

(2004) 12 J&K CK 0011

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 2522 of 2002

Niranjan Paul Singh Chouhan [Brig.]

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 17-12-2004

Acts Referred:

Army Act, 1950 — Section 122, 16A, 19

Army Rules, 1954 — Rule 14, 16A, 179

Defence Service Army Regulations, 1987 — Regulation 67, 68, 76

Citation : (2005) 1 JKJ 632

Hon'ble Judges : Permod Kohli, J

Bench : Single Bench

Advocate : Sunil Hali, for the Appellant; Rohit Kapoor, Addl. CGSC, for the Respondent

Judgement

Permod Kohli, J.—The petitioner has questioned the validity of impugned Order No. 41620/01/E/B dated 01.10.2002 issued by

respondent No. 3 whereby petitioner has been ordered to be retired from service in the rank of Col. w.e.f. 30th Sep.2002. The petitioner has

approached this Court seeking further direction to treat him as Brig. holding substantive rank in the Indian Army and further direction for the

issuance of an appropriate Notification in the Govt. gazette for substantive promotion as Brig. and consequently allow the benefit of retirement at

age of 56 years.

2. Briefly stated facts leading to the filing of the present petition are that petitioner joined in the Indian army as 2nd Lieutenant on 14.03.1971. He

earned promotion upto the substantive rank of Col. in the year 1993. The promotion from Col. to next higher rank of Brig. is made by the

Selection Board constituted under Regulations 67 of the Defence Service

Regulation by the Selection Board No. 2. The Board considers the officers of same batch who fall within the consideration zone. The petitioner was considered for promotion to post of Brig. alongwith other officers of 1971 batch by Selection Board No. 2 in its meeting held on 20th and 22nd March, 2001. He was recommended for empanelment amongst 14 officers by the Board. The recommendation of the Selection Board came to be approved by the Army Headquarters and Government as is evident from the communication dated 3rd July, 2001 issued by the Army Headquarters to all the Commands. It is mentioned in this communication that the Government has approved the empanelled officers named therein for promotion to the acting rank of Brig. It is further stipulated that the officers will be promoted only subject to availability of vacancies and satisfactory performance and medical fitness. It is also relevant to notice that at the time of initial recruitment in the army, the petitioner was diploma in Civil Engineering and subsequently he acquired the Bachelor of Engineering qualification and is a member of the Army Engineering Corps.

3. That on the basis of the aforesaid recommendation, the petitioner was posted as Chief Engineer Udhampur as Brig. in the local rank without effecting pay or pension vide signal dated 04.02.2002. While the petitioner was performing the duties as Chief Engineer, Udhampur another order was issued by the MS branch vide its message dated 17th July, 2002 whereby the petitioner was placed in the acting rank of Brig. with pay and rank of Brig. subject to the following conditions: --

alafa (.) In acceptable med. Cat. Vide AO 20/75 or MS MS Br policy letter No. 03974/WW/MS-5B dated 18 May 1982 if battle cas (.)

bravo (.) no drop in performance (.)

fourthly (.) intimate dates assumption acting rk to MS (Brigs) and to all concerned (.) all add

This acting rank was conferred upon the petitioner w.e.f. 01.05.2002.

4. That before the petitioner could be considered for promotion, and while he was holding the rank of Col., the army authorities had issued a communication dated 17.10.2001 whereby list of officers who had to retire by the end of Sept. 2002 was issued. Petitioner's name also figured in the said list who was to retire in the rank of Col. on 30th Sep. 2002 at the age of 54 years. After the approval of the petitioner as Brig. HQ

Commands Works Eng. 229 MG Road Lucknow vide its letter dated 17.06.2002 informed the Controller Defence Accounts (Officers) Pune that

the petitioner who was due to retire on 30th Sep. 2002 on attaining age of 54 years, has been promoted to the rank of Brig. and posted to Chief

Engineer Udhampur Zone, Udhampur.

5. That while the petitioner was posted as Chief Engineer, Udhampur, he received a Show Cause Notice dated 12th Sep.2002 from the

Directorate of Discipline and Vigilance Army HQs. New Delhi asking him to show cause as to why censure of the Chief of the Army Staff in

appropriate form should not be conveyed to him and the petitioner was also asked to submit his explanation, within 15 days from date of this

notice. It is relevant to note that show cause notice is based upon some incidents of year 1988 regarding which court of inquiry was held and

proceedings of Staff Court of inquiry were approved by 13th Sep.1999. Para No. 3 of the letter also stipulates that the proceedings of Summary

Court of inquiry were approved by AIR HQ on 13th Sep. 1999. However, disciplinary action against him for the above said lapses has become

time barred in terms of Army Act Section 122, It is further stated in para 4 that the facts were placed before the Chief of Army Staff who has

opined that there is adequate evidence on record to indicate the culpability of the petitioner in relation to aforesaid lapses. This letter was received

by petitioner on 13th Sep. 2002 as per averments made in the writ petition. The petitioner received impugned order dated 01.10.02 whereby he

was ordered to be retired w.e.f. 30.09.2002 in the substantive rank of Col. and asked to handover the charge to Col K.L. Rao ACE (Works) CE

Udhampur Zone.

6. The contention of the petitioner is two fold;

(i) that he was selected and appointed as Brig. by the competent authority and therefore, his age of superannuation being 56 years u/s 16A of the

Army Act and the impugned order retiring him at the age of 54 years in the substantive rank of Col. is illegal;

(ii) that show cause notice issued to petitioner in respect to some incidents of the year 1985-86 is only devise to retire the petitioner in the rank of

Col.

7. The respondents in their objections resisted the petition of the petitioner on

the ground that the petitioner was never appointed as Brig. in substantive rank. He was only promoted to the acting rank of Brig while holding substantive rank of Col. And the retirement age for the Col. is 54 years whereas age of 56 years is applicable for retirement in the substantive rank of Brig. It is further stated that the petitioner could not be granted substantive rank because of imposition of Discipline and Vigilance ban against him. Regarding issuance of show cause notice, it is stated that Chief of the Army Staff initiated censure on 5th June, 2002 for acts of omission and commission based on court of inquiry proceedings. Regarding retirement age, it is further stated that the retirement age is regulated by Govt. of India vide letter No. F-14(3)/98/D(AG) dated 3rd Sep.1998, the petitioner could not qualify for grant of substantive rank of Brig due to disciplinary action pending against him in accordance with the policy laid down in the letter dated 4th July, 2000.

8. From the record and pleading of the parties, certain admitted facts emerge which are relevant for the purpose of this petition and are noticed as under: --

(i) That the petitioner was holding substantive rank of Col. w.e.f. 1990 and selected by the Selection Board No. 2 for promotion to the rank of Brig. and approved by the Govt. of India vide letter dated 3rd July, 2001 and promoted in acting rank of Brig vide Order dated 17th July, 2002 w.e.f. 01.05.2002.

(ii) That in the rank of Col. the petitioner was to retire on 30th Sep. 2004.

9. There is no dispute of approval of promotion and placement of petitioner in the acting rank of Brig. In reply, the stand taken by respondents is that the petitioner was only holding acting rank of Brig and his substantive rank continues to be that of Col. and in view of the disciplinary proceedings pending against him, he was not allowed substantive rank of Brig as there was D.V. Ban.

10. Two questions that need examination and consideration : (1) whether the petitioner was holding substantive rank as Brig. or is entitled to hold such a rank and is consequently entitled to benefit of retirement upto 56 years; (2) And whether the petitioner could be denied the benefit of substantive rank of Brig. on the basis of show cause notice and the decision of Chief of the Army Staff to initiate disciplinary proceedings against

him with respect to an incident relating to years 1985-86.

11. It is contended on behalf of the petitioner that there is no provision for acting rank of promotion in the Army and hence the promotion of the

petitioner is deemed to be substantive in nature after having been selected by the competent Selection Board and his appointment approved by the

Central Government under the provisions of Army Act.

12. The promotion in the Army is regulated by the Army Regulations and promotion policies issued from time to time. Regulations 67 and 68 of the

Army Regulations deal with promotion of substantive ranks by selection. The relevant extract of the same are reproduced as under: --

67. Substantive Promotion by Selection.

All officers, (except officers of Military Nursing Service, Army Medical Corps, Army Medical Corps (Non-Technical, Army Dental Corps,

Remount and Veterinary Corps, Military Farms, Jag's Department Special List and Officers permanently seconded to Research and

Development and Inspection Organizations):--

(a) Substantive promotion to the rank of Lieutenant Colonel (by selection) and above will be made to fill vacancies in the substantive cadre,

provided the officer has to his credit the following minimum period of reckonable commissioned service and satisfied the conditions of medical

fitness as laid down below : --

To Lieutenant Colonel.... 16 years

To Colonel 20 years

To Brigadier 23 years

To Major General..... 25 years

To Lieutenant General.... 28 years

To General..... No restriction

(b) Substantive promotion by selection to the rank of Lt. Col. And above will be subject to the medical fitness of the officer concerned for active

service and the permanent medical classification of an officer not being other than SI HI AI PI E1 SI H2 AI PI EI or SI HI AI PI E2. An officer

whose permanent classification is SI HI A2 PI E! SI HI AI P2 E1 or SI H2 AI PI E2 may also be considered for promotion provided the

following conditions are fulfilled : --

(i) Such promotion would be in the public interest.

(ii) In the opinion of a Medical Board : --

(aa) the officer is capable of performing the normal active service duties of the rank to which he is being promoted in his present medial category.

(ab) any defect, disability or disease, from which the officer is suffering is not likely to be aggravated by service conditions, provided he is

employed on duties compatible with the medical category and within the restrictions placed by the Board.

68. Effective date of substantive promotion. Substantive promotion to the rank of Colonel and above, and of Lt. Col. By selection, will from the

date an officer was passed fit in all respects for such promotion, provided a vacancy existed in the substantive cadre of that rank on that date.

Should the date of assumption of the higher appointment be later than the former date, then the date of actual assumption of appointment will

reckon for pay, pension and tenures. But for the purposes of seniority the date will be as notified in the Gazette.

13. In addition to above, promotion policy that was in operation at the time of petitioner's selection was circulated vide letter dated 26.11.1990.

Para No. 2 of the policy reads as under :--

2. The powers for grant of substantive rank of Brigs. and Maj. Gens. will be exercised by the Chief of the Army Staff subject to the following

stipulations :-

(i) Officers are promoted to the substantive rank of Brigs. and Maj. Gens. strictly subject to the availability of clear vacancies in the concerned

ranks.

(ii) The officers fulfils other existing laid down conditions.

14. Regulation 67 prescribes conditions for grant of substantive promotion by selection to the ranks of Lt. Col. and above whereas Regulation 68

prescribes that the promotion on substantive basis will be effected from the date an officer was passed fit in all respects for such promotion. In

terms of Regulation 68, it is not only selection which confers a right for promotion to the substantive rank, it also prescribes that selected person is

entitled to a substantive promotion from the date he was passed fit in all

respects for such promotion and a vacancy in substantive rank exists.

Therefore, selection alone may not be enough to confer the status of substantive promotee upon an officer unless he is otherwise found fit and

substantive vacancy is available. Promotion policy dated 26.11.1990 noticed above, also bears the testimony that the promotion to the substantive

rank of Brig./Maj. Gen. is subject to the availability of clear vacancy in the concerned rank and power to grant substantive rank has to be

exercised by the Chief of the Army Staff when an officer fulfills other existing conditions laid down for the purpose. As far the acting rank is

concerned, Mr. Kapoor has referred Special Army Instructions No. 1 dated 09.01.1974 which reads as under :--

SPECIAL ARMY INSTRUCTION:

New Delhi, Wednesday., January 9, 1974/Pause 1995.

1. Acting Promotions-Officers

1. an officer selected to fill an appointment carrying a rank higher than his substantive rank of acting rank (if he is holding such a rank) will be

granted acting promotion to the rank carried by the appointment, provided he has completed the following minimum total periods of reckonable

service as a commissioned officer.

(a).....

.....

Rank to which acting Total minimum service Remarks

promotion is made as commissioned

Officer

1 2 3

Colonel 8-1/2 years With a minimum

period of two years

service in the rank of
Lt.Col.Broken periods
will count towards this
limit.

Brigadier 12 years With a minimum
period of three years
combined service in
the ranks of Lt. Col
and Col. Broken
periods will count
towards this limit.

15. From the above Army Instructions, it is evident that on promotion, a person is to be placed in acting rank and if this Special Army Instructions is read with policy dated 26.11.1990, it is the Chief of the Army Staff who has to confer substantive rank upon an officer who is promoted to a higher rank on selection by the competent selection board. In the present case the petitioner was selected by the competent selection board in the meeting held on 20/21.03.2001 and his empanelment was approved by the Government as is evident from the letter dated 03rd July, 2001. He was given acting rank vide letter dated 17th July, 2002 subject to the conditions stipulated therein.

16. The respondents in their reply have specifically stated that the substantive rank could only be conferred by the Chief of the Army Staff.

Because of DV Ban imposed against petitioner, he was not approved for substantive rank by the Chief of Army Staff who is only competent to approve the substantive rank of petitioner. The petitioner has also sought direction in the nature of Mandamus for issuance of Notification to be published in the Government Gazette. For declaring the petitioner as having been substantively promoted as Brig. this prayer itself is suggestive of fact that the petitioner was never appointed as Brig. on substantive basis.

17. From the conjoint reading of the Regulations 67 and 68, promotion policy

and Army Instructions, it becomes apparent that as per procedure/norms, promotion in the army is made on acting basis and substantive rank is conferred only by the Chief of Army Staff. The petitioner was never conferred substantive rank till he was retired on superannuation in the substantive rank of Col.

18. As far the age prescribed for superannuation is concerned, Rule 16-A of the Army Rule prescribes age for different ranks and of Brig. In

substantive rank age of retirement is 56 years. Even under Regulation 76 the age for retirement prescribed for Brig. and other ranks is for officers

holding substantive ranks. Since the petitioner was not conferred the substantive rank, the impugned order dated 01.10.2002 retiring the petitioner

from army service at the age of 54 years treating him as Col. in the substantive rank cannot be faulted with.

19. As far 2nd question is concerned, admittedly the disciplinary proceedings were initiated against the petitioner in respect to certain allegations

and staff court inquiry was duly conducted. Some evidence has come against him. Based upon such evidence, a show cause notice dated

12.09.2002 was issued to him and consequently DV Ban imposed in view of award of censure to the petitioner on 01.08.2002. This censure was

awarded in terms of policy dated 04th July, 2000 Clauses 3 and 7 of the policy provide as under : --

3. Provisional DV Ban is imposed only when the competent disciplinary authority takes cognizance of an offence. Cognizance is taken of an

offence as soon as the disciplinary authority, competent for the purpose, applies its mind to the offence with the intention of initiating disciplinary or

administrative proceedings against the offender in respect of the offence. Imposition of DV Ban therefore has its origin in the decision of the

Commander to initiate disciplinary/administrative action. Similarly, the removal of Provisional DV Ban is contingent upon finalization of

disciplinary/administrative proceedings against the officer concerned by the competent authority. The duration of Provisional DV Ban can therefore

be minimized if the cases are finalized expeditiously. Career management as a concept is closely linked with the Discipline and Vigilance aspects of

the officer concerned. It is, therefore, imperative that commanders in chain must finalize disciplinary/administrative action cases as expeditiously as

possible in the interest of both the officer and the organization.

7. Provisional DV Ban will be imposed only when a competent disciplinary authority takes cognizance of an offence. A competent authority takes

cognizance of an offence when he decides to proceed (disciplinarily or administratively) against the person who is alleged to have committed the

offence. The word "cognizance" is used to indicate the point in time when a disciplinary authority applies his mind for the purpose of proceeding

against the individual(s) either disciplinarily or administratively. At the stage of taking cognizance, the competent authority has to be satisfied that

prima facie, the allegations(s) made against the individual makes an adequate case for summary trial/GCM/SGCM or an administrative action

resulting in termination of service or otherwise. This means where a Court of Inquiry has been held, Provisional DV Ban should only be imposed

when directions have been issued thereupon. Where an administrative action is contemplated without holding a Court of Inquiry, Provisional DV

Ban is to be imposed from the date of issue of "Show Cause Notice" containing definite allegations against such an officer. Such 'Show Cause

Notice" should be based on relevant documents/papers to which the competent authority has applied his mind.

20. Under this policy, it is provided that DV ban is to be imposed from the date of issuance of show cause notice wherever competent disciplinary

authority applies its mind with the intention to initiate disciplinary/administrative proceedings against the offender. It is not disputed that the

competent authority has initiated administrative action against the petitioner and issued show cause notice. The petitioner has not challenged either

show cause notice dated 12.09.2002 or order relating to award of censure in the writ petition. In absence of any challenge to these, the petitioner

is otherwise not entitled to relief prayed for. It is also relevant to notice that no malafide or bias has been pleaded against Chief of Army Staff or for

that matter against any other competent authority relating to issue of show cause notice and award of censure. Apex Court in case Maj. General

O.P. Sabharwal v. Union of India and Ors. in Civil Appeal No. 3821/1989 decided on 20.02.1990 held that in view of the award of

displeasure", appellant in the said case has no right to be promoted to the post of Major General. What was held in the said case is noticed : --

The High Court, rejecting the writ petition, held that the appellant had no right to be promoted to the substantive post of Major General, especially when on two occasions inquiries conducted under Rule 179 of the Army Rule, 1954, resulted in orders of "displeasure" on the first occasion and severe displeasure" on the second occasion. On 04.07.1986 proceedings under Rule 179 had been initiated in respect of certain matters, which resulted in an order of "displeasure" against the appellant. On 12.09.1986 the appellant was promoted on an acting basis to the rank of Major General. The second proceeding under Rule 179 was initiated on 02.03.1988 which resulted in an order of "Severe displeasure" which the Chief of the Army Staff made against the appellant on 22.03.1988. As a result of these two adverse remarks, the appellant was not considered for promotion to the substantive rank of Major General and was consequently retired from service on 31.03.1988.

Considering the facts and circumstances of the case, we are of the view that the High Court was right in coming to the conclusion which it did. We see no reason to interfere with the findings of the high Court. The appeal is dismissed accordingly. There will be no order as to costs.

21. In the present case also, the circumstances are not different. It is a settled proposition of law that writ court is not to sit as a Court of appeal

and power of judicial review in such matters is very limited. The Apex Court in a case Union of India and Others Vs. Harjeet Singh Sandhu etc.,

while considering the scope of power of judicial review held as under:

41. Exercise of power u/s 19 read with Rule 14 is open to judicial review on well settled parameters of administrative law governing judicial

review of administrative action such as when the exercise of power is shown to have been vitiated by malafides or is found to be based wholly on

extraneous and/or irrelevant grounds or is found to be a clear case of colourable exercise of/or abuse of power or what is sometimes called fraud

on power, i.e. where the power is exercised for achieving an oblique end. The truth or correctness or the adequacy of the material available before

the authority exercising the power cannot be revalued or weighed by the Court while exercising power of judicial review. Even if some of the

material, on which the action is taken is found to be irrelevant, the Court would still not interfere so long as there is some relevant material available

on which the action can be sustained. The court would presume the validity of the exercise of power but shall not hesitate to interfere if the

invalidity or unconstitutionality is clearly demonstrated. If two views are possible, the court shall not interfere by substituting its own satisfaction or

opinion for the satisfaction or opinion of the authority exercising the power.

For what has been stated above, I am of considered opinion that this Court cannot interfere in the matter in exercise of power of its judicial review.

Writ petition fails and is, accordingly, dismissed. Record of the case has been returned to Mr. Rohit Kapoor, Addl.CGSC in the Court.