

(1993) 07 DEL CK 0045

In the Delhi High Court

Case No : Civil Writ Petition No. 3971 of 1992

S.P. Murgai

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 28-07-1993

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1993) 3 AD 355 : (1993) 27 DRJ 193

Hon'ble Judges : V.K. Jain, J;D.P Wadhwa, J

Bench : Division Bench

Advocate : A.P.S. Ahluwalia, Sanjeev Ralli, P.P. Singh, S. Tandon, Rajeev Bansal and Madan Lokur, for the Appellant;

Judgement

D.P. Wadhwa, J.

(1) Rule D.B. We have heard the matter in detail and proceed to decide the matter.

(2) By this petition filed under Article 226 of the Constitution the petitioner, a service officer, seeks a declaration that he was entitled to promotion to the rank of Brigadier w.e.f. 13 November 1992 and that the order dated 29 October 1992 promoting the third respondent who was junior to the petitioner to the rank of Brigadier overlooking the right of the petitioner, was illegal and of no effect.

(3) There are three respondents. First respondent is Union of India through the Secretary in the Department of defense Production & Supplies in the Ministry of defense, second respondent is the DirectorGeneral, Quality Assurance; andt he third Colonel S.B. Despande (now promoted as Brigadier).

(4) The petitioner was commissioned in the Indian Army in 1962 and then permanently seconded to the Directorate General, Quality Assurance Organisation in the Department of defense Production & Supplies in the Ministry of defense, Government of India, New Delhi. Earlier this department was known as Directorate General, Inspection Organisation. There are two types of officers

in this organisation -civilian and service (military). There are separate rules for promotion to the higher rank in the organisation by the service personnel. Office Memorandum dated 16 February 1982 issued by the Government of India in the Ministry of defense gives the procedure for intake of service officers in the organisation and the terms and conditions of those permanently retained. This Office Memorandum is for promotion to the acting/substantive ranks up to the level of Brigadier against service vacancies in the organisation. It is not disputed that the petitioner was eligible for promotion to the rank of Brigadier. The number of officers to be considered from out of eligible officers in the feeder grade are determined with reference to number of vacancies anticipated in a year. The Selection Board called the Quality Assurance Selection Board is constituted of the Chairman and four members who are respectively (1) the Secretary, defense Production & Supplies; (2) Additional Secretary (defense Supplies); (3) Joint Secretary (Dealing with DGQA); (4) Director General of Quality Assurance; and (4) Under Secretary/Deputy Secretary (Dealing with DGQA). Then representative from the Military Secretary Branch, Army Headquarters, preferably of the rank of Brigadier, may also be co-opted, when necessary. This constitution of Selection Board is given in the letter of the Government of India dated 28 April 1981. The functions of the Board are also given in this letter. It is to assess the officers employed in the organisation for various purposes, like acting/substitutive promotion to the Lt. Colonels and above of permanently seconded officers; officiating promotions; permanent secondment in the organisation; review of cases; etc.

(5) The Board is to prepare a panel of officers equal to the number of regular anticipated vacancies plus 25% there of subject to a minimum of one additional name on the panel over and above the number of anticipated vacancies, to cover any exigencies. The panel so drawn up by the Board shall normally remain valid for one year from the date of approval of the competent authority. The panel can, however, be extended for a period of not more than six months, with the prior approval of the Secretary in the Department of Production & Supplies. In the present case, for the year 1992, five vacancies in the rank of Brigadier were anticipated. The Board drew up a panel of seven officers in the rank of Colonel for promotion to that of Brigadier. This panel was approved on 20 December 1991 by the Minister-in-Charge. The competent authority. It was, thus, to remain valid up to 20 December 1992. The petitioner was, however, at number seven being the last in this panel and was found fit for promotion to the higher rank of Brigadier. Seven vacancies in the rank of Brigadier in the organisation arose and six officers from the panel were accommodated, but when the turn of the petitioner came he was not so promoted. The petitioner says that the panel was to remain valid up to December next and he should have been promoted as a matter of course since he was medically fit and his service record was also good. He says during all this period when he was on the panel he was not given any warning or given any adverse report. Instead, he says, it was the third respondent who was not even on the panel and was junior to him, was given the

rank of Brigadier and promoted. Petitioner felt aggrieved and filed this petition on 9 November 1992. When the matter came up for admission this Court did not grant any stay but by an interim order directed that promotion of the third respondent to the post of Brigadier shall be subject to further orders of the court. This interim order is continuing.

(6) Respondent No.3 has remained un-represented. Respondents 1 and 2 have filed their counter-affidavit. They contended that latest two reports in respect of the petitioner showed continuous drop in performance. They say that the record of performance based on which the petitioner was empanelled was up to 31 March 1991, and subsequently when the Selection Board met in the third quarter of 1992 the Board graded the officer as not fit for promotion. It is admitted, however, that normal period of validity of the panel is one year and that normally a panel for next calendar year is drawn up in the last quarter of the year based on the Annual Confidential Reports of the period ending 31 March.

(7) Respondents have not told us as to what they mean by "drop in performance as understood in the organisation. Infact they had no answer. Rather Mr. Ahluwalia, learned counsel for the petitioner, referred to letter dated 4 December 1992 issued by the Military Secretary's Branch, Army Headquarters, and addressed to all the Commands to show as to what drop in performance" meant. He said this communication would be applicable to the case of the petitioner as well who is an Army Officer though permanently seconded to the organisation. He said even according to this there cannot be said to be any drop in performance of the petitioner. Mr. Bansal then said that this communication was not applicable as it was not issued by the Department of defense Supplies & Production. It is not necessary to go into this question and it is, therefore, not necessary for us to reproduce the circumstances which would lead to drop in performance as per aforesaid letter. We, however, called upon the respondents to show us the Annual Confidential Reports of the petitioner ending 31 March 1992. His A.C.R. ending 31 March 1991 had already been considered by the Selection Board when the petitioner was empanelled. We do not think the Selection Board which met in the third quarter in 1992 was competent to look into the A.C. Rs. of the petitioner up to March 31, 1991 afresh. We have seen the A.C.R. of the petitioner ending 31 March 1992. The Reporting Officer has rated him "Very Good" and he has remarked that officer is very highly qualified with numerous qualifications of post graduate level covering different facets of electronics and that his performance in this course was very good. The Reporting Officer also said that the petitioner was very knowledgeable on technical matters and possessed necessary maturity commensurate with his age and service and also had the talent for organising mass functions. The Reviewing Officer said that he generally agreed but then said that the grading "Very Good" given by the Reporting Officer was not commensurate with his write up and that the officer was "Good". The Reviewing Officer also recorded that the petitioner was a tactful officer who was able to get around problems and situations, and was resourceful and had ability to put across his view which was a good performance. We do not

think that the A.C.R. for the period from 1 April 1991 to 31 March 1992 would mean that there was a drop in performance of the petitioner. As noted above, the respondents themselves were unable to tell us as to in what circumstances it would be said that there was drop in performance of the officer.

(8) Mr. Bansal, learned counsel for the respondents, submitted that if Secretary in the Department of defense Production & Supplies could extend the period of validity of the panel for further six months, he could also cut short the validity of the panel for a period less than one year. He said this the Secretary could do in the exigencies of service. For one, we are not able to agree that the Secretary could cut down the period of panel which is otherwise valid for one year, and, two, the exigency which was stated to have been existed was the imminent transfer of the Secretary. This would hardly be an exigency justifying cutting down the valid period of panel.

(9) The analogy that when there is a power to extend the power to limit is implicit cannot stand. The instructions make the panel valid for one year. If it is exhausted within a year it would be a different matter. If the panel validly made need not be worked upon during the period of its validity in certain circumstances then the rule or instructions must specify that and also specify the circumstances. Otherwise assuming there is such a power it would be an arbitrary exercise of power without there being any reason or rationale behind it. In the present case, the instructions specifically provided that panel would be valid for a period of one year. Respondents could not have afresh panel during the validity of the first panel and work on that. If any such fresh panel is made it has to work after the lapse of the first panels

(10) We enquired from the respondents as to what was the necessity for the Selection Board to meet in the third quarter of 1992 for preparing a panel for the expected vacancies in the rank of Brigadier for the year 1993. As noted above they said that since the Secretary in the Department of defense Production & Supplies was being transferred to some other posting, it was thought fit to hold a meeting of Selection Board in the third quarter of 1992 itself. It is admitted, however, that the panel earlier prepared by the Selection Board in the last quarter of 1992 was valid up to 20 December 1992. This argument that the Secretary was about to be transferred and on that account Selection Board was held appeared rather strange to us and that would appear to be the reason as to Why the petitioner has come up with an allegation that whole action of the respondents in preparing the panel in post-haste was malafide in order to benefit the third respondent and that this was done by the second respondent who himself was retiring on 31 December 1992. To us, Therefore, it appears that the vacancy in the rank of Brigadier in the organisation which arose on 13 November 1992 should have gone to the petitioner. The order promoting the third respondent is dated 29 October 1992. To that extent this order cannot stand and is set aside. It is declared that the petitioner was entitled to be promoted to the vacancy in the rank of Brigadier w.e.f. 13 November 1992. If the result of this

order is that the third respondent loses his rank of Brigadier we cannot help. Of course, if any other vacancy in the rank of Brigadier has arisen in the meanwhile, the third respondent will be entitled to continue in that rank if otherwise permissible. However, he will not be entitled to claim any seniority on the petitioner on that account.

(11) Accordingly, the petition is allowed. The petitioner is held entitled to be promoted to the rank of Brigadier w.e.f. 13 November 1992. Parties are left to bear their own costs.

(12) RULES is made absolute.