

CASE NO.:
Appeal (civil) 503 of 2007

PETITIONER:
Union of India and Anr

RESPONDENT:
F.H. Dubash

DATE OF JUDGMENT: 06/02/2007

BENCH:
Dr. ARIJIT PASAYAT & LOKESHWAR SINGH PANTA

JUDGMENT:
J U D G M E N T
(Arising out of SLP (C) No. 5180 of 2006)

Dr. ARIJIT PASAYAT, J.

Leave granted.

The appellants call in question legality of the judgment rendered by a Division Bench of the Delhi High Court allowing the writ petition filed by the respondent and holding that the respondent was eligible for promotion to the rank of Rear Admiral. The High Court was of the view that there were two vacancies available and, therefore, the respondent who was eligible and at serial No.2 in the merit list was denied promotion. The order of the High Court is challenged on the ground that the High Court has completely lost sight of the requirements of Navy Order 4/99. It is the case of the appellants that only one vacancy was under consideration by the Promotion Board and, therefore, only the officer who was at the first rank was appointed. In case the vacancies are more, particular modalities are to be adopted and in the zone of consideration respondent was placed lower. The High Court was not justified in holding that merely because the respondent was ranked second in the merit list when the consideration was for one vacancy, he ought to have been appointed when two vacancies were considered by the Promotion Board.

It is pointed out that the normal procedure adopted is not disputed by learned counsel for the respondent that when consideration is for one post, two "fresh look" and two "review" cases are to be considered in terms of the Directorate Business Rules, 2001. The promotion factors and the Government instructions have one objective i.e. one batch should not take advantage because of one year vacancy. Therefore, the cases of 1989, 1990 and 1991 come within the zone of consideration and that the consideration was not confined to one batch and that is why the zone of consideration was expanded. The High Court's view is that since two vacancies were to be considered, the respondent automatically becomes entitled to promotion. By following the norms of zone of consideration if two vacancies are considered, he does not come into zone of promotion. In fact, three people were promoted taking into account the vacant posts. They were not parties before the High Court. Therefore, the High Court did not disturb them. It has not been indicated in the

High Court's order as to how its order can be implemented if there was no vacancy. Further, the High Court should not have interfered with the policy decision. It was the Chief of Naval Staff who had decided the norms. It is not the case of respondent that there mala fides were involved.

According to learned counsel for the respondent, the High Court has taken note of the fact that there were two vacancies which could have been considered at the time of initial consideration. Therefore, the respondent who was at serial no.2 in the merit list should have been automatically appointed.

A few provisions in the Regulations for Navy Part III (Statutory) Chapter I need to be noted. Clause 10 reads as follows:

"Before each Promotion Board, an Approach paper is to be prepared by the Personnel Branch and approved by the CNS. The paper will broadly lay down the procedure to be followed by the Board. It will provide information regarding batches to be considered, number of officers to be selected based on a long term perspective and other important policy decisions as applicable. No departure from the procedure stipulated in the Approach Paper will be permitted without prior approval of the CNS."

The selection procedure is provided in Clause 11. The same reads as follows:

"Number of officers to be considered: The following guidelines will apply with regard to the number of officers to be considered:-

(a) Selection to the rank of Vice Admiral: The number of officers to be considered for promotion to the rank of Vice Admiral will be decided by the Board based on the seniority wise distribution of officers and the number of vacancies available in the higher rank.

(b) Selection to the rank of Rear Admiral and below: For promotion to the rank of Rear Admiral and below, officers of each branch will be divided into half-yearly batches depending on their seniority, i.e. officers of 1st January to 30th June seniority forming one batch and of 1st July to 31st December seniority forming the other. The number of half-yearly batches to be considered on a particular occasion will be decided on the basis of the long and short term requirements of the Services and the number of vacancies likely to become available.

NOTE: The select list of a particular year will be divided into two batches, i.e. Select List A & B corresponding to the six monthly batches considered in that year. The officers belonging to a particular batch list will be considered together for promotion irrespective of their date of confirmation in the rank Select List A and B will be used only for the purpose of confirmation in the higher rank, as a batch."

The number of officers to be considered is of considerable importance in the present dispute. The relevant prescriptions are in Clause 13. The same read as follows:

"The officer, not placed in Select List for promotion to higher rank will be considered for promotion upto three times in each rank."

Before each Promotion Board, the number has to be fixed and the Chief of Naval Staff has to fix the number. As noted above, the Chief of Naval Staff had fixed the norms as follows:

Vacancies	Area of consideration
1. Two fresh look cases	Two review cases
2. Four fresh look cases	Two review cases
3. Seven fresh look cases	Two review cases

It is to be noted that review number remains constant at two. There is no dispute that initially the Chief of Naval Staff decided that there was one vacancy.

It is to be noted that the High Court has lost sight of one relevant fact that if two vacancies are to be considered for filling up by the appellant, then the zone of consideration is six officers as against zone of 4 officers taken into account for filling up one vacancy. If the zone of consideration is in respect of two vacancies, then two more officers from within the zone of consideration for filling up the vacancy are to be considered. By order dated 10.3.2006 this Court had directed that the process as directed by the High Court is to continue, but no final decision can be taken. It was indicated by way of an affidavit that the exercise was undertaken and in the said exercise six officers were considered and the respondent in the promotional list prepared by the appellants is at serial No.4 and accordingly he does not come within the first two names for promotion as Rear Admiral if only two vacancies are taken into consideration. The first and second persons in the merit list are amongst the three persons who were promoted in the selection by the Promotion Board dated 24.8.2004.

The High Court seems to have proceeded on the basis that there was a conflict between the Ministry of Defence Guidelines dated 25th September, 2000 and Navy Order (Special) 4/99 issued by the Chief of the Naval Staff. The appellants have accepted that there is no conflict and the Navy Order (Special) 4/99 was to prevail. It is to be noted that when all vacancies are made available the panel of officers for consideration has to be accordingly expanded. There appears to be no conflict between the Government guidelines dated 25.9.2000 and the policy of the equitable distribution of vacancies containing the Naval Order (Special) 4/99. The High Court seems to have proceeded on the basis that when two vacancies were available on 18.6.2004, one vacancy should not have been released and the selection of the respondent was to be done automatically. This does not appear to be the correct approach to be adopted.

The High Court found fault with the procedure adopted i.e. considering one vacancy on 18.6.2004 and two vacancies in the New Board convened on 24th August, 2004 thereby considering cases of five more officers. There is nothing illegal in the procedure adopted. It was inter alia noted that while considering the matter on 24th August, 2004, two additional vacancies of 2005 were taken into account keeping in view the guidelines issued by the Ministry of Defence in September,

2000 and five more "First Look officers" of next 18 months batch were included in the list for consideration in accordance with Naval Orders (Special) 4/1999 to ensure equal distribution of promotion factor amongst batches. The Chief of Naval Staff is required to approve the Approach papers prepared by the Personnel Branch of the Ministry of Defence. The paper laid down the procedure to be followed by the Board and to supply the information regarding the batches to be considered, number of officers to be selected and other policy decisions. The aforesaid procedure does not appear to have been departed from. Therefore, the High Court's approach is clearly erroneous and deserves to be set aside which we direct. The appeal is allowed but without any order as to costs.