
(1981) 09 MP CK 0005

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 101 of 1981

Naresh Chander Vasudeva

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 17-09-1981

Acts Referred:

Army Act, 1950 — Section 18

Citation : (1982) MPLJ 223

Hon'ble Judges : P.D. Mulye, J

Bench : Single Bench

Advocate : R.G. Waghmare and R.R. Waghmare, for the Appellant; G.K. Neema, for the Respondent

Final Decision : Dismissed

Judgement

P.D. Mulye, J.

This is a petition filed under Articles 226 and 227 of the Constitution of India by an Army Officer, a Lt. Colonel, who on attaining the age of 50 years, which is the normal period of retirement for the Colonel, has been retired by an order dated 3rd September, 1980 (Annexure-L), with effect from 31st March, 1981.

The first grievance of the petitioner is that the said order Annexure-L be quashed or annulled and the respondents be restrained from retiring the petitioner from service before the age of superannuation i. e. 31st March, 1983 as by letter dated 12th March, 1980 issued by the Military Secretary (Annexure-D) the petitioner has been approved for promotion to the acting rank of Brigadier, though this letter further states that he will be promoted in his turn subject to continued satisfactory performance and medical fitness. His other grievance is that by an order dated 4th December, 1979 (Annexure-G), the Chief of the Army Staff has approved the retention in service of the petitioner amongst other Lt. Colonels up to the age 52 years, beyond the minimum age of retirement, though this retention is also subject to continued satisfactory performance and medical

fitness and in continuation of the aforesaid letter dated 4th December, 1979, it has been clarified by subsequent letter dated 30th May, 1980 (Annexure-H) that the date of grant of retention in service beyond minimum age of retirement in respect of the petitioner be read for 2 years i. e. upto 31st March, 1983.

The facts of this case are not in dispute. The petitioner is a permanent regular commissioned officer in the Indian Army with the substantive rank of Lieutenant Colonel, which he has been holding since 1st March, 1972. He was commissioned in the army on 11th December, 1955. The petitioner during his tenure of service served the army in peace, field and war and in command of troops, staff and instructional appointments with distinction and that his meritorious and efficient services have been recognised as mentioned in Para 1 of the petition.

It is not in dispute that there is a mandatory requirement of annual medical examination for all Army Officers as per army Order 169 of 1978 (Annexure-A) and the medical classification to officers is required to be awarded in accordance with Army Order 43 of 1978-Instructions for medical classifications of serving officers (other than JCOs)-(Annexure-B), under five factors indicated by the Code letter SHAPE which represents the following:

S - Psychological. H - Hearing. A - Appendages. P - Physical capacity. E - Eyesight.

It is further not in dispute that the normal minimum age of retirement of the officer of the rank of substantive colonel or lieutenant colonel by selection is 50 years. It is further not in dispute that as per Special Army Order SAO/2/ S/77 (Annexure-C) in certain cases as mentioned therein, an Officer of the rank of Lt. Colonel (excluding the case of Army Service Corps, Army Ordinance Corps, Corps of Electrical and Mechanical Engineers and Pioneer Corps, where the minimum age of retirement is 52 years) can be retained in service upto the age of 52 years, provided he is found to satisfy the criteria- (a) he is in an acceptable medical classification and (b) his efficiency for his rank is of a sufficiently high standard. It is also not in dispute that the normal age of retirement for a Brigadier is 52 years.

After the petitioner was approved for retention in the service as Lt. Colonel upto 31st March, 1983 as per Annexure-G and Annexure-H and after his subsequent approval for promotion to the acting rank of Brigadier (Annexure-D) he was medically examined by the Medical Board on 17th July 1980 in order to assess the fitness of the petitioner and as per the report of the said Medical Board (Annexures-E and F) he was found fit under the medical category SI, H3, AI, PI, and EI. The Board while giving its opinion observed as under:

This 49 years old officer was found to be having substandard- hearing during his Promotion Medical Board. History of exposure to acoustic trauma in 1965 operations following which he developed tinnitus as well as deafness which gradually improved over a few weeks. Since then the officer has been aware of only a minor degree of hearing loss and could carry out duties without any

appreciable degree of difficulty. Has served as a staff officer in Army Headquarters and could follow the discussions in conferences etc. No tinnitus at present. No history of any toxic drugs.

This officer has got bilateral sensory nerve loss of organ type most likely due to acoustic trauma sustained in 1965 operations. Recommended to be placed in H3 (permanent) of SHAPE. Degree of disability twenty per cent attributable to service.

Army order 43 /78 (Annexure-B) lays down the functional capacity and employability limitations pertaining to factor H, which reads as under:

Numerical grading FUNCTIONAL CAPACITY Employ-ability restrictions

(a) (b) (c)

H2 ... Has excellent hearing in one ear with impaired acuity in the other, partial or near complete; viz. with back to the examiner, can hear forced whisper at 6 metres with one ear (? 10 decibels) and conversational voice at 1.2 metres or less with the other ear (60 decibels). Fit for duties anywhere not requiring keen hearing standards.

H3 ... Is partially deaf in both ears; viz with back to the examiner, can hear conversational voice at 3 metres with both ears (40 decibels). 1 No restrictions in physical capacity and fit for duties in peace or field areas, including combat duties during active hostilities including counter insurgency anywhere except as under: (i) Not fit for patrol sniping or scout duties, (ii) Not fit for duties which demand keen hearing acuity of both ears.

Accordingly the Medical Board has, as per its report Annexure-E and Annexure-F recommended that the petitioner be placed in H3 (permanent) of SHAPE.

In the returns submitted by the respondents it is not disputed that at the time of retirement the petitioner was posted as Instructor in the College of Combat at Mhow. It is also not disputed that the petitioner was screened in December 1979 for assessing his suitability for retention in service and after having been found suitable for retention was granted retention of service for two years i.e. upto the age of 52 years subject to continued satisfactory performance and medical fitness. Further according to the respondents the Officer's administrative authority was also ordered that if the officer is placed in a medical classification lower than SI, HI, AI, PI, EI, the fact should be immediately intimated to Army Headquarters by signal. According to the respondents the retention orders had to be cancelled consequent on the petitioner having been found to be in medical classification lower than SI, HI, AI, PI, EI and it is for that reason that on account of the report of the competent Medical Board which kept him in an unacceptable medical classification for retention in service beyond 50 years that he was retired and it is for this very reason that even though as per Annexure-D he was approved for promotion to the acting rank of Brigadier and was to be promoted in his turn subject to continued satisfactory performance and medical fitness and

even though after the occurrence of vacancies order of promotion to the acting rank of Brigadier was issued dated 1st July, 1980, the same had to be cancelled as per order dated 25th July, 1980 (Annexure-I) when it was found that the petitioner was placed in low medical category by the Medical Board.

Further according to the respondents relevant rules governing promotion in respect of low medical category officers are contained in Army Head Quarter's letter dated 22nd March, 1972 (Annexure-1). As per these rules, which relate to promotion to the acting ranks of Col. and above-Officers of Low medical classifications, it is provided that the Officers in medical classifications SI, H2, AI, PI, EI and SI, HI, AI, PI, E2 will be considered at par with those in Medical classification SI, HI, AI, PI, EI and be eligible for promotion to higher acting rank in the normal manner and Officers in medical classifications other than these will not be considered for promotion to the acting ranks of Brigadier and above. Therefore, according to the respondents as the petitioner, as per the medical report was placed in low medical category, he has no legal right of promotion to the acting rank of Brigadier or for his retention even as Lt. Colonel beyond the minimum retirement age of 50 years while being placed in an unacceptable medical classification.

The learned counsel for the petitioner, therefore, contended that as per Annexure-G and Annexure-H the petitioner acquired the legal right of service in present rank upto 31st March, 1983. He further submitted that as per special army order SAO 2/S/77 (Annexure-C) it provided that for retention in service of an Officer other than a Lieutenant Colonel, Colonel of Army Service Corps, Army Ordnance Corps., Corps of Electrical and Mechanical Engineers and Pioneer Corps, will be assessed by the appropriate selection board approximately one year in advance of the date of completion of minimum age or qualifying service for retirement, referred to in sub clause (i) above i.e. 50 years, whichever is later and an officer shall be retained in service for such further period as may be determined by the Chief of Army Staff if holding the rank of Lieutenant Colonel and the Ministry of Defence if holding a higher rank but not beyond the age specified for his substantive rank in sub-clause (ii) above i.e. 52 years. Normally he will be allowed to serve upto the age specified in sub-clause (ii) above i.e. 52 years if he is found to satisfy the following criteria : (a) He is in an acceptable medical classification; (b) His efficiency for his rank is of a sufficiently high standard.

The learned counsel for the petitioner, therefore, contended that as per Annexure-B which contains instructions for the medical classification of serving officers of the Army (including AMC, AD Corps, and MNS) which has to be done under the five factors indicated by the code letter SHAPE, even though the petitioner was found in category H3 by the Medical Board, his right of retention as a Lt. Colonel upto the age of 52 years or his right of promotion to the acting rank of Brigadier should not be curtailed by resorting to Annexure-L filed by the respondents as the instructions contained in Annexure-B have virtually superceded Annexure-L dated 22nd March, 1972. According to the learned counsel the criteria does not

say that any officer graded H3 is unacceptable as the expression "acceptable" has to be understood in the light of Annexure-B which says that it is only grade 4 which is temporarily unfit and grade 5 which is permanently unfit. Therefore, according to the learned counsel, as the petitioner was not placed in the category of H4 or H5, the remaining categories namely H1, H2 and H3 have to be treated as "acceptable" and thus the petitioner acquired a legal right to continue in service upto the age of 52 years atleast as a Lt. Colonel in view of the fact that H3 is no longer the excluded category for promotion as per Annexure-B, which is the latest in point of time. In short the argument of the learned counsel for the petitioner is that retention in the present case is a must as it was obligatory on the respondents in view of the fact that the petitioner was not found in the category of H4 or H5.

The learned counsel for the petitioner further contended that by the impugned order Annexure-L the petitioner has been prematurely retired without observing the requirements of Rule 15 of the Army Rules, which is as follows:

Termination of service by Central Government on grounds other than misconduct-
(1) When the Chief of the Army Staff is satisfied that an officer is unfit to be retained in service due to inefficiency or physical disability. The officer-

(a) shall be so informed;

(b) shall be furnished with the particulars of all matters adverse to him; and

(c) shall be called upon to urge any reasons he may wish to put forward in favour of his retention in the service;

Provided that clauses (a), (b) and (c), shall not apply if the Central Government is satisfied that for reasons to be recorded by it in writing it is not expedient or reasonable to comply with the provisions thereof;

Provided further that the Chief of the Army Staff may not furnish to the officer any matter adverse to him, if, in his opinion, it is not in the interest of the security of the State to do so.

(2) In the event of the explanation being considered by the Chief of the Army Staff unsatisfactory, the matter shall be submitted to the Central Government for orders, together with the officer's explanation and the recommendation of the Chief of the Army Staff as to whether the officer should be,

(a) called upon to retire; or

(b) called upon to resign.

(3) The Central Government after considering the reports the explanations, if any, of the officer and the recommendation of the Chief of the Army Staff, may call upon the officer to retire or resign, and on his refusing to do so, the officer may be compulsorily retired or removed from the service on pension or gratuity, if any, admissible to him.

15A. Release on medical grounds: (1) An officer who is found by a Medical Board to be permanently unfit for any form of military service may be released from the service in accordance with the procedure laid down in this rule.

(2) The President of the Medical Board shall, immediately after the Medical Board has come to the conclusion that the Officer is permanently unfit for any form of military service, issue a notice specifying the nature of the disease or disability he is suffering from and the finding of the Medical Board and also intimating him that in view of the finding he may be released from the service; every such notice shall also specify that the officer may, within fifteen days of the date of receipt of the notice, prefer a petition against the finding of the Medical Board to the Chief of the Army Staff through the President of the Medical Board:

Provided that where in the opinion of the Medical Board the officer is suffering from a mental disease and it is either unsafe to communicate the nature of the disease or disability to the officer or the officer is unfit to look after his interests, the nature of the disease or disability shall be communicated to the officer's next of kin who shall have the like right to petition.

(3) If no petition is preferred within the time specified in sub-rule (2), the officer may be released from the service, by an order to that effect by the Chief of the Army Staff.

(4) If a petition is preferred within the time specified in sub-rule (2), it shall be forwarded to the Central Government together with the records thereof and the recommendation of the Chief of the Army Staff. The Central Government may, after considering the petition and the recommendation of the Chief of the Army Staff, pass such order as it deems fit.

Placing reliance on these rules the learned counsel for the petitioner contended that the procedure mentioned herein having not been followed, the principles of natural justice have been violated and in support of this submission he placed reliance on the decision reported in Capt. Virendra Kumar Vs. Union of India (UOI), .

But, in my opinion, the above decision does not help the petitioner as in that case an emergency commissioned officer before attaining the normal age of retirement was discharged or released on account of physical disability and it is in such cases of premature retirement that, in my opinion, provisions of Rule 15 or Rule 15A"of the Army Rules are attracted. Admittedly the petitioner has not been retired prematurely but has been retired only after attaining, the age of 50 years, which was the normal age of retirement as a substantive Lt. Colonel and for such a normal and routine retirement the petitioner cannot get any assistance from Rule 15 or Rule 15A, which are inapplicable to the facts of the present case.

The learned counsel for the petitioner also relied upon the decision of the Supreme Court reported in Col. A.S. Sangwan Vs. Union of India (UOI) and Others, wherein it has been held that-

A policy once formulated with regard to promotion of employees in a cadre of defence forces by the Union of India is not good for ever, it is perfectly within the competence of the Union to change it, re-change it, adjust it and re-adjust it according to the compulsions of circumstances and the imperatives of material considerations. There is no bar to its changing the policy formulated earlier if there are good and weighty reasons for doing so. It is entirely within the reasonable discretion of the Union of India. It may stick to the earlier policy or give it up but if it does change its policy it must do so fairly and should not give the impression that it is acting by any ulterior criteria or arbitrarily. Whatever, policy is made subsequently should be done fairly and made known to those concerned.

In my opinion this decision does not help the case of the petitioner.

The statutory complaint filed by the petitioner dated 31st August, 1980 (Annexure-J) against withholding of promotion to the rank of Brigadier on medical ground, has been considered by the Central Government and the same has been rejected by an order dated 25th April, 1981. Therefore, the argument of the learned counsel for the petitioner that an officer like the petitioner who has been classified as H-3 by the Promotion Medical Board must be deemed to be fit for all purposes and as of right entitled for promotion as Brigadier, cannot be easily accepted on the ground that retention is a rule and an enforceable right. The further argument that in these circumstances retirement of the petitioner at the age of 50 is not automatic, but takes place only if criteria is not satisfied, in my opinion, also cannot be accepted.

The learned counsel for the respondents relying on the provisions of Article 33 of the Constitution of India, which provides that Parliament may by law determine to what extent any of the rights conferred by this part shall, in their application to the members of the Armed Forces charged with the maintenance of public order, be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them, contended that the applicant has no such right to come up before this Court under Article 226 or Article 227 of the Constitution of India as under the provisions of the Army Act as also the rules and instructions issued thereunder, which admittedly had the force of law, the applicant is not entitled to the relief sought for by him. He further contended that according to the provisions of Art. 227(4) of the Constitution of India, which provides that nothing in this Article shall be deemed to confer on a High Court power of superintendence over any Court or Tribunal constituted by or under any law relating to Armed Forces, this Court should not lightly interfere in the careful decision taken by the Chief of the Army Staff after considering the report of the Promotion Medical Board which has recommended the petitioner to be placed in H-3 (permanent) of SHAPE and consequently not acceptable for promotion or retention. He further submitted that Annexure-D dated 12th March, 1980 specifically provides that his approval for promotion to the rank of Brigadier in his turn is subject to continued satisfactory performance and medical fitness.

Similarly the retention order of the petitioner as Lt. Colonel for a further period of 2 years as per Annexure-G dated 4th December, 1979 and Annexure-H dated 30th May, 1980 also specifically mention that the retention is subject to continued satisfactory performance and medical fitness. He, therefore, submitted that though the performance of the petitioner as an Army Officer was quite satisfactory the report of the Promotion Medical Board which examined the petitioner thereafter, namely in July 1980 found him unfit by placing him in H-3 (permanent) category.

The learned counsel for the respondents therefore, submitted that petitioner has been retired in the routine course only after having attained the minimum age of retirement prescribed for a Lt. Colonel by selection, without any stigma. He, therefore, does not acquire any right as such to claim promotion to the rank of acting Brigadier or retention as a Lt. Colonel for a further period of 2 years especially when the competent Medical Board has opined that the petitioner has been placed in an unacceptable medical classification for retention in service beyond 50 years and it is for this reason and on that basis that the petitioner before he actually attained the age of 50 years was by an order dated 3rd September, 1980 (Annexure-L) was ordered to be retired with effect from 31st March 1981, after giving him all the benefits to which he was entitled. He further submitted that it is no doubt true that promotion order dated 1st July, 1980 was also issued with the direction that the petitioner shall proceed to his new appointment on receipt of confirmation from competent medical authority that he was in medical category SHAPE one and this order was subsequently cancelled by an order dated 25th July, 1980 when it was learnt that he was placed in low medical category by the Medical Board.

The learned counsel for the respondents further contended that as per Annexure-I dated 22nd March, 1972 relevant Rules governing promotion in respect of low medical category officers are framed according to which Officers in medical classification lower than H2 and E2 are not eligible for promotion to the acting rank of Brigadier and above. He further submitted that AO 20/75 (Annexure N) lays down rules regarding medical fitness for substantive promotion of Army Officers and it does not apply to acting promotion. He further submitted that though the petitioner was a war wounded Officer, as has also been found by the Medical Board, Annexure-M dated 26th October, 1976, which relate to career prospects of war wounded Officers who were and are still in permanent low medical classification, provides that war wounded Officers will be eligible for promotion to the acting ranks of Lt. Colonel, Colonel and Brigadier subject to approval by appropriate selection boards. Officers promoted to the acting rank under the provisions of this letter will also be eligible for substantive promotions to corresponding rank. So far as medical classification is concerned, the said communication further provides that war wounded Officers will be eligible for promotion, whilst placed in one of the following medical classifications:

(a) Individual low medical factors:

(i) H2 or E2 or P2 (Dental) which will be considered at par with SI, HI, AI, PI, EI and

(ii) A2 or P2 or A3.

(b) Combined low medical factors:

(i) H2 and E2 combined; and

(ii) H2 or E2 combined with either A2, A3 or P2.

It is also provided therein that such promotions will be subject to rendition of the requisite certificate in terms of AO 20/75. It was, therefore, urged on behalf of the respondents that the petitioner does not qualify for promotion to the acting rank of Brigadier or even for retention as Lt. Colonel after attaining the age of 50 years.

He also urged that section 18 of the Army Act provides that every person subject to this Act shall hold office during the pleasure of the President and relying upon the decision reported in *Ram Sarup Vs. The Union of India (UOI)* and Another, he further submitted that each and every provision of the Army Act is a law made by Parliament and that if any such provision tends to affect the fundamental right under part III of the Constitution, that provision does not, on that account, become void, as it must be taken that Parliament has thereby, in the exercise of its power under Article 33 of the Constitution made the requisite modification to affect the respective fundamental right and these provisions also do not infringe Article 14 of the Constitution.

Further relying upon the decision reported in *Lekh Raj Khurana Vs. Union of India (UOI)*, he further submitted that whereas the power contained in Article 310 governs all Government servants, including those in the services connected with defence the benefits of Article 311 which impose limitations on the exercise of this power, though it is not the case of the petitioner that provisions of Article 311 of the Constitution are attracted in this case, do not extend to those who hold posts connected with defence. Further he also urged that the earlier routine medical check up were not required to be as vigorous as the one by the Promotion Medical Board which was held for the purpose of judging the suitability of the petitioner from medical point of view for promotion to the rank of Brigadier. Further according to the learned counsel the expression "acceptable medical classification" means that classification of medical category which is acceptable for a particular purpose i.e. retention or promotion as the case may be. Therefore, his high average record of service alone cannot entitle him for retention in service to earn the prospect of promotions especially when the promotion Medical Board found him fit as SI, H3, AI, PI, EI which is not an acceptable medical classification for promotion to the rank of Brigadier or for further extension.

Ordinarily the Civil Court has no power to interfere with matters of Military law. Courts will not interfere with the administration of Military law by the properly

constituted Tribunals acting within their jurisdiction. Matters which are placed within the jurisdiction of Military Tribunals or Authorities constituted under the Military Law must be determined by such Authorities themselves and their decisions cannot be reviewed or set aside by Civil Courts. This principle has been embodied in clause (4) of Article 227 of the Constitution of India. The general power conferred on the High Court under Article 226 of the Constitution has to be construed subject to the limitations enforced by clause (4) of Article 227. But it cannot be said that the Court has no jurisdiction to relief against un-authorised or illegal acts of Military Authorities affecting the fundamental rights of persons in Military Service.

Discrimination as between those "acceptable" and those "unacceptable" is inevitable in any process of selection and grading and there can be nothing wrong in such a discrimination. Thus, in the matter of being subject to "screening" by the promotion Medical Board after a thorough medical examination, the officers who are graded as unacceptable as a result of such screening and examination, in my opinion, cannot complain that there was any discrimination violating the fundamental right of the petitioner granted, by Article 16 of the Constitution of India.

What Article 14 of the Constitution forbids is hostile discrimination and not reasonable classification. Equality before law does not mean that the same set of law should apply to all persons under every circumstances ignoring the differences and disparities between men and things. The classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and the differentia must be a reasonable nexus to the object sought to be achieved by the statute. It is also equally well settled that Article 16 is merely an incident of Article 14. Article 14 being the genus is of universal application whereas Article 16 is the species and seeks to obtain equality of opportunity in the services. The theory of reasonable classification is implicit and inherent in the concept of equality for there could hardly be any country where all the citizens would be equal in all respects. Equality of opportunity would naturally mean a fair opportunity not only to one section or to the other, but to all sections by removing the handicaps if a particular section of the society suffers from the same. In other words the idea of classification is implicit in the concept of equality, because equality means equality to all and not merely to the advanced and educated section of the society.

In this state of affairs, as discussed above it does not appear that the Army order 43 /78 (Annexure-B) has superseded the earlier instructions or orders issued in this behalf. Clause 6 of Annexure-B under the heading "Reclassification Medical Boards : Low Medical Category Officers" it has been provided that when an officer is placed in a classification lower than SHAPE or whether temporary or permanent, it is obligatory for him to appear before a Medical Board for reclassification after the specified period of temporary category or after every

two years if he is placed in a permanent low medical classification. Officers will not have any option of review of their category permanent or temporary earlier than the period specified. It is, however, not in dispute that as per Annexure-C the normal minimum age of retirement of a Lt. Colonel or Colonel by selection shall be 50 years. Therefore, it does not appear that the petitioner has been deliberately retired after attaining the age of 50 years, even though he was approved for promotion to the acting rank of Brigadier or for retention as Lt. Colonel for a further period of 2 years, namely upto 52 years.

The argument of the learned counsel for the petitioner that if with H-3 category the petitioner could carry on his duties as a Lt. Colonel till he attains the age of 50 years, he can in the same state of physical condition is duly qualified for a further period of 2 years when he has been approved for retention or promotion, cannot be easily accepted in view of the report of the Promotion Medical Board, relying on which the petitioner has not been retained or promoted.

Similarly the argument of the learned counsel for the petitioner that the impugned order (Annexure-L) does not give any reasons for his retirement, cannot be accepted in view of the decisions reported in *Som Datt Datta Vs. Union of India (UOI) and Others*, which has been relied upon in the subsequent decision of the Supreme Court reported in *Tara Chand Khatri Vs. Municipal Corporation of Delhi and Others*, and also the Full Bench Decision of this Court reported in 1980 M P L J 729 : 1980 J L J 69 which has also considered these two decisions.

In the result I see no merit in this petition, which is consequently dismissed. However, considering the facts and circumstances of the case the parties are directed to bear their respective costs of this petition. The outstanding amount or security deposit be refunded to the petitioner.