
(2014) 07 GAU CK 0030
In the Gauhati High Court
Case No : Writ Petition (C) No. 1422 of 2013

Umakant Pandey

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 17-07-2014

Acts Referred:

Citation : (2014) 5 GLT 377

Hon'ble Judges : Tinlianhang Vaiphei, J

Bench : Single Bench

Advocate : S. Bhattacharjee and M. Bhattacharjee, Advocates for the Appellant; Randeep Sharma, A.S.G., P. Phukan, D. Borah and R. Borah, C.G.Cs, Advocates for the Respondent

Judgement

Tinlianhang Vaiphei, J.—Aggrieved by the posting of Colonel P.D. Naidu (respondent No. 3) as Chief Engineer, Project Vartak in anticipation of his promotion to the acting rank/local rank of Brigadier, the petitioner is filing this writ petition to challenge such posting and to direct the respondent authorities to allow the senior most officer in the hierarchy of Project Vartak take over the charge of Chief Engineer, Project Vartak from the present incumbent on his moving out. Shorn of unnecessary details, the case of the petitioner is that he belongs to the Civil Engineer Cadre of Border Roads Engineering Service (BRES) of the Border Roads Organization (BRO) which is under the organization known as Border Roads Development Board (BRDB) in the department of Ministry of Road Transport and Highways. The Head of the BRES service is Director General, Border Roads Organisation, the post currently held by an Army Officer in the rank of Lt. General on loan basis and there is no recruitment rule for the post and the same is under the challenge in the Delhi High Court. In so far as the GREF is concerned, as per the policy decision of the Government of India, the General Reserve Engineering Force (GREF) is formed with personnel primarily drawn from two sources namely,

(a) Officers and men directly recruited;

(b) Personnel on deputation from Central Ministries, State Government, local bodies and Corporations.

2. Apart from the GREF manpower, Government of India in the Border Road Development (BRDB) also hired the service of the Defence Forces in early years of GREF raising, but the personnel of the Defence Forces working with BRDB do not form a part of GREF, which is a civil work force under the Department of Ministry of Road Transport and Highway and not a regiment or Department of Military under Ministry of Defence. In the year 1986, on the recommendation of the 4th Central Pay Commission, the posts of Chief Engineer (Civil) Grade-I and Chief Engineer (Civil) Grade-II were merged into one Grade of Chief Engineer (Civil) in the pay scale of Rs. 5900-200-6700. An amendment to that effect was already published in the Gazette of the Government of India dated 5.11.1988. The eligibility condition for recruitment to the Chief Engineer post in case of recruitment by promotion is restricted to BRES officers only: Superintending Engineering (Civil) with 8 years regular service in the grade, including service if any in the non functional selection Grade or 17 years regular service in Group "A" of BRES (Civil) out of which 4 years be in the grade of Superintending Engineer. Officers should have had two years experience as Task Force Commander in the rank of Superintending Engineer (Civil) to be eligible for promotion. In the case of recruitment by posting from Army on deputation or transfer, the post is to be filled by officers in the rank of Brigadiers.

3. The petitioner is currently performing the duties of Director (Contract) in the Project Vartak, Head Quarter. Director General, BRO. Among the authorised strength of five Directors, the petitioner is the senior most Director. In the year 2007, the Govt. of India published the criteria for inter-se-seniority among the Superintending Engineers. BRES and officers in Colonel rank in the Army and clarified that this inter-se-seniority between the Colonels and Superintending Engineers (Functional Scale) will be with reference to date of their assumption of charge as Superintending Engineer (Functional Scale)/the date of appointment as Colonel. The notification also states that the post of Chief Engineer may however be held by a Brigadier till such time sufficient number of Major General is not available from the regular Army. Thus, it is clear that the post of BRES (Chief Engineer) is equivalent to the grade of a Major General of the Indian Army as stipulated in the Gazette notification dated 12.2.2007. It is the case of the petitioner is that the recruitment Rule of BRES Group "A" service do not provide posting of a Colonel as Chief Engineer in BRO Project. The Colonels are posted to BRO against the vacancies of Director and can assume the charge of Officiating Chief Engineer only if they are senior amongst the Directors posted in the same project. According to the petitioner, being the senior most Director level officer at Project Vartak, he was made to work as officiating Chief Engineer Project Vartak whenever the incumbent Brigadier Rohit Kapoor, Chief Engineer, Vartak was away from the duty station or proceeded on leave. Earlier to the posting of the petitioner, one Shri S.K. Doon, SE (Civil) was made officiating CE Project Vartak by virtue of he being senior most Director.

4. The Ministry of Secretariat Branch/MS-5 on Integrated Head Quarter of MOD (Army) South Block, vide letter dated 24.1.13 circulated lists of Army Officers in the rank of Colonel who have been approved for promotion to the Acting rank of Brigadiers in the Corps of Engineers of Indian Army. Para-3 of this letter clearly mentions that these empanelled officers should be promoted in their turn subject to the availability of vacancy, continued satisfactory performance and medical fitness. The said letter dated 24.1.13 clearly demonstrates that the Colonel rank officers shown in the annexure of the letter have been approved for Acting rank of Brigadier but their actual promotion to the rank of Brigadier is subject to the vacancies in the Corps of Engineers of the Indian Army. The said letter does not indicate that those officers including Colonel P.D. Naidu have been promoted to the substantive rank of Brigadier inasmuch as in the Army an officer promoted in the substantive rank of Brigadier is authorized to draw the pay and perks of Brigadier rank post and officer empanelled and promoted to Acting rank of Brigadier do not enjoy Brigadier rank pay and perks and are, therefore, in the rank of Colonel for all practical purposes. It is, therefore, contended that even the respondent No. 3 has been merely approved for empanelment for promotion to the Acting rank of Brigadier in the Corps of Engineer in the Army he cannot be said to have been promoted in the rank of Brigadier in a substantive capacity as he has not been allowed to get the financial benefits admissible to the rank of Brigadier.

5. It is also the case of the petitioner that the Central Government, in reply to the letter of a GREF Employee Wives Welfare Association (GREWWA) complaining the practice of posting a junior Army officer (Brigadier) against the higher post of GREF Chief Engineer, has categorically informed that a direction had been issued to the Indian Army stating that the post of Chief Engineer in GREF had been equated with the post of Major General in Regular Army and the Chief of Army staff has been advised by the Defence Secretary not to post local rank Brigadiers against the post of Chief Engineer. Notwithstanding this, the impugned No. 075045 was issued posting the respondent No. 3 as Chief Engineer Project Vartak, even though he is admittedly a local rank Brigadier without the benefit of pay or pension of Brigadier vice Brigadier Rohit Kapoor. The promotion/posting order of Army clearly shows that the respondent No. 3 has not been promoted to the substantive rank of Brigadier and has been posted in the capacity of acting rank of Brigadier with the pay and grade of Colonel only. Consequently, the impugned order allowing the respondent No. 3 to assume the charge of Chief Engineer Project Vartak is illegal as it violates the provision of General Statutory Rule 868 Column 11 and 12 dated 5.11.1988 according to which only Brigadier rank officer can be posted as Chief Engineer from Army. It is also the contention of the petitioner that the impugned order of posting is in violation of principles of Natural justice and administrative fair play inasmuch as he, being in the grade of Superintending Engineer (Functional Grade), is senior to the respondent No. 3 as he is holding the post of Superintending Engineer (Functional Grade) since 2003 whereas the respondent No. 3 is in the Colonel Grade only since June, 2005. Aggrieved by this, the petitioner is seeking the intervention of this Court in this

writ petition.

6. The writ petition is opposed by the respondent authorities by filing their affidavit-in-opposition. The stance taken by the respondent authorities is that the respondent No. 3 was already approved and posted as Chief Engineer, Project Vartak on promotion to the rank of Brigadier as per the posting order dated 7.2.13, which clearly mentions the words "promotion/posting order". The respondent No. 3 reported at Project Vartak to assume the charge of Chief Engineer from Brigadier Rohit Kapoor on 18.3.2013. The Signal dated 13.3.13 does not relate to assumption of appointment of Chief Engineer Project Vartak but deals with grant of acting rank of Brigadier by the respondent No. 3 and other officers mentioned therein on 29.3.2013 or assumption of appointment, whichever is later. The authorities have also granted the rank to the respondent No. 3 from 22.3.2013 or the date of assumption of appointment, whichever is later. According to the answering respondents, an army personnel is posted in GREF in accordance with carefully drawn manning policy and that the posting of Army personnel in GREF is regarded as normal regimental posting.

7. It is pointed out by answering respondents that the Border Roads Organization comes under the Ministry of Defence for the purpose of administration while Ministry of Road Transport and Highways provides the budgetary support to the organization. According to the answering respondents, Army officers are posted to BRO on normal Regimental Employment as per existing manning policy and as laid down in R & R Rules, 1988 and as approved by the Cabinet Committee on Security (CCS) while according sanction for restructuring of the organization. It is pointed out by the answering respondents that Brigadier Rohit Kapoor, former Chief Engineer Project Vartak, was also posted to project Vartak as Chief Engineer with local rank Brigadier without any effect on pay or pension in an existing vacancy. The answering respondents submitted that the officers of the rank of Colonel who have been empanelled for promotion in the higher rank of Brigadier after due approval by the Raksha Mantri are posted on promotion as Chief Engineers in the rank of Brigadier of Indian Army. According to the respondent authorities the grant of local and acting rank is related to pay fixation and has not correlation with their promotion, status etc. to the higher rank per se: local rank carries with it the same advantages of precedence and command as permanent rank as provided in para 83 of Regulations for the Army (Revised Edition), 1987 and will have effect so long as the officers is holding the appointment for which it is given.

8. The answering respondents further states that the respondent No. 3 picked up the rank of Brigadier on 18.3.2013 and that the posting order of Brigadier Arjun Rawat, who was posted as Chief Engineer of Project Udayak was challenged by one Shri Sheo Balak by filing WP(C) No. 3308/2012 before this Court and the Hon"ble Chief Justice did not grant any interim order. According to the respondent authorities the respondent No. 3 is senior to the present petitioner for all purposes and he is empowered to exercise the financial and disciplinary

powers of a Brigadier. In so far as the letter dated 23.1.12 of the Defence Minister is concerned, the instructions therein are clearly advisory in nature. The position is now clarified by the Military Secretary vide his letter dated 27.1.2012 and 11.5.2012. The respondent No. 3 has assumed the charge of the rank of Brigadier w.e.f. 18.3.2013 with full administrative and disciplinary power. It is stated by the answering respondents that they have not violated principles of natural justice and statutory Rule in posting the respondent No. 3 to Project Vartak. It is pointed out by the respondent authorities that due to administrative reason, officers of Army, who were approved to the higher rank of Brigadier are initially given the local rank of Brigadier without effect pay or pension in the existing vacancy as the promotion-cum-posting orders in the Army are not strictly in the order of seniority, but are planned to fill vacancies by suitable officers in a timely manner.

9. In order to avoid disparity in the pay of senior Brigadier vis-a-vis junior Brigadier of the same Batch, the grant of acting rank is given subsequently, on the basis of their inter-se-seniority. Thus, grant of local or acting rank is related to pay fixation and has not co-relation with their promotion, status etc. to the higher rank per se. All such officers are granted substantive rank after taking into consideration the seniority of the officers which enhances their age of retirement to 56 years. This is merely an administrative procedure which is being followed by the Indian Army for officers in the rank of Brigadiers as well as other ranks to enable placing the right man for the right job when a vacancy occurs, without waiting for others in the batch. As per para 83 of Defence Services Regulation's, it is stipulated that officer of the rank of Brigadier (Local, acting or substantive) carries the same advantages of command as a permanent rank. It is also submitted that Brigadier P.D. Naidu has been posted as Brigadier and he is senior to Superintending Engineer for all purposes.

10. An additional affidavit has been filed by the respondent authorities incorporating the subsequent development. It is clarified therein that the respondent No. 3 has been posted out from post of Chief Engineer, Project Vartak not in violation of the order of this Court, but purely for his career advancement. Following his empanelment in rank of Acting Brigadier, he was posted as Chief Engineer, Project Vartak vide the impugned signal. Subsequently, he was also considered by the No. 2 Selection Board held on 12 and 13 April, 2013 for induction into General Cadre along with officers of other Arms/Services and based on his overall profile and comparative merit, he was also empanelled for induction in the General Cadre vide Army Headquarters letter dated 18.4.2013: he submitted his willingness for induction into General Cadre. He has, therefore, ceased to be an engineer officer and become a General Cadre officer entitling him to tenant appointment of Commander of other Arms and could no longer be retained in the Corps of Engineers. He is now posted as Commander, 77 Mountain Brigade for his career advancement vide the Army Headquarters Signal dated 4.7.2013. There is, therefore, no violation of the orders dated 18.3.2013 and 21.3.2013 of this Court.

11. The submissions advanced by the learned counsel appearing for both the parties have been duly considered. I have also carefully gone through the pleadings of the parties. A number of decisions have been cited by the learned counsel for the petitioner, but since I decide to dispose of this writ petition on a narrow compass, I need not burden this judgment with those decisions. At the outset, it may be noticed that following the posting of the respondent No. 3 as Commander, 77 Mountain Brigade, the first part of the prayer of the petitioner in writ petition has become infructuous. In view of the development, the question as to whether his posting as Chief Engineer, Project Vartak when he was not even promoted in the substantive rank of Brigadier or not has now become merely academic in nature. Court does not decide a case in vacuum. The sole question which now falls for consideration is whether the petitioner is entitled to hold the charge of Project Engineer since he is the senior most Director in the Project Vartak. No rule has been cited by the learned counsel for the petitioner upon which the petitioner can claim appointment to the post of Chief Engineer, Project Vartak. Incidentally, such appointment is not even claimed by him in the relief portion. All that he seeks from this Court is to direct the respondent-BRDB to direct the current Chief Engineer, Project Vartak to hand over the duty of Chief Engineer, Project Vartak to the senior most officer in the hierarchy of Project Vartak on his moving out/handing over the charge thereof. The question as to whether it should be an army officer of the rank of Brigadier, or it should be the senior-most Director, who should be posted as, or asked to discharge the duty of, Chief Engineer, Project Vartak, is matter purely within the discretion of the respondent authorities. In other words, such posting or entrustment cannot be claimed by the petitioner as a matter of right. Moreover, in terms of the letter dated 17.2.2014 of the Deputy Director General (Personnel), the Secretariat of BRDB has apparently obtained the approval of the Government of India to the proposal of posting of an army officer against the post of Chief Engineer, Project Vartak in relaxation to BRO Rotation Policy dated 25.8.2010. In any case, the petitioner must succeed on the strength of his own case and not on the weakness of his opponent. Moreover, the relief claimed must be one permissible in law and based on legally recognised principles. In this context, I am tempted to quote the following observations of the Apex Court in State of Himachal Pradesh Vs. Shri. P.D. Attri and Others, :

"5. The case of the respondents is not based on any constitutional or any other legal provisions when they claim parity with the posts similarly designated in the Punjab and Haryana High Court and their pay scales from the same date. They do not allege any violation of any constitutional provision or any other provision of law. They say it is so because of "accepted policy and common practice" which, according to them, are undisputed. We do not think we can import such vague principles while interpreting the provisions of law....."

Need I say more? I have carefully gone through the decision of the Apex Court in Government of A.P. and Another Vs. A.V. Venugopala Rao, cited by the learned counsel for the petitioner. This case, I am afraid, will not be of any assistance to

the petitioner inasmuch as that case was rendered in the context of the entitlement of a person to hold charge of an office when the claimants to such an arrangement belong to the same organization, which is not the case. There is, therefore, no merit in this writ petition, which is hereby dismissed. The interim order stands vacated. There shall, however, be no order as to costs.