

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3973 OF 2010

Hardev Singh

.....Appellant.

Versus

U.O.I. & Anr.

.....Respondents

JUDGMENT

ANIL R. DAVE, J.

1. Aggrieved by the Judgment and Order dated 26.4.2010 passed by the Principal Bench of the Armed Forces Tribunal, New Delhi in T.A. No. 541 of 2010 (O.A. No. 29 of 2010), the appellant has filed this appeal under Section 30 of the Armed forces Tribunal Act, 2007.

2. The appellant was commissioned as an Officer in Indian Army on 17.6.1973. Over a period of time, he rose to the rank of Major General and retired on 30.4.2010. During his service tenure, he performed his duties well and he had also carried out several special assignments and he was suitably honoured by Indian Army. Being aggrieved by the aforesaid order passed by the Tribunal, he has filed this appeal, as according to him, he was wrongly denied promotion to the rank of Lieutenant General.

3. The facts giving rise to the present litigation in a nutshell are as under:

Grievance of the appellant is that he was not promoted to the rank of Lieutenant General. According to him, the policy with regard to promotion had been changed after Special Selection Board (hereinafter referred to as the 'SSB') had been constituted for considering cases of officers of 1973 batch for promotion to the rank of Lieutenant General. After the SSB started the process of selecting officers for promotion to the rank of Lieutenant General, the Government had promulgated a new policy dated 31.12.2008 with

regard to promotion. Formerly, the policy with regard to promotion was based on 'value-judgment' and on that basis the SSB was to consider overall profile of all the concerned officers. According to the said Policy, confidential remarks, war operation report, course report, honours and awards and disciplinary background of each officer was to be considered while taking a final decision with regard to giving promotion to him to the rank of Lieutenant General. The said policy was changed with effect from 1st January, 2009. Instead of the aforestated 'value judgment', a new policy described as 'quantification method' has been adopted for giving promotion to the rank of Lieutenant General. According to the new policy, while considering cases for promotion, 92% weightage is to be given to confidential reports, 3% to courses, honours and awards and 5% weightage is to be given to value judgment.

4. The learned counsel for the appellant submitted that the new policy was adopted at the time when the appellant and other officers of 1973 batch became due for promotion to the rank of Lieutenant General. According to him, the SSB had already started the procedure for considering officers of 1973 batch during calendar year 2008 and, therefore, the policy could not have been changed. According to him,

this was not permissible in law because once the SSB was constituted in 2008 and had started procedure for considering the officers of 1973 batch for their promotion to the rank of Lieutenant General, new policy, even if framed could not have been implemented but the same could have been implemented only for the officers of 1974 batch. The learned counsel relied upon the judgments delivered in the cases of **P. Mahendran & Ors. v. State of Karnataka & ors.** [(1990) 1 SCC 411]; **Maharashtra State Road Transport Corpn. & ors. v. Rajendra Bhimrao Mandve & Ors.** [(2001) 10 SCC 51]; **K. Manjusree v. State of Andhra Pradesh and another** [(2008) 3 SCC 512] so as to substantiate his submissions.

5. He also submitted that every year, the SSB used to consider officers of a particular batch for promotion to the rank of Lieutenant General. In the calendar year 2006, 1971 batch officers were considered for promotion to the rank of Lieutenant General; in 2007, officers of 1972 batch were considered for promotion to the said rank but in 2008, officers of 1973 batch were not considered. The officers of 1973 batch were considered in 2009. Had the officers of 1973 batch been considered in calendar year 2008, they could have been considered as per the old policy.

6. He also submitted that though the appellant was awarded 'Kirti Chakra', the said fact was not given due weightage while considering the appellant's case for his promotion.

7. As the appellant had not been promoted, the appellant had filed non-statutory and statutory complaints but the said complaints were not properly considered and were disposed of without assigning any reason. In the circumstances, the appellant was constrained to approach the Armed Forces Tribunal, Jaipur Bench, by filing an Original Application. The said application was thereafter transferred to the Armed Forces Tribunal, Principal Bench, New Delhi. The said application was rejected by the judgment dated 26th April, 2010, which has been challenged in this appeal.

8. According to the learned counsel, if the earlier policy based on 'value judgment' had been followed by considering overall profile of the appellant, the appellant would have been selected for promotion to the rank of Lieutenant General. According to him, the appellant, who was an outstanding officer, ought to have been promoted to the rank of Lieutenant General.

9. In substance, the counsel submitted that the entire procedure followed by the SSB was incorrect and the appellant and the officers of 1973 batch ought to have been assessed as per old policy and in that event, the appellant would have been found fit for promotion and, therefore, it was submitted that the appellant deserved promotion to the rank of Lieutenant General. It was further submitted that the appellant retired on 30.4.2010 but had he been promoted to the rank of Lieutenant General, he would not have been made to retire. Finally, he submitted that the appeal deserves to be allowed and relief sought for in the appeal be granted.

10. On the other hand, Mr. P.P. Tripathi, learned Additional Solicitor General submitted that the judgment delivered by the Tribunal is just and proper. He submitted that Indian Army is having a pyramidal organisation and it has framed its promotion policy accordingly. Till 15th December, 2004, promotions up to the rank of Major were given on the basis of seniority whereas promotions from the rank of Major to Lieutenant General and onwards were strictly on merit and they were given promotion on the basis of recommendations of a Selection Board. However, as per the new policy, at present promotions upto the rank of Lieutenant Colonel are by time scale and

thereafter the promotions to higher ranks are given on the recommendation of the Selection Board.

11. He submitted that the averments of the appellant to the effect that the policy with regard to promotions was changed after commencement of selection process of the officers of 1973 batch for their promotion to the rank of Lieutenant General is incorrect. He submitted that the old policy, which was prevalent up to 31st December, 2008, was never applied in case of the appellant and other officers of 1973 batch for their promotion to the rank of Lieutenant General. He submitted that first meeting of the SSB for considering cases of the appellant and other officers of 1973 batch was convened on 9th January, 2009. He denied that the SSB had ever convened its meeting prior to 2009 for the aforesaid purpose. It was clarified that only the process of collecting relevant data had been started in 2008 because for the purpose of considering cases of all officers of 1973 batch, certain record was to be made available to the SSB in a particular form and the process being lengthy, needful was done by the ministerial staff for collecting the data in 2008, but the said data was considered by the SSB only after 1st January, 2009 i.e. when the new policy had been implemented.

12. So far as 'Kirti Chakra' is concerned, it was submitted that the appellant was awarded 'Kirti Chakra' in 1985 when he was working in the rank of Major. The said fact cannot be considered for ever. While giving promotions to the higher ranks, the aforesaid fact was duly considered by the Selection Board earlier. The said fact was considered while considering the appellant's case for giving him four promotions i.e. upto Major General. The award/ honour cannot be considered for ever as per normal promotion policy. As per the new policy, marks for awards are allotted only for two times after receipt of the award/honour. In the circumstances, in the case of the appellant, award of 'Kirti Chakra' had rightly not been considered by the SSB when it had convened its meeting in January, 2009.

13. The case of the appellant was considered twice by the SSB along with other officers of 1973 batch. His case was considered when the SSB convened its meeting on 9th January, 2009 and his case was again considered, by way of a second chance, by the SSB in December, 2009 but the appellant was not empanelled for promotion on both the occasions for the reasons that there were many other more meritorious officers and, therefore, the appellant could not be promoted to the rank of Lieutenant General.

14. The learned counsel for the respondents also denied that the appellant was having 'outstanding' grade. He submitted that most of the time the appellant was considered 'above average' and the said fact was duly considered by the SSB. He further submitted that the appellant had not levelled any allegations with regard to mala fides and, therefore, the recommendations made by the SSB cannot be faulted with. The averments and allegations with regard to pressure exerted by officers so as to grant '8' instead of '9' points were also baseless.

15. The learned counsel also relied upon judgments delivered by this Court in the cases of Union of India & Ors v. Lt. Gen. Rajendra Singh Kadyan and Another, [(2000) 6 SCC 698]; Lakhwinder Singh v. Union of India and Ors. [(2008) 7 SCC 648] so as to substantiate his submissions. He further submitted that the appellant had a right to be considered for promotion but he had no right to be promoted as observed by this Court in the case of Union of India & Ors. v. S.L. Dutta and Anothers. [(1991) 1 SCC 505] and Roshan Lal Tandon v. Union of India [AIR 1967 SC 1889].

16. For the aforesaid reasons and for the reasons recorded by the Tribunal, the learned counsel submitted that the appeal deserves to be dismissed with costs.

17. We heard the learned counsel and also perused the relevant material placed before this Court.

18. It cannot be disputed that no employee has a right to get promotion; so the appellant had no right to get promotion to the rank of Lieutenant General but he had a right to be considered for promotion to the rank of Lieutenant General and if as per the prevailing policy, he was eligible to be promoted to the said rank, he ought to have been considered. In the instant case, there is no dispute to the fact that the appellant's case was duly considered by the SSB for his promotion to the rank of Lieutenant General.

19. The main grievance ventilated in the appeal is with regard to change of promotion policy. The case of the appellant is to the effect that after starting the selection process, the respondents could not have changed the policy. According to the appellant, the policy was changed with effect from 1st January, 2009, whereas the selection process for promoting the appellant along with other officers of 1973

batch started in December, 2008. According to him relevant material was prepared and placed before the SSB and in fact it convened its meeting and started doing the needful in December, 2008 and, therefore, it was not open to the respondents to change the policy after having started the process for selection. The appellant had also relied upon the judgments delivered by this Court to substantiate his case to the effect that after initiating the selection process, the authorities and the SSB should not have given effect to the new policy.

20. Upon perusal of the contents of the counter affidavit filed and submissions made on behalf of the respondents by the learned Additional Solicitor General, it is clear that the first meeting of the SSB to consider the cases of the appellant and other officers for promotion to the rank of Lieutenant General was convened on 9th January, 2009, and not prior thereto. The counsel had however, stated that the ministerial staff of the respondents had collected relevant data in 2008 because relevant material for considering cases of all the concerned officers was to be placed before the SSB when its meeting was to be convened. For the said reason, necessary exercise for collecting the data and putting it in a proper form was done in 2008

but, in fact, the said data was considered by the SSB only when it convened its meeting in January, 2009, i.e. after the new policy had come into force.

21. The above facts would make it clear that the cases of the appellant and others were never considered by the SSB in 2008 or prior to 1st January, 2009. It means that the cases were considered as per the new policy and, therefore, all submissions made on behalf of the appellant that the policy was changed after the process of selection had been started are not correct and, therefore, they are to be discarded.

22. The grievance made by the appellant with regard to non-consideration of award of 'Kirti Chakra' is also not having any substance for the reason that as per the new policy, the grant of such an award/honour is to be considered only twice. In 1985, when the appellant was in the rank of Major, he was awarded 'Kirti Chakra' and the said fact was duly considered till he got promotion to the rank of Major General. As per the new policy, this honour, which he had secured in 1985 could not have been considered again and, therefore, it was rightly not taken into account. We also find substance in the

policy that if a person has performed his duty excellently at a particular stage in his career, then that performance of excellence cannot be considered for the entire life. When an officer has to get his promotion strictly on merits, his performance should be commendable throughout and especially during last few years. The case of the appellant was considered in 2009 for his promotion to the rank of Lieutenant General and, therefore, the achievements of the appellant in 1985 could not have been ordinarily considered by the SSB. In the circumstances, the submissions relating to not considering 'Kirti Chakra' award would not help the appellant.

23. The appellant has tried to evaluate his qualities and competence. Though, he believed himself to be an 'outstanding' officer, it is stated that most of the time he was considered 'above average'. He was hardly considered as an 'outstanding' officer. We are in complete agreement with the view expressed by this court in the case of Air Vice Marshal S.L. Chhabra, VSM (Retd.) v. U.O.I. [1993 Supp (4) SCC 441] wherein it has been held in para 13 that:

“According to us, neither the High Court nor this Court can moderate, the appraisal and the grading of the appellant for a particular year. While exercising the power of judicial review, a Court shall not venture

to assess and appraise the merit or the grading of an officer. If the Appraisal Report of the year 1987 giving the appellant '5.3' stands, then according to the criteria fixed, the case of the appellant could not have been considered for extension."

The entire relevant service record of the appellant was placed before the SSB on two different occasions, in January, 2009 and in December, 2009. On both the occasions, the appellant failed to get himself empanelled in the list of selected officers for the reason that there were better officers available for limited number of posts available in the higher rank.

24. In absence of any allegation with regard to mala fides, we would not like to look into the assessment of the SSB in relation to the appellant's performance.

25. In our opinion, it is always open to an employer to change its policy in relation to giving promotion to the employees. This court would normally not interfere in such policy decisions.

26. We would like to quote the decision of this Court in the case of

Virender S. Hooda & Ors. v. State of Haryana and Anr.

[(1999) 3 SCC 696] where this Court had held in para 4 of the judgment that:

“.....When a policy has been declared by the State as to the manner of filling up the post and that policy is declared in terms of rules and instructions issued to the Public Service Commission from time to time and so long as these instructions are not contrary to the rules, the respondents ought to follow the same.”

Similarly, in the case of Balco Employees' Union (Regd.) v. Union of India and Others [(2002) 2 SCC 333], it has been held that a court cannot strike down a policy decision taken by the Government merely because it feels that another policy would have been fairer or wiser or more scientific or logical. It is not within the domain of the court to weigh the pros and cons of the policy or to test the degree of its beneficial or equitable disposition.

27. For the aforesaid reasons, we are of the view that no injustice had been caused to the appellant as his case was duly considered for promotion to the rank of Lieutenant General by the SSB twice but as other officers were found better than the appellant, he could not be

promoted. In the circumstances, we do not find any substance in the appeal and, therefore, the appeal deserves to be dismissed.

28. The appeal is dismissed with no order as to costs.

.....J.
(Dr. MUKUNDAKAM SHARMA)

.....J.
(ANIL R. DAVE)

New Delhi
September 14, 2011.

