
(1989) 08 DEL CK 0011
In the Delhi High Court
Case No : Civil Appeal No. 3071 of 1987

Rajindernath

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 11-08-1989

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1989) 39 DLT 238

Hon'ble Judges : P.K. Bahri, J; Leila Seth, J

Bench : Division Bench

Advocate : Lalit Bhasin, Sonia Afehta, Sat Pal, Maninder Singh and Rekha Agarwal, for the Appellant;

Judgement

Leila Seth, J.

(1) By this writ petition the petitioner is praying for a writ of mandamus to direct the respondents to promote the petitioner as a Brigadier with original seniority and permit him to continue to serve his tenure till the age of 54 years.

(2) The relevant facts are not in dispute and are in a narrow compass. The petitioner has been in the employment of the Government of India, defense Services since 3/06/1956. He was promoted to the rank of Acting Colonel on 15th July, 1981 and got the substantive rank of Colonel with effect from 1/07/1982. However, he was not placed in the select list for promotion to the rank of Brigadier despite the fact that his case was considered as a fresh case in the year 1982, a first review in 1983 and a second review in 1984. The reason apparently was because of certain entries in his annual confidential reports.

(3) It is the admitted position that a Colonel in the Indian army retires at 52 years of age and a Brigadier at 54 years. The petitioner was born in October, 1935 and from December, 1985 was serving as Deputy Chief Signal Officer, Jammu & Kashmir, in the rank of Colonel. In accordance with a circular issued by the Army Headquarters on 5/02/1987, the petitioner was informed that he would

be retiring with effect from 31/10/1987. Soon thereafter, on 25/03/1987 he made a statutory complaint addressed to the Central Government with regard to his having been superseded for the rank of Brigadier.

(4) We have perused the relevant original files which were produced in court and admittedly the said statutory complaint was received in Army Headquarters on 24/04/1987. On 7/07/1987, the Chief of Army Staff made the following order after examining the statutory complaint :

"1direct expunction of the following from the ACRs of the officer :-(a) Acre 77-78, 1cr Jun 78-Nov. 78, Acre 78-79, complete assessment of the HTO.(b) Acre Jul. 81-Feb. 82, Acre 81-82 Acre 82-83. Complete assessment of the Head of the Arm.2. Officer's case for promotion should be regulated.3. Subject to the redress as given by me residual portion of the complaint is recommended to be rejected."

(5) The case of the petitioner was then considered by the Selection Board as a special review (fresh) He was approved for promotion. "By a letter dated 23/09/1987, written by Maj. General A. Banerjee, Army Headquarters, Military Secretary's Branch, he was informed of the promotion .The letter reads :

"I am glad to inform you that you have been approved for promotion to the acting rank of Brig. in the Corps of Signals on the Special Review (fresh) consideration of your case."

(6) Since no actual promotion orders were issued, the petitioner addressed another letter to the Central Government dated 15/10/1987. As no reply was forthcoming and time was running out, he filed the writ petition in this Court on 26/10/1987.

(7) On 27/10/1987. this Court issued notice to the respondents to show cause why rule nisi be not issued, and also made an ex parte order in view of the letter dated 23/09/1987, abovementioned, restraining the respondents from giving effect to the letter dated 5/02/1987 retiring the petitioner from service with effect from 31st October 1987.

(8) As above indicated the two basic prayers of the petitioner are, one ,to be promoted as a Brigadier and continue to serve till the age of 54years and, two, be given his original seniority.

(9) With regard to the second prayer pertaining to original seniority we are not inclined to interfere as the petitioner filed a statutory complaint only in March 1987 whereas he was admittedly superseded as far back as 1982-1984 and has not indicated any satisfactory reason for the delay.

(10) We now take up the first prayer. The petitioner is informed that he is approved for promotion but is not promoted.

(11) Faced with their own letter of 23/09/1987, indicating that the petitioner has been approved for promotion to the acting rank of Brigadier, Mr. Sat Pal, learned counsel for the respondents contends that the petitioner cannot be promoted in

view of Army Headquarters letter dated 10/04/1974.

(12) The said letter pertains to the policy of promotion to higher ranks of officers "on the verge of retirement" and reads :

1. THE policy so far has been not to Promote officers who are about to retire, to higher ranks, save in exceptional circumstances.

2. There have been representations that the above policy affects officers adversely, particularly in view of the provisions AI/S/70, according to which gratuity is calculated on the basis of pay of last rank held.

3. The question has been reviewed, taking all pertinent factors into consideration, and it has now been decided that : (a) Officers will, as a general rule be promoted in their turn if they are able to serve in the new appointment in the higher rank for a minimum period of four months before proceeding on retirement/leave pending retirement. (b) Where an officer is not willing to move to a new station and chooses to forgo promotion, he may be allowed to do so (c) Exceptional cases will continue to be considered on merits.

4. It has further been decided, in pursuance of the above Policy, that officers, who come up for promotion to a higher rank when they have 4-10 months left for retirement, will be required to give an undertaking to the effect that they would be willing to forgo part or whole of their leave pending retirement as necessary, to enable them to render effective service for (r) minimum period of 4 months in their new appointments, if promoted. "

(13) Mr. Sat Pal relying on this letter, submits that it is clear that officers cannot, as a general rule, be promoted if they cannot serve in the new appointment in the higher rank for a minimum period of four months before proceeding on retirement. Since the petitioner was due to retire on 31/10/1987, he would not have the requisite four months in the higher rank of Brigadier and could not be promoted.

(14) Mr. Bhasin, learned counsel for the petitioner, however, contends that the interpretation as suggested by Mr. Sat Pal is incorrect as this does not apply to acting rank. Be that as it may, in the present case, we feel it is not necessary for us to go into the question of interpretation of the said provision as in the peculiar facts of this case, which we will indicate shortly, we think it is an exceptional and not a general case.

(15) Mr. Bhasin, learned counsel for the petitioner, submits that If the petitioner's statutory complaint had been considered within the time prescribed of 30 days (or even 45 days in exceptional circumstances) the petitioner would have had four months in the higher rank and should have been promoted; that he cannot be penalised for the delay of the authorities.

(16) Regulation 361(4)(b) of the Army Regulations, on which Mr. Bhasin relies, provides that where a statutory complaint "is addressed to the Central

Government or an authority at Army Headquarters", the Branch Department concerned "will ensure that under normal circumstances the final orders of the authority so addressed are obtained within a period of 30 days of its receipt at the Army Headquarters. Under exceptional circumstances, this period may extend to 45 days.

(17) In the counter affidavit filed by the respondents, they have not disputed that this Regulation applies to the petitioner. However, Mr. SatPal urges that the said Regulations have been amended and now it is Regulation 364 which deals with the matter and the permissible time to be taken at Army Headquarters is 45 days. But in case of delay, "a report explaining in detail the reasons for delay will be forwarded to the next higher authority.

(18) We have perused the original files which were produced in Court and we find there is no such report. Further, as already indicated above, the statutory complaint was received in Army Headquarters on 24/04/1987 and was dealt with finally by the Chief of Army Staff on 7/07/1987, which means that 74 days, were taken from the date of receipt of this complaint. If the said statutory complaint had been dealt with within the time specified i.e. 45 days. It would have been dealt with before 8/06/1987 and there would have been sufficient time before the end of June 1987 for the Selection Board to have held a special review (fresh). Consequently, the petitioner, who was to retire on 31/10/1987, would have had more than four months enabling him to serve in the higher rank for the minimum period.

(19) Since we have taken the period of 45 days, being the outer limit in arriving at the above indicated conclusion, it is not necessary for us to "decide" whether Regulation 361 (4)(b) or the amended Regulation 364 applies to the petitioner because in either case he would have had an opportunity of serving for four months before his retirement in the higher rank. Consequently, we consider it an exceptional case in which the petitioner deserves to be given the promotion of acting rank of Brigadier in the Corps of Signals.

(20) On a perusal of the original files, it is apparent that the Chief of Army Staff had recommended relaxation of the four months rule, promotion to the acting rank of Brigadier and granting of an extension of service for three months from 1/11/1987 up to 31/01/1988 so as to enable the petitioner to earn a confidential report in the acting rank of Brigadier so that his case could be considered for promotion to the substantive rank of Brigadier. But the respondents did not accept their commendation for fear of it creating a precedent resulting in numerous cases having to be considered. We need not comment on this matter, because as already indicated by us, we consider it an exceptional case in the facts and circumstances outlined above.

(21) The petitioner, who would have retired in accordance with the circular of Army Headquarters dated 5/02/1987, on 31st October, 1987, is fortunately still in service by virtue of the orders of this Court. The respondents are directed to

promote the petitioner in accordance with the letter dated 23/09/1987 and consider his case for promotion to the substantive rank of Brigadier in accordance" with law and give him the consequential reliefs.

(22) The petition is partially allowed as above indicated, but in the facts and circumstances of the case, we make no order as to costs.