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(1993) 12 GAU CK 0007

In the Gauhati High Court

Case No : Civil Rule No. 936 of 1993/98(K) of 1993

S.K.Awasthy APPELLANT

Vs

Union of India and Ors. RESPONDENT

Date of Decision : 03-12-1993

Acts Referred:
Constitution of India, 1950 — Article 226, 226

Citation : (1994) 1 GLJ 107

Hon'ble Judges : H.K.Sema, J

Bench : Single Bench

Advocate : A.M.Majumdar, A.H.Saikia, Advocates appearing for Parties

Judgement

1. In this writ petition, the petitioner is aggrieved by an order dated 30th November, 1979 rejecting the petitioner''s case for promotion to the rank of Acting t. Colonel by the Selection Board.

2. I have heard Mr. AM Mazumdar, learned counsel for the petitioner as well as Mr. AH Saikia, learned Central Govt. Standing Counsel.

3. At this stage it would be convenient to dispose of one argument of Mr Saikia. It is contended by Mr. Saikia that the petitioner has approached this Court after lapse of thirteen (13) years and as such the petition is not maintainable and is liable to be dismissed in limine on this score alone. I am unable to accept this contention of Mr. Saikia, because it appears from the records that the petitioner filed statutory complaint at various stages and the last communication received by the petitioner is order dated 6th April, 1993 (Annexure 25). The present writ petition was filed on 18th April, 1993. Therefore, it cannot be said the petitioner had committed laches or negligence in preferring this petition. On the other hand it would appear that the petitioner was diligently pursuing the matter.

4. Having settled the preliminary objection raised by the respondents, I now proceed to decide the case on merit. The petitioner after his graduation from the Punjab University joined the Indian Military Academy in 1962 and was

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commissioned as Second Lieutenant on 30.6.1963. While in service the petitioner completed MA in Economics, MSc (Military Science), PhD (Economics) and won Gold Medal in LL. B. (Honors). In 1963, he became Lieutenant, in 1966 he became Acting Captain, in November, 1971 he became Acting Major and on 30.6.76 he became Substantive Major. In May, 1981 he became Acting Lt. Colonel and on 11.4.82 he became Substantive Lt. Colonel. In June, 1986, he became Colonel and in April, 1990 he attained the rank of Brigadier. Presently the petitioner is holding the rank of Brigadier.

5. The grievance of the petitioner is that his case was denied arbitrarily for promotion to the post of Acting Lt. Colonel by Selection Board. The terms and conditions of the service of the defence personnel are regulated by the provisions contained in the Army Act, Army Rules and Defence Services Regulations (Regulations for the Army), 1^87 (hereinafter the Regulations) and circulars and also orders issued from time to time from the Army Headquarters. The provisions relating to promotion are contained in paragraphs 65 to 73 of the Regulations. Paragraph 65 deals with substantive promotion by time scale upto the rank of Major. Paragraph 66 deals with substantive promotion by time scale upto the rank of Lt. Colonel. Paragraph 67 deals substantive promotion by selection. Paragraph 67 of the Regulations laid down inter alia that an officer will be entitled to substantive promotion to the rank of Lt. Colonel (by selection) in the substantive cadre on his completion of minimum period of reckonable service of sixteen (16) years, subject to medical fitness. For the above purpose the Selection Board are constituted under the order of the Chief of the Army Start. It is stipulated that promotion to a particular rank will be subject to availability of vacancies. For the purpose of ascertaining the availability of vacancies, a provision has been made for making a tentative forecast. The guidelines for the purpose of tentative forecast of assessment for promotion to the acting rank of Lt. Colonel and Colonel is contained in Army Headquarter letter No. 32666/P/ Ms5B dated 23.9.74 (Annexure 2). This guideline has important bearing for the purpose of disposal of this writ petition and I shall be dealing with this elaborately at appropriate time.

6. Paragraph 4 of the guideline stipulates that for the purpose of promotion to Acting Lt. Colonel, an officer should have served in career command appointments covering a minimum period of two years (20 to 22 months) physical service at the time of their initial assessment by the Selection Board. The tentative forecast of the year of assessment and batches likely to be considered for promotion to the rank of Acting Lt. Colonel has been annexed to the Army Headquarter letter as Appendix A. According to Appendix A, 1960 batch was to be assessed in 1975, 1961 batch in 1977 and 1962 batch in 1979. According to this tentative forecast, it clearly indicates that the assessment for the promotion of 1963 batch to which the petitioner belong was to be in 1981. Further paragraph 11 of the Annexure 2 made it clear that the tentative forecast of the years of assessment given in Appendix A was provisional and subject to change by one (1) year on either side depending upon various administrative

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factors. Therefore, in terms of paragraph i 1 of the guideline, the accepted year of assessment of 1963 batch, even if there is any change in the year, it could have been one year on either side, which means either in 1980 or in 1982. However, the assessment year for 1963 batch was postponed by two (2) years and ultimately the Selection Board for 1963 batch was held in 1979 and the case of the petitioner was rejected.

7. It is contended by Mr, Mazumdar that the Selection Board held in August, 1979 and in October, 1979 for 1963 batch was in violation of guideline issued by Army Headquarter by letter dated 23rd September, 1974 (Annexure 2) and the Appendix A appended therein. Alternately it is contended that the case of the petitioner ought to have bee a considered after the receipt of the requisite reports as enjoined under paragraph 8 of the letter.

8. Before I advert further on the submission of Mr. Mazumdar it will be pertinent to mention herein that sometime in the month of June, 1977, the petitioner was posted on compassionate ground at Delhi for getting his sort treated for Cerebral Plasy. At the relevant time, the petitioner had already completed twelve (12) months of approved career command appointment and obtained a report as Major. The petitioner had only 8 months more to serve in such appointment to obtain a report to qualify to be placed before the Selection Board for consideration for promotion to the rank of Lt. Colonel. Normally the maximum duration of posting on compassionate ground is two (2) years. However, when the petitioner came to know that the tentative forecast of assessment for promotion to the acting rank of Lt. Colonel and Colonel of 1963 batch was to be considered in 1979, he applied for reversion to regimental duty by its petition dated 14.4.1978 so that he could obtain criteria report of at least eight (8) months to make him eligible for consideration by the Selection Board for promotion to the rank of Lt. Colonel. The letter dated 14.4.78 of the petitioner was recommended by Major General SC Sinha by its letter dated 20th April, 1978 and reminded by 18 August, 1978. In the aforesaid letter dated 18th August, 1978, the Major General SC Sinha inter alia mentioned that the officer is of 1963 batch and he require one more command criteria report covering at least a period of eight (8) months before he can be considered for promotion to the next rank in terms of para 4 of 23rd September, 1974 letter and requested to revert the officer to regimental service on relief before 30th September, 1978 so as to enable him to satisfy the requirement of command criteria report. In reply to this letter, a letter dated 21st September, 1978 (Annexure 9) was written by Military Secretary''s Branch, Army Headquarters stating inter alia that the officer is of 1963 seniority and his board for promotion to acting Lt. Colonel will be held in 1979 and as the officer has one report in criteria command appointment during the last five(5) years, he will be deferred even if he is reverted during this year, (under line is mine). Ultimately the petitioner was reverted and posted to 9 Punjab by Military Secretary Signal dated 5th January, 1979 and the petitioner reported to 9 Punjab in February, 1979. Due to the culpable delay in reverting the petitioner to regimental service, the petitioner could not earn confidential

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report only for about four (4j months when the Selection Board for 1963 batch was held in August, 1979 and as such the case of the petitioner was graded ''deferred'' for want of criteria report for the requisite period.

In this connection I may usefully refer to para 3(g) of Army Headquarter letter No.00545/3/A WING/MS3A dated 28 June,1983 and Army Headquarter letter No.29150/MS98 dated 20:h April, 1984, which stipulates that the tenure of compassionate cases will not exceed two (2) years as other officers on the waiting list have also to be accommodated. This shows the posting on compassionate ground prescribed only the maximum limit. An officer opted for compassionate posting may at any time apply for reversion. In the instant case, the petitioner had applied for reversion by its petition dated 14.4.78. Had the case of the petitioner considered timely for his reversion, he could have earned criteria report when the Selection Board for 1963 batch held in August, 1978. The petitioner Could not earn criteria report in August, 1978 due to culpable delay committed by the respondent in reverting the petitioner back to the regimental service. Petitioner cannot be made suffer for no fault of his.

9. Reverting to Army Headquarter guideline dated 22nd September, 1974, para 8 of the guideline stipulates that officers are graded deferred by Selection Board due to the non availability of adequate command reports. Further proviso to para 8 provides that the deferred cases are to be submitted to the Selection Board as soon as possible after the receipt of the requisite report. (emphasis supplied). It was also stipulated that the grading, ''deferred'' is awarded by the Selection Board for want of adequate material and it should not therefore be regarded as an adverse reflection on an officer''s career.

Also according to the Military Secretary''s Branch Policy Compendium (item No. 10 page 146) deals with the effects of deferment and states that the officer will be considered for promotion by subsequent Selection Board once he becomes adequately exercised and will be awarded a definite grading, (under line is mine). In the instant case, the officer was considered in August, 1979. He was short by 8 months and was graded ''deferred'' for want of adequately exercised. In terms of proviso to para 8 and item No. 10 of Military Secretary''s Branch Policy Compendium, his case should have been considered only when he becomes adequately exercised. But unfortunately the case of the petitioner was again considered in October, 1979 when he was short by 4 months and not adequately exercised. Grading of an officer ''deferred'' is a definite grading and as such grading the officer by the Selection Board in August, 1979 is definite grading. Thereafter the case of the petitioner ought to have been considered by subsequent Selection Board after he becomes adequately exercised. However, the petitioner''s case was once again considered by the Selection Board held in October, 1979 before he becomes adequately exercised and was graded ''unfit''. This was definitely an erroneous exercise of power detrimental to the petitioner''s case.

10. Mr. Saikia contended that under paragraph 67 of the Regulations, the 1963

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batch to which the petitioner belongs to has completed a minimum period of reckonable service of sixteen years in 1979 and as such the 1963 batch Selection Board was rightly held in 1979. This in my view is erroneous reading of Regulations and guidelines. It must be remembered that paragraph 67 deals with substantive rank; whereas the guidelines dated 23rd September, 1974 deals with acting rank. The tentative forecast of assessment of the petitioner was for promotion to the acting rank of Lt. Colonel. Therefore the case of the petitioner falls within the guidelines issued on 23rd September, 1974.

11. The petitioner is an officer of high profile is not disputed by the respondents. In paragraph 11 of the petition, it is stated by the petitioner that he is having unblemished and distinguished career and keeping in view of high profile in the service, he was detailed by the Military Secretary''s Branch to attend Senior Command Course from December, 1977 to March, 1978 while on compassionate posting at Delhi''. The petitioner did extremely well in the Senior Command Course in spite of his personal problem and was later posted in the same Wing. The petitioner categorically stated that only those officers are detailed on Senior Command Course who are found fit to be Commanding Officers of a Unit as per internal assessment of the Military Secretary''s Branch. This statements made in paragraph 11 of the writ petition are admitted by the respondents in paragraph 12 of their counter.

12. Keeping in view of this background I now proceed to examine the minutes of the Selection Board held in October, 1979. At the time of hearing of this writ petition, Mr. Saikia produced the relevant records containing the minutes of the Selection Board and perused the same. It states that the case of the petitioner was assessed by No.3 Selection Board in August, 1979. He was not adequately exercised and was graded deferred. In October, 1979 the case of the petitioner was again assessed by the Selection Board and his case was rejected by the Board purportedly on the ground of an adverse career certificate submitted by the petitioner in May, 1977 while opting for compassionate ground. This grading of the Selection Board held in October, 1979 was vehemently assailed by Mr. Mazumdar on two grounds, first, in August 1979 when the petitioner''s case was assessed by No.3 Selection Board, the adverse career certificate was very much in existence yet he was graded deferred for want of adequately exercised. Secondly, situated as such the petitioner''s case could have been placed before the subsequent Selection Board after the petitioner becomes adequately exercised. In view of my findings above, this contention of Mr. Mazumdar is well founded and must prevail. When the petitioner was assessed by No.3 Selection Board in August, 1979 he was graded as deferred for not adequately exercised, the adverse career certificate was very much in existence in August, 1979, therefore rejecting the petitioner''s case by a Selection Board held in October, 1979 on the pretext of adverse career certificate is not well founded. As stated earlier, the petitioner had applied for reversion to the regimental service by its petition dated 14.4.78. Assuming the adverse career certificate did operate against the career of the petitioner adversely, it is deemed to have been waived

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by the time the petitioner opted for reversion and the authority thereafter cannot act on the basis of such adverse career certificate. The Selection Board held in October, 1979 also appears to have been taken over all assessment of the petitioner including the ACR of 1972 of the petitioner. The ground for rejection of the petitioner''s case appears in a remarks column of the minutes of Selection Committee held in October, 1979, it states :

"IOshould avoid the tendency of concealing facts and unnecessary criticising others,"

These remarks have been given by initiating officer in his ACR of 1972. However, the same officer has eloquently graded the petitioner in terms of the following words

"Confidential : An officer who possesses an impressive and pleasing personality. Is very intelligent, keen and extremely hard working. Takes interest in his profession and is a devoted soldier. Is cooperative, adjustable and understanding. Has commanded his Company, well. Is methodical, analytical and mature. Possesses high average professional knowledge and is a good instructor. His verbal as well as written expression are good. Has the potential of being an efficient Staff officer. Has been an asset to the unit. He should learn to apply his theoretical knowledge in the ground.'''' On the top of this, the reporting officer observed as under :

"Well mannered and pleasant. Takes keen interest in his work and is an effective leader. A potential Staff Officer."

Unfortunately the Selection Board choose to pick up the demerits of a spike ignoring the beam of merits of the petitioner. The above observation noted by the Selection Board in his ACR of 1972, in my view does not constitute; any adverse remarks with regard to his proficiency in military. Even assuming such remarks does constitute an adverse, the merits of the petitioner for outweighed the demerits. In my opinion the observation of the initiating officer and reporting officer with regard to military proficiency of the petitioner are the best qualities of an officer which cannot be ignored. In this view of the matter the Selection Board for the 1963 batch held in October, 1979 has denied justice to the petitioner.

13. Mr. Saikia submits that promotion of 1963 batch was considered by the Selection Board on the basis of merit and the petitioner was not found qualified. He therefore, cannot claim promotion as a matter of right. In this connection he has referred to a decision of the Apex Court in State Bank of India & others vs. Mohd Mynuddin, AIR 1987 SC 1889 where the Apex Court had held that promotion to a higher post is to be made on the basis of merit. No officer can claim promotion to the higher post as a matter of right by virtue of seniority alone. This decision in my view is not applicable to the facts of the case at hand. In the case at hand, the petitioner claimed promotion on the basis of merit which has been denied to him. Mr. Saikia again referred to the decision of the Apex

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Court rendered in Union of India & another vs. Dayananda Khurana, AIR 1991 SC 1955 where the Apex Court had occasion to deal with fixation of seniority after adaptation of two stream concept, ''command and staff'' and ''Staff only'' and had held that officers approved in command and staff stream of the same batch are enblocked rank senior to officers approved in staff only. This decision is also distinguishable on facts and is of no help to the respondent''s case.

14. In view of what has been stated above, this writ petition is allowed. The petitioner is entitled to the original seniority of 30th June, i963.

15. Before I part with the record, I may mention herein that there should be no difficulties in implementing this Court''s order because of two interim orders. On 6.8.93 this Court allowed the petitioner to appear before the Selection Board along with others of 1963 batch for the post of Major General to be held in September, 1Q93 and the result of the petitioner was to be kept in sealed cover. I am told the petitioner appeared before the Selection Board. Further on 5.10.93 this Court directed the respondents to keep one post in the cadre of Major General unfilled until further orders.

With the aforesaid observation, this petition is allowed, however without costs.

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