

(2000) 03 AP CK 0024

In the Andhra Pradesh High Court

Case No : Writ Petition No"s. 20053 of 1996

R.K. Dalal

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 09-03-2000

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2000) 4 ALD 53 : (2000) 2 ALT 579

Hon'ble Judges : B.S.A. Swamy, J

Bench : Single Bench

Advocate : Mr. Capt. K.M. Saxena, for the Appellant; Mr. L. Ravi Chander, Additional SC for CG for Mr. Adinarayana Rao, Senior SC for CG, for the Respondent

Judgement

1. One R.K. Dalai, JC-74795/ P Subedar (Tech) working in the Corpse of EME, filed this writ petition questioning the action of the respondents in not giving him promotion as Naib Subedar in January, 1989 as per the existing policy on that date, as arbitrary, illegal and offends Article 14 of the Constitution of India, and for a consequential direction to the respondents to promote the petitioner to the post of Naib Subedar with effect from 8-1-1989 and further promote him to the next rank of Subedar with ante-date seniority with effect from 1-1-1992 and grant all consequential benefits.

2. The petitioner joined the Army as Sepoy on 15-1-1974, and thereafter, he was promoted to the post of Lance Naik. As per the channel of promotion, a Sepoy is eligible to be promoted as Lance Naik and from that category, to Naik and thereafter Havaldar Major (Tech). But, under the Rules any of the employees working in the category of Sepoy and Lans Naik are eligible to be appointed to the post of Havaldar Major (Tech) skipping the intermediary category by appearing for the Common Entrance Test conducted by the authorities. It is not in dispute that the petitioner, having improved his educational qualifications and passed his Common Entrance Test in 1986, was promoted as Havaldar Major

(Tech) on 21-10-1986; the next promotion being Naib Subedar. Though the respondents did not produce the relevant Circulars before this Court, the Officers, who are present at the time of hearing, categorically admitted that as per Para 149 of the Defence Service Regulations, the guidelines relating to the Annual Confidential Reports for consideration to the promotional posts can be changed to suit the exigencies of the administration. In Circular No.9430/AG/PS.2 (c), dated 18-12-1985, the Rules relating to the Annual Confidential Reports for promotion to certain posts are given. This promotion policy was in force from 1-1-1986 to 31-12-1987. We are concerned with the promotion to the post of Naib Subedar. Para 3(b) of the said Circular dated 18-12-1985 deals with the Annual Confidential Reports for promotion to the post of Naib Subedar from the post of Havaldar Major (Tech), and for better appreciation of the case of the respondents, the said Para 3(b) is reproduced hereunder:

"(b) For promotion to the rank of Nb Bis/Nb Sub:

(i) Three out of the last five reports rendered on an individual must be above average out of which atleast one should be on regimental duty or as an instructor in any Army School of Instruction in the rank of Daf/ Hav.

(ii) No report should be lower than average in the last three years.

(iii) Should have been recommended for promotion in the last three reports".

3. From this, it is seen that for promotion to the post of Naib Subedar, one must earn five Annual Confidential Reports, out of which, three must be above average and one should be in the category of Daffedar/Havaldar, while he was on regimental duty or as an instructor in any Army School. Hence, by any stretch of imagination, it cannot be contended that all five Annual Confidential Reports should be in the category of Daffedar/Havaldar for promotion to the post of Naib Subedar. But, the respondents started interpreting the language of this circular as, that one must necessarily have five Annual Confidential Reports, out of which, one should be as Daffedar/Havaldar on regimental duty or as an instructor in the Army School. While it is the case of the respondents that no Annual Confidential Reports are maintained for Sepoys and Lance Naiks and Annual Confidential Reports are maintained only for the rank of Naiks, it is the case of the petitioner that Annual Confidential Reports are maintained for Lance Naiks also. It is his further case that he earned one Annual Confidential Report while he was working as Lance Naik. But, he has not placed any material to substantiate his contention in this regard. Likewise, the respondents also have not placed the Rules with regard to the maintenance of Annual Confidential Reports for the Military personnel. To dispose of this writ petition, I am proceeding on the presumption that no Annual Confidential Reports are maintained for Lance Naik. From the facts of the case, it has also come to light that most of the personnel working in the lower categories are being appointed as Havaldar Major (Tech) through the process of Common Entrance Test and no one is able to satisfy the criteria prescribed for promotion as per the

interpretation by the respondents on circular dated 18-12-1985, with the result, as on 31-12-1988, as many as 189 posts of Naib Subedars were left unfilled. Having realised the difficulties faced by the Department in filling up the vacancies, the Army Head Quarters issued Proceedings No.B/12500/EME.Pers., dated 25-1-1988 amending the Circular dated 18-12-1985. It is useful to extract the circular dated 25-1-1988, which runs thus:

"A.C.R. Criteria For Promotion: HMs T to NB Sub Tech :--

1. Reference point referred to Additional DG EME (P&A) during his visit to EME Records on 9th January, 1988.
2. HMT Cadre is exclusive to EME. It is a selective and superior technical cadre. A Cfn promoted to L/NK, on qualifying competitively in HMT entrance examination and thereafter successfully completing HMT Courses, can be promoted as HMT.
3. HMst, in their turn, may be promoted as Nb Subs Tech on satisfying the mandatory criteria of earning atleast one report as HMT with favourable recommendation for promotion.
4. In the event of an HMT, having earned more than one report, he should have been recommended for promotion in the last report.
5. In the event of the recommendation for promotion in the last report is negative and is not consistent with the previous reports, the case will be referred to Dte Gen of EME (EME) for a decision.
6. This has the approval of Additional DG EME (P &A).

Para 4. Reconstructed as under; vide Army HQs letter No.B./12500/EME Pers dated 13th February, 1989: "in the event of an HMT having earned more than one report, he should have been recommended for promotion" in the last three reports.

Para 5. Deleted vide Army HQs letter No.B/12500/EME Pers dated 13th February, 1989 and Para 6 renumbered as Para 5."

4. From this, it is seen that Havaladar Major (Tech) is an exclusive cadre and selective technical cadre for EME. The appointment to the post of Havaladar Major (Tech) from the post of Lance Naib and passing of competitive examination were also referred to in Para 2. In Para 3, it is clearly stated that the Havaladar Major (Tech) may be promoted as Naib Subedar (Tech) on satisfying the mandatory criteria of earning atleast one report as Havaladar Major (Tech) with favourable recommendation. In other words, there is a change in the policy with regard to the Annual Confidential Reports. While the Circular of 1985 insists for five Annual Confidential Reports, under this new Circular, it is suffice if a Havaladar Major (Tech) earns one Annual Confidential Report, which is mandatory for promotion to the post of Naib Subedar (Tech). As referred to supra, the rules relating to the prescription of Annual Confidential Reports may also be changed according to the convenience of the department. This deviation has been made by the Army

Headquarters keeping in view the fact that many posts of Naib Subedars are left unfilled for a number of years. Pursuant to this policy, the respondents admitted, that as many as 67 persons in the cadre of Havaldar Major (Tech) were promoted on 14-2-1989. It is also their case that no panels will be prepared for appointment to these posts and appointments will be made strictly on the basis of seniority and fitness. They nextly contended that the cases of persons working in the category of Havaldar Major (Tech) before the end of 1986 upto the Serial No.2423 were considered for promotion to the post of Naib Subedar on 14-2-1989 on the basis of the circular dated 25-1-1988. Admittedly, the petitioner earned two Annual Confidential Reports in the category of Havaldar Major (Tech) for 1987-88 and" it is not in dispute that he was categorised as "high average", and in the normal course, the petitioner would have been considered for promotion along with the promotees on 14-2-1989. Here, I may state that as per the information furnished by the Department, the petitioner belongs to the DAE"B 91 batch and there are 77 persons between the batch 86 and 91, who are seniors to him, and their cases as well as the case of the petitioner were not considered on the ground that they have not earned five Annual Confidential Reports in the light of the subsequent instructions given by the Army Headquarters in Circular No.B/12500/EME Pers., dated 27-2-1989. Under this Circular, the Army Headquarters opined that the Circular dated 18-12-1985 was not amended in any manner and started contending that a Havaldar Major (Tech) should have earned five Annual Confidential Reports, out of which, one shall be in the category of Havaldar Major (Tech) go get eligibility for consideration to the post of Naib Subedar. I have no manner of doubt in holding that this Circular was issued without reference to the Circulars dated 18-12-1985 and 25-1-1988 and Para 149 of the Defence Service Regulations. As referred to supra, the policy with regard to the Annual Confidential Reports issued in the year 1985, was in force from 1-1-1986 to 31-12-1987. Thereafter, from the Circular of Army Hq. Sig. No.351661/AG/PS.2(c) dated 10-1-1989, the policy underwent several changes. As I have already held that the reason for giving up the policy of insisting five Annual Confidential Reports is that a number of vacancies are left unfilled for want of candidates; more so, when the personnel working in the category of Lance Naib can be straightaway appointed as Havaldar Major (Tech) pursuant to the Common Entrance Test. On the basis of the Circular dated 27-2-1989, now the respondents are contending that as the petitioner was not having five Annual Confidential Reports as on 8-1-1989, his case was not considered for promotion to the post of Naib Subedar. !t is only when he earned five Annual Confidential Reports, his case was considered in the year 1992. It has also come to light from the Circular dated 27-2-1989 that the number of vacant posts is swelling year after year, and as per the particulars given by the department, by 1992, the vacant posts of Naib Subedar swelled to 592. At this stage, the learned Counsel for the respondents brought to my notice that the Army Headquarters, in its Circular No.B/12500/ EME Pers., dated 24-5-1989, reverted back to the policy of 1985 and was insisting for five Annual Confidential Reports. As I am called upon to decide as to whether the petitioner is eligible for

promotion to the post of Naib Subedar as on 8-1-1989, either Circular dated 27-2-1989 or the Circular dated 24-5-1989 cannot have any bearing on the issue. As stated supra, though the petitioner was eligible for appointment as Naib Subedars as on 8-1-1989, but on a wrong interpretation of the Circular of the year 1985, which lapsed on 31-12-1987, the petitioner was denied of his promotion. They are trying to justify their action under the Circular dated 27-2-1989 and the Circular dated 24-5-1989. But, the fact remains that as per their own admission, under the policy dated 25-1-1988, as many as 67 persons were appointed as Naib Subedars including Woman and Gopal Singh Rathon, who earned only three Annual Confidential Reports by the date of their promotion. When once the policy of the Headquarters dated 25-1-1988 is implemented in case of some persons, denial of benefit under the Circular to the other persons, when the Circular is in force results in hostile discrimination and offends Article 14 of the Constitution of India. Admittedly, the Circular, on which they are placing reliance, was issued much later to the date on which the petitioner acquired qualification for promotion to the post of Naib Subedar. The case of the department is that those 67 persons were wrongly promoted. As long as they are not reverted, the right of the petitioner to claim promotion to the post of Naib Subedar cannot be denied. On this ground also, the petitioner is entitled to get his promotion as on 8-1-1989, who undisputedly earned to Annual Confidential Reports in the category of Havaldar Major (Tech) under the circular dated 25-1-1988 where under one Annual Confidential Report in the category of Havaldar Major (Tech) is sufficient to earn promotion to the post of Naib Subedar.

5. Coming to the claim of the respondents even according to them that out of five Annual Confidential Reports, one should be in the category of Havaldar Major (Tech). In other words, the other four Annual Confidential Reports, that are being insisted, can be in the lower cadre. When a benefit is given to the in-service candidates to get appointed as Havaldar Major (Tech) by appearing for the Common Entrance Test skipping the cadre of Naik post, for which Annual Confidential Reports will be maintained, as per the version of the respondents, and it is not known as to how the department can insist for four Annual Confidential Reports in the post of Lance Naib, when his ease was considered for appointment to the post of Havaldar Major (Tech) on the basis of a Common Entrance Test without working in the category of Naik. Hence, according to me, the Circulars dated 27-2-1989 and 24-5-1989 were issued without understanding the implications, with the result, between 1985 and 1992, as many as 600 posts of Naib Subedars were left unfilled, out of which, only 67 posts were filled up under the circular dated 25-1-1988 on 14-2-1989. It is rather difficult to understand the logic and purport underlying these Circulars, more so, when an in-service candidate, by sheer virtue of his merit and ability, to face a Common Entrance Test conducted by the department and could be appointed as Havaldar Major (Tech) skipping the category of Naik for which alone confidential reports will be maintained as per the version of the Respondents when once an in-service candidate is not required to work as Naik, the question of earning confidential

reports in the feeder category of Naik for promotion to Havaldar Major (Tech) does not arise. If these circulars have to be given meaningful interpretation, they have to be applied to the person whose cases have to be considered for promotion from the feeder category of Naik but not to the persons appointed to the post of Havaldar Major (Tech) by way of a Common Entrance Test. I feel that these Circulars with regard to the maintenance of the Annual Confidential Reports emanated due to non-application of mind, which resulted in not only depriving the eligible candidates to get promotions but also impairing the work in an essential department like the Army. For all these reasons, I hold that the action of the respondents in not giving promotion to the petitioner as Naib Subedar on 14-2-1989 along with other promotees resulted in hostile discrimination and offends Article 14 of the Constitution of India.

6. Accordingly, the writ petition is allowed, and as the petitioner has already earned promotion in 1992, a direction is given to the respondents to refix his seniority in the cadre of Naib Subedar by giving promotion with effect from 14-2-1989 with all consequential benefits and consider his case on the basis of seniority in the post of Naib Subedar for further promotions with all consequential benefits. The respondents are directed to pass orders within three months from the date of receipt of this order.

7. At this stage, the learned Counsel for the petitioner brought to my notice that though formal promotion orders were given by the respondents on 14-2-1989 to other persons, they were promoted as Naib Subedar from the dates on which they acquired eligibility. As the information is not available with this Court on this aspect, I direct the respondents to consider the case of the petitioner for giving promotion with effect from 8-1-1989, if the contention of the petitioner is found to be true. No costs.