining their seniority vis-a-vis non regular officers. No credit will be given for any period of relegation at the OTS/IMA or periods of absence other than authorised leave in reckoning the period of training of Emergency Commissioned Officers. The actual period of antedate will be specified in each case by MS Branch in the orders regarding the grant of Permanent Commission to the officer.

The above amendment will have affect as if issued with Army Instruction 13/S/65".

8. As per unamended provisions, for the purpose of seniority and promotion, officers were to be granted an ante date equivalent to full pay commission service as an Emergency Commissioned Officer less the period by which the training undergone by these officers before the grant of Emergency Commission falls short of two years. After the amendment of 1969 the officers were to be granted an ante date equivalent to full pay commission service as an Emergency Commissioned Officer less the period by which the training undergone by these officers before the grant of Emergency Commission falls short of normal prescribed period of training for a particular type of entry. Thus the words "less the period by which the training undergone by these officers before the grant of Emergency Commission falls short of two years in the original Para-11 were substituted by the words "less the period by which the training undergone by these officers before grant of Emergency Commission falls short of normal prescribed period of training for a particular type of entry...". Therefore, in place of two years period, which was uniform in all cases, after the amendment, the normal prescribed period of training for a particular type of entry was to be taken into consideration.

9. At the time of granting permanent commission in the year 1965, in the case of the petitioner the prescribed training was two years and he had undergone only for six months. Therefore, ante date of one and half years (two years minus six months) was given to him. Thus out of the two total services rendered as Emergency Commissioned Officer, the period was deducted by one and half years. Respondents 5 to 31 had also undergone training for six months and, Therefore, as per original provisions contained in Army Instructions during service rendered by them as Emergency Commissioned Officer was also deducted by one and half years for the purpose of counting their seniority. In this manner petitioner ranked senior than respondents 5 to 31 who were holders of NCC "C" Certificate. However, by the amendment of 1969 instead of two years period, normal prescribed period of training for a particular type of entry was to be taken into consideration. Position in respect of the petitioner remained the

same as prescribed period of training was even otherwise two years. However, in case of respondents 5 to 31 who were holders of NCC "C" certificate, prescribed period of training was 18 months and accordingly they were given an ante date of one year (18 months prescribed period minus six months) and this deduction of one year after the amendment instead of one and half years before the amendment gave respondents benefit of six months for the purpose of seniority and promotion and because of this period, these respondents 5 to 31 became senior to the petitioner.

10. The amendment in 1971 did not make any change in this position after 1969 amendment. However, in 1971 amendment, only addition which is made is that the deducted service would be restored while determining the seniority of these persons vis-a-vis normal regular officers. That does not change the position of seniority insofar as petitioner and respondents 5 to 31 in this writ petition are concerned.

11. The aforesaid narration would show that there was one provision of seniority, introduced in 1965 (in terms of Para-11 of Army Instruction 13/S/65 as it originally stood) as per which seniority of petitioners and respondents 5 to 31 was fixed and petitioner was treated as senior to the respondents 5 to 31. This position remained till 1969 and in 1969 the criteria for fixation of seniority was changed. If this was to be changed in 1969 i.e. from the date when the amendment was made in para-11 of Army Instruction 13/S/65, it would have caused no problem as it would have operated prospectively and would not have unsettled the seniority already fixed. However, this amendment was made from retrospective effect i.e. from 1965 itself because of which petitioner who was up to now senior to respondents 5 to 31 was rendered junior to them. Rule determining seniority is a condition of service and such a rule/provision could not have been amended retrospectively thereby taking away the vested right which had accrued in favor of the petitioner. Various judgments cited by the petitioner, Therefore, squarely apply to the situation in this case. These Army Instructions are admittedly administrative in nature and such Instructions could not have been amended retrospectively which had the effect of taking away the right of the petitioner.

12. However, before it is considered that petitioner is entitled to any relief, petitioner has to cross the hurdle and meet the objection/preliminary submission of the respondents about the delays and latches in filing the present petition. Examination of some further facts on this aspect would demonstrate that petitioner has been able to successfully cross this hurdle also. Although decision was taken by the respondents by making amendment in 1969 and 1971 in giving benefit of seniority to Emergency Commissioned Officers, on grant of Permanent Commission who were in possession of NCC "C and D" certificates, the Government itself inspired by issuing these orders was reexamining this issue. This was the position even on 2.8.1980 as is clear from confidential letter written by Secretary, Sainik Sachiv Military to various Commands. Along with this letter half

yearly letter No.1/80 was enclosed for general information of the officers. Relevant portions thereof dealing with grant of ante date seniority are worded in the following manner:

20. "Benefit of seniority was given to ECOs and SSCOs, granted permanent commission, who were in possession of pre commission qualifications/experience (including NCC "C"/"D" Certificate) under the revised provision of AIs 13/S/65 and 3/S/70.

21. The matter is being reexamined "de Novo" in consultation with the Government and a decision is awaited. Pending finalisation of the case, further grant of antedate seniority of NCC certificate holders as well as grant of substantive promotion to the ranks of Captain/Major in case of those who had already been allowed such ante date, has been held in abeyance".

13. Thus even in the year 1980 the matter was not only being examined de nova, in those cases where such benefit was allowed, these were held in abeyance. Thereafter only on 25.3.1982 Army Headquarter conveyed the decision that the question regarding seniority of Permanent Commissioned Officer (previously Emergency Commissioned Officers) had been examined "...such officers who were granted non regular commission prior to October,1974 and had obtained NCC "C" and "D" certificates, Army Wing will be eligible for 6 to 12 months ante date seniority respectively...". After this decision petitioner submitted statutory complaint dated 25.8.82 against the decision of the respondents in granting seniority to respondents 5 to 29, inter alia, mentioning that granting of such benefit to respondents 5 to 29 over the petitioner was unfair. It was also stressed that while recurring such seniority while NCC certificate undue benefit the petitioner's 13 years of Army Service in a non-commissioned rank was totally ignored. This statutory complaint was rejected only on 10.2.83 by the Government of India and the present petition was filed on 2nd May,1983. Therefore, the petition does not suffer from unexplained latches and delays.

14. Petitioner retired from service on 30.6.83 i.e. within two months after the filing of the present petition. The question to be considered in these circumstances is as to what is the relief which the petitioner is entitled to and what directions can be given at this juncture of time. It is the case of the petitioner that the name of the petitioner for promotion to Lt. Col. was approved on 15.5.82. By December,1982 all the persons senior to the petitioner in the approved list were promoted. Petitioner was not given the promotion though vacancies arose thereafter. In any case respondents 29 to 31 were promoted on 23.3.83. Petitioner made representation on 31.3.83 followed by another detailed representation dated 12.4.83 requesting respondents to promote him to the rank of Lt. Col. However, when no reply was received, petitioner filed this petition on 2nd May,1983 as he was due to retire on 30.6.83. Had the petitioner been granted promotion before 30.6.83 he would have been entitled to remain in the Army Service for another two years. It cannot be disputed that if the seniority

fixed as per original Para-11 was allowed to be remained, the petitioner would have been senior to respondents 5 to 31 and, Therefore, on 23.3.83 he would have got promotion as Lt. Col. when respondents 29 to 31 were promoted. Undoubtedly in Army services the rank at which a particular officer retires is a matter of status for him even after his retirement which rank he carries for the rest of his life and enjoys various privileges, apart from status because of this rank. Going by the totality of circumstances including the fact that the petitioner is challenging the amendment of 1969 in the year 1983, although writ is not dismissed on this ground because of Explanation for delay, I am inclined to give the relief to the petitioner to the extent that he should be treated as promoted to the rank of Lt.Col. as on 23.3.83 when the respondents 29 to 31 were promoted and should be treated "as retired as Lt. Col." and his pension should be fixed on the basis of pay which he would have drawn as Lt.Col. However, the petitioner shall not be entitled to the arrears of salary from 23.3.83 in the post of Lt.Col. for the remaining period served or would have served on his actual promotion as Lt.Col. Thus the relief is confined to petitioner retirement as Lt.Col. and fixation of his pension and other retiral dues accordingly.

This writ petition, accordingly, stands allowed in aforesaid terms. However, there shall be no orders as to costs.