

***IN THE HIGH COURT OF DELHI**

+ W.P.(C) No.274/2009 & CM No.533/2009

Reserved on : 25th August, 2010

Date of decision : 13th September, 2010

MAJOR ALOK SHUKLA **Petitioner**
Through Mr. S.S. Pandey, Adv.

versus

UNION OF INDIA & OTHERS **Respondent**
Through Mr. Sanjeev Sachdeva, Adv.

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL
HON'BLE MR. JUSTICE J.R. MIDHA

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| 1. Whether reporters of local papers may be allowed to see the Judgment? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

GITA MITTAL, J

1. The petitioner's grievance in the present writ petition is that despite possessing a valid university degree; clearing the prescribed examination and fulfilling the eligibility conditions for the inter arms/service transfer from the Corps of artillery to the Judge Advocate General department with the Indian Army, his application for the same has wrongly not been considered. In support of his submissions, the petitioner places reliance on the judgment of this court dated 16th August, 2007 in W.P.(C) No. 17025/2006 entitled Lt. Col. Mukul Dev vs. UOI & Ors. also an ex officer of the Corps of

artillery who is similarly placed and had taken the same exam for inter arms/service transfer in 2005 as the petitioner.

2. The factual narration leading to the present case is not disputed. The petitioner completed his undergraduate course in 1992 from the Kanpur university and then joined the three year Bachelor of Laws ('LL.B.' hereafter) degree course with the DAV college, Kanpur, which was affiliated to the Chhatrapati Shahu Ji Maharaj University, Kanpur. The petitioner successfully completed the LL.B. Part I course in 1998.

3. While pursuing the second year of the course, the petitioner was selected and required to proceed in June, 1999 to the Officers Training Institute, Chennai for basic military training. The petitioner has contended that though he had undertaken the classes for the second year course, he could not undertake the examination for the reason that he was required to join his training with the Army at Chennai.

4. On successful completion of the training on the 4th of March, 2000, the petitioner got his commission in the Indian Army in the regiment of artillery, a fighting wing. The petitioner is stated to have been graded A in his Young Officers Course in the School of Artillery as well.

5. It is noteworthy, that in the second year, the petitioner had sought migration of his candidature for the LL.B. course to the Brahmanand College, Kanpur. This college was also affiliated to the Chhatrapati Shahu Ji Maharaj University, Kanpur.

6. In 2001, the petitioner successfully took the LL.B. second year examination which he is stated to have passed in the first division as per the mark sheet dated 26th June, 2001 placed before us.

7. It has been submitted before us, that on account of the ongoing Operation Parakram in 2002, the petitioner was not granted any leave for completing his LL.B. course. However, he successfully took the LL.B. third year examination in the year 2003 and as per the mark sheet dated 17th June, 2003, passed the same in the first division as well.

8. On a successful completion of the LLB course in first division, the petitioner was awarded the degree of Bachelor of Laws by the Chhatrapati Shahu Ji Maharaj University, Kanpur.

9. The petitioner applied for attachment with the Judge Advocate General's department (referred to as the JAG Department hereafter) as he had a verve to be concerned and involved with the performance of judicial functions in the Indian Army. As he possessed a LL.B. degree, on 19th July, 2004 he was formally attached to the JAG's department in the Headquarters Western Command.

10. The criteria for such transfer are laid down in the relevant para 82 of the Defence Service Regulation (hereinafter referred to as "Regulation" for brevity), which include a departmental exam. With the above aspiration, on 3rd October, 2005, the petitioner cleared the prescribed JAG's departmental examination for an inter arms/service transfer to the JAG department. As the petitioner met

all the criterion laid down in paras 82 of the Regulation, he made an application dated 10th August, 2006 to the respondent seeking a permanent transfer to the JAG department. This application was followed by reminders, by way of demi-official letters addressed to the authorities in the Army, in August, 2007; 27th January, 2008; 3rd August, 2008, 23rd September, 2008 and as late as on 9th December, 2008.

11. These communications did not result in any favourable consideration.

12. The petitioner was advised, and is stated to have consequently submitted a formal application on 23rd September, 2008 for the permanent transfer to the JAG's department.

13. This application was also not considered. Instead, the respondents passed an order dated 20th of December, 2008 transferring the petitioner back to his artillery regiment, compelling him to file the present writ petition seeking quashing of the order of transfer dated 20th December, 2008 and a direction to the respondents to permanently transfer the petitioner to the JAG department, relying on para 82 of the Regulations for the Army and the judgment dated 16th August, 2007 in W.P.(C) No. 17025/2006.

14. Pursuant to an order dated 5th February, 2010, this writ petition was transferred to the Armed Forces Tribunal for adjudication in view of the Armed Forces Tribunal Act, 2007. However, for the reason that the matter related to postings and transfer which was beyond the jurisdiction of the tribunal, the

Tribunal passed an order on 15th April, 2010 that it had no jurisdiction in the matter and the case was re-transferred for adjudication before us.

Accordingly, parties have been heard.

15. The petitioner has also set up a plea of individual discrimination, contending that out of the four officers (including the petitioner) who qualified in the same JAG's Departmental Examination for the Inter Arm/Service Transfer to the JAG department, three officers namely Lt. Col. Mukul Dev, Major A.K. Pawar, Major J.G. Manhas, have been granted permanent transfer to the JAG department whereas this has been wrongly denied to him even though these officers are similarly placed.

16. The petitioner has explained that Lt. Col. A.K. Pawar was physically posted at Mathura from October, 2000 to March, 2003, whereas he had obtained a law degree on 1st April, 2004 requiring 66% attendance.

17. In the counter affidavit which has been filed, the respondents have given the dates on which these officers obtained their LL.B. degrees without dealing with the petitioner's contention premised on their objection in respect of the petitioner pertaining to the percentage of attendance in the law course leading to award of the law degree.

18. The respondents have premised their opposition to the writ petition on the sole ground that the petitioner failed to give a

certificate certifying that he had regularly attended all classes of the Bachelor of Laws Course prior to award of the degree and that he had the minimum attendance as prescribed by the rules for the LL.B. degree course and thereafter his application could not be considered. It has been contended by Mr. Sanjeev Sachdeva, learned counsel for the respondents, that unless and until the same is established and ascertained, the application of the petitioner for regular appointment with the JAG department is not permissible. In this behalf, reference has been made in the counter affidavit to the Bar Council of India Rules framed under the Advocates Act, 1961. The further submission is that in terms of the provisions of para 82(f) of the Regulations for the Army, 1987, the service rendered in the Judge Advocate General's department is deemed to be a judicial service and shall reckon as such for all purposes. The respondents contend that the petitioner does not meet the criteria laid down by the Bar Council of India to be enrolled as an advocate and consequently cannot be transferred to the JAG department, which service is deemed to be a judicial service.

19. So far as the rule position is concerned, our attention is drawn to the following criterion in the para 82 of the Defence Service Regulations for the permanent transfer to the JAG department, laid down by the respondents, which has been captioned as '*Inter Arms/Service Transfer*' and reads as follows :-

"82. Transfer to the Judge Advocate General's Department.--(a) Eligibility.--Permanent commissioned officers of all Arms and Services of

the rank of Major and below, who hold a Bachelor's degree in law from a recognised university are eligible for transfer to the Judge Advocate General's Department. Special List and Non-Technical Army Medical Corps commissioned officers whose employability is restricted are not eligible.

(b) Attachment and posting.--(i) Eligible officers may apply through proper channel to the Judge Advocate General, Army Headquarters, to be attached to the office of Deputy Judge Advocate General at Command Headquarters for a period not exceeding 6 months in the first instance. No such application will be withheld by any intermediate authority and volunteers found suitable for attachment in all respects shall be made available by the Directorates of Arms and Services concerned.

xxx xxx xxx
(c) Judge Advocate General's Departmental Examination.-- (i) Judge Advocate General's Departmental examination will be held twice a year provided adequate number of candidates apply to take the examination.

xxx xxx xxx
(d) Transfer to the Department.--(i) Candidates qualifying in the Departmental examination will be transferred to the Judge Advocate General's Department if recommended by the Judge Advocate General.

xxx xxx xxx
(f) General.- (i) Service rendered in the Judge Advocate General's Department shall be deemed to be judicial service and shall reckon as such for all purposes.
(ii) The age of retirement for officers of the Judge Advocate General's Department will be as laid down in Army Rule 16-A."

(Underlining by us)

20. Having given our considered thought to the submissions made by both parties, before we deal with the objection of the respondents premised on the attendance of the petitioner in the

law course, we may notice a few more essential facts. We find that it is admitted before us that the petitioner has satisfactorily rendered service of more than four years and ten months from July, 2004 to February, 2009 with the JAG department without any kind of objection. The petitioner's claim that he possessed requisite qualifications in the nature of the LLB degree which resulted in the acceptance of his request for attachment with the JAG department, is also not denied in the counter affidavit which has been filed.

21. During this attachment with the Judge Advocate General's department, the respondents also do not deny that the petitioner was regularly giving legal advice on issues which were brought before him. In addition, the petitioner has claimed that he was assigned the role of Judge Advocate, in accordance with the Army Act, 1950, in more than seven court martials, apart from duties assigned to regular incumbents in the JAG department. The petitioner has claimed that he was the Judge Advocate even in a court martial of a full colonel, on grave charges of murder allegedly committed by him under Section 302 of the Indian Penal Code. These facts are also not disputed.

22. Our attention has also been drawn to several recommendations on the petitioner's application for the Inter Arm/Service Transfer from Artillery to the JAG department. In this behalf, Brig. A.K. Srivastava, the concerned Deputy JAG, HQ Western Command on 10th August, 2006 recommended the petitioner's application for such transfer. This senior JAG officer

additionally issued a recommendation certifying that the petitioner was serving in the JAG department for the last two years and performing all duties including court martial duties diligently and efficiently.

The second application submitted by the petitioner on 23rd September, 2008 was again recommended by the then officiating Deputy JAG. This application bears a strong recommendation by Major General R.K. Kalra, MG IC, Adam, HQ Western Command on 25th September, 2008 who wrote that the petitioner's case is deserving for the Inter Arms Services Transfer to JAG department and that he was "a hard working officer who is sharp, legally well versed, forth right and balanced in his legal advice and produces completed staff work". The Major General Kalra further stated that the petitioner was "an asset to the organisation". Therefore, so far as the specific performance of the petitioner in the JAG branch is concerned, the respondents have not laid any objections. On the contrary, the same has been appreciated and his permanent transfer has been recommended at the highest level.

23. It is also important to note that in the several communications noticed hereinabove, the petitioner has expressed his inability to give a certificate about the attendance and contended that his case was similar to that of Lt. Col. Mukul Dev meriting a similar consideration. The respondents did not even acknowledge these applications and communications from the petitioner, let alone deal with the contentions mentioned therein. The same remain pending

with the respondents.

24. Another factor pointed out by Sh. S.S. Pandey, learned counsel for the petitioner deserves to be noted. It appears that during the pendency of the petitioner's request for permanent absorption, by an order passed on 28th August, 2007, he was again posted to his artillery regiment. The petitioner's representation dated August, 2007 against the same was accepted by the respondents who issued a signal dated 21st September, 2007 directing that the petitioner's posting from the JAG department would be held in abeyance till further orders. Learned counsel would suggest that this action also underscores the valuable contribution being made by the petitioner to this department and its working.

25. Coming now to the main ground for denial of the transfer to the petitioner, perusal of the above para 82 of the Regulation would show that three essential conditions have been laid down for an inter arm/service transfer to JAG department of the Indian Army. Firstly, the officer must be a permanently commissioned officer of the army. Secondly, he must be of the rank of a major and below; and thirdly, he must hold a bachelor's degree in law from a recognised university. Nothing further is prescribed under these regulations.

26. Yet another important aspect is the distinction in the eligibility conditions prescribed by the respondents for direct recruitment for grant of Short Service Commission for the JAG department and the prescription contained in para 82 of the Defence Service

Regulations dealing with the issue of Inter Arm/Service Transfer to it. So far as the eligibility criterion for appointment on Short Service Commission in the army for the JAG department are concerned, the respondents have placed before us, a copy of an advertisement issued in this behalf for “the Short Service Commission (NT) course – October, 2006 For Law Graduates”. The relevant portion thereof reads as follows :-

“The Indian Army is looking for the best and the brightest LAW GRADUATES men amongst you.

Applications are invited from male Law Graduate candidates for grant of Short Service Commission in the Indian Army for Judge Advocate General Deptt.

1. *Vacancies:*

2. *Conditions of Eligibility:-*

(a) *Nationality:* must be an Indian.

(b) *Age Limit:* 21 to 27 years (Born not earlier than 02 Oct 79 and not later than 01 Oct 85)

(c) *Educational Qualification:* Minimum 55% aggregate marks in LLB Degree (three year professional after graduation or five years after 10+2 examination. The candidates should meet the eligibility criteria for enrolment as an advocate.”

(Emphasis supplied)

27. The above advertisement shows that a law graduate seeking commissioning into the JAG Department directly must meet the eligibility criteria for enrollment as an advocate. On the other hand, para 82 of the Regulation does not mandate that the candidate is required to meet the eligibility criteria for enrollment as an advocate, as in the case of a direct recruit seeking

commission to the JAG Department. The respondents have therefore, knowingly and carefully prescribed different eligibility conditions for the two category appointments. This distinction cannot be obliterated by the respondents by reading a stipulation into the regulation which is not specifically provided.

28. Shri Pandey, learned counsel for the petitioner has pointed out that this distinction assumes importance for the fact that officers who are in the rank of major and below would have joined the army at young ages as cadets after school or have directly joined the short service commission at OTA, Chennai or directly joined the Indian Military Academy after their graduation. It is not possible for such candidates to have completed their LLB degrees before joining the army. Learned counsel has contended that the respondents normally permit study leave for a period of only two years. It is evident, therefore, that in order to regularly attend classes for the period of three years in order to obtain the LLB degree would be next to impossible for an in-service candidate. The submission is that for this reason, the respondents are satisfied if the candidate has successfully cleared the examinations and is possessed of a valid LL.B. degree from a recognized university in terms of the aforesaid para 82 of the Regulations, in order to be eligible for an Inter Arms/Service Transfer. Shri Pandey explains that on the other hand, the respondents insist on the candidate meeting the eligibility criteria for enrollment as an advocate and thus an attendance criteria as per the applicable rules if a law graduate

directly seeks short service commission (NT) into the Indian Army.

29. We may also notice from a reading of para 82 of the Regulations that under clause (b) of para 82 of the regulation, attachment and posting to the JAG department is also of only 'eligible officers'. Such eligibility is prescribed in clause (a) of para 82 of the Regulations. It is evident, therefore, that in order to be attached with the JAG department, a candidate is required to possess a LL.B. degree from a recognised university. It is because the petitioner on 19th July, 2004 and others like him, including Lt. Col. Mukul Dev, fulfilled this requirement that they were attached to the JAG department.

30. Clause (c) of para 82 provides the manner in which the Judge Advocate General's departmental examination would be conducted while clause (d) of para 82 of the Regulations stipulates that upon qualifying in the departmental examination, the candidate would be transferred to the JAG's department if so recommended by the JAG.

31. The above narration would show that the petitioner admittedly possessed a bachelor's degree in law from a recognised university. His applications stood recommended by the concerned Judge Advocate General. Before us, the respondents also accept that the petitioner fulfills all eligibility criterion under para 82 of the Regulations as it stands. He was permitted to take the inter arm service transfer examination obviously.

32. In this factual background, the sole issue which arises for consideration before us in this petition is whether the respondents

can introduce an additional eligibility qualification and criterion which is not prescribed under the rules.

33. It is well settled that the respondents are bound by the eligibility criteria which was notified at the time of inviting applications for the Judge Advocate General Departmental Inter Arm/Service Transfer Examination pursuant to which the petitioner applied and undertook the examination. It is not open for the respondents either to vary the eligibility criteria in any manner or to change the manner of selection after its commencement.

34. In this regard, reference can usefully be made to the pronouncement of the Supreme Court dated 1st February, 2010 in WP(C) No.66/2008 **Ramesh Kumar Vs. High Court of Delhi & Anr.** In this case, it was held that selection is to be made giving strict adherence to the statutory provisions and if such power i.e. "inherent jurisdiction" is claimed, it has to be explicit and cannot be read by necessary implication for the obvious reason that such deviation from the rules is likely to cause irreparable and irreversible harm. In so concluding, the court placed reliance on earlier judgments in **MANU/SC/0409/1980 : AIR 1981 SC 561 B.S. Yadav and Ors. v. State of Haryana and Ors.;** **MANU/SC/0395/1983 : AIR 1984 SC 541 P.K. Ramachandra Iyer and Ors. v. Union of India and Ors.;** and **MANU/SC/0050/1985 : AIR 1985 SC 1351 Umesh Chandra Shukla v. Union of India and Ors.** wherein it had been held that there was no "inherent jurisdiction" of the Selection

Committee/Authority to lay down such norms for selection in addition to the procedure prescribed by the Rules.

35. In **AIR 2008 SC 1470 : MANU/SC/0925/2008 K Manjusree v. State of Andhra Pradesh and Anr.** it was held that selection criteria has to be adopted and declared at the time of commencement of the recruitment process.

We may observe that the restriction on the jurisdiction to lay down additional eligibility conditions would be even more stringent than the procedural requirements which are to be followed by the selecting body. Therefore, having commenced with the process of selection based on prescribed eligibility conditions, it is certainly not open to the respondents to add additional requirements after having invited applications and the petitioner having successfully participated in the examination for the same.

36. In the light of this legal position, the respondents cannot insist that the petitioner has to give an attendance certificate before granting his application when there is no such requirement under the applicable rules. The respondent's action in rejecting the petitioner's application for permanent transfer to the JAG department is liable to be struck down on this short ground alone.

37. We may now refer to the primary contention of the petitioner. It is contended that the petitioner is entitled to permanent transfer in view of the principles laid down by the Division Bench of this court in its judgment dated **16th August, 2007** rendered in **W.P.(C) No. 17025/2006** entitled **Lt. Col. Mukul Dev vs. UOI &**

Ors. In this case, this petitioner was in possession of a bachelor's degree in Law as noted above and had obtained a transfer to the JAG department in March, 2003. Just as Major Alok Shukla (petitioner herein), he had been also commissioned in the Indian Army and again, as the petitioner, he also belonged to the regiment of artillery. He based his claim for permanent transfer to the JAG department on this degree as well as the fact that he had conducted several court martials etc as part of his posting in the JAG department. He had obtained his bachelor of Law degree from Chaudhary Charan Singh University in the examination held in 1996 and was also attached with the JAG Department. Lt. Col. Mukul Dev had also qualified the JAG department's exam for the inter arm/service transfer with the petitioner and sought permanent transfer to the JAG Department. Lt. Col. Dev had candidly admitted that he had not fulfilled the essential criteria for attendance, that is 2/3rd of the total number of lectures delivered in the law course as set down for membership to the Bar Council of India.

38. The respondents' contested his claim in the writ petition on the objection that Lt. Col. Dev could not establish as to how and when he attained the minimum attendance as prescribed by the rules for the LL.B. degree course and therefore, he was not entitled to the permanent transfer. It was the respondents' case that Lt. Col. Mukul Dev had been awarded the LL.B. Degree by the Chaudhary Charan Singh University, Meerut, U.P., whereas he was posted in Faridkot (Punjab), Dinjan (Assam) and NC Hills Assam

during the period of 1993 to 1996. Lt. Col. Dev had also premised his claim for permanent transfer to the JAG Department on para 82 of the Defence Service Regulations noted hereinabove.

39. In this case, the Division Bench had occasion to hear learned counsel for the Bar Council of India as well, who had brought out the distinction between professional (academic) and other LL.B. degrees. In para 5 of the pronouncement, the court had noted as follows :-

“5. We had the advantage of hearing Mr.Sachdeva, learned counsel for the Bar Council of India, who had brought out the distinction between professional and other (academic) LLB Degrees. It appears that certain Universities offer a Degree after pursuing only a two year course. Attendance requirements vary from one University to another but so far as the Bar Councils are concerned, unless a University prescribes a minimum attendance of 2/3rd of the lectures delivered, and insists on student's compliance with this requirement, a person would not be granted a licence by the Bar Council to practice the profession of law as an Advocate. Mr.Sachdev had clarified that apart from this stringent stipulation, the Bar Council is not concerned with the award of the LLB Degree to any student.”

40. It is evident from the above that so far as the conferrment of a licence to practice as an advocate by the Bar Council is concerned, in addition to the possession of the Bachelor of Laws' degree, the attendance requirement in the course would not only be relevant but is compulsory. The court had accordingly observed in para 6 of the judgment that the concerns of eligibility for practice as an advocate were not topical or relevant to answer the issue raised by Lt. Col. Dev, since the prayer of the petitioner was not his

enrollment as an advocate or the bestowal of a licence by a bar council and that Lt. Col. Dev was only seeking the relief of his permanent transfer to the JAG Branch.

41. On a consideration of para 82 of the Regulations, this court had unequivocally declared the legal position in Lt. Col. Mukul Dev's case in the following terms :-

“8. Having considered the rival cases we are of the opinion that the Respondents are not justified in insisting that the petitioner “should meet the eligibility criteria for enrollment as an Advocate”. This requirement can legitimately be insisted upon at the threshold, but if it has to be applied at any stage thereafter paragraph 82 of the Regulation would have to be amended. The Regulation would have to stipulate that in addition to having attended a three year Professional LLB Course, (which the petitioner has successfully undergone as evidenced by his Degree) every officer in the JAG Branch could also be additionally eligible for enrollment as an Advocate. We may observe, *en passant*, that the natural consequence of such a Regulation may be that only such officers who are eligible to be enrolled as Advocates can be transferred to the JAG Branch. Thereupon the initial transfer of the Petitioner into the JAG Branch would be irregular and illegal. The ramifications of such an interpretation would be highly deleterious to the interests of the Indian Army as persons such as the Petitioner have played pivotal roles and responsibilities in sundry Court Martials. Be that as it may, we are of the unequivocal view that the Regulation, as it presently stands, does not envisage that only those officers can be considered for service in the JAG Branch who are eligible for enrollment as Advocates.”

(Underlining by us)

42. An effort has been made by Mr. Sanjeev Sachdeva, learned counsel who appears for the respondents before us, to draw a distinction between Lt. Col. Mukul Dev's case and that of the present petitioner. This distinction is premised solely on a

Presidential sanction which had been obtained in Lt. Col. Dev's case. We may notice that so far as Lt. Col. Dev was concerned, unlike the petitioner, he had faced a disqualification even in terms of para 82 of the Regulations. The regulation clearly stipulates that only officers of the rank of Major or below were eligible for the permanent transfers. This officer was of the rank of Lieutenant Colonel. The respondents were satisfied that this officer satisfied the other eligibility conditions and in acceptance and admission thereof, the respondents had moved the President of India for a waiver of only the rank stipulation in para 82 of the Regulations so far as the permanent transfer of Lt. Col. Dev to the JAG Department was concerned. This waiver was sought by a reference dated 20th July, 2006 submitted by the Military Secretariat which has been placed before us. The reference records that Lt. Col. Mukul Dev was "a law graduate who was serving in the Judge Advocate since 9th September, 2002". The Military Secretariat had endorsed his eligibility premised on the bachelor's degree in law from a recognised university held by him and also on the fact that he had qualified in the Judge Advocate General's departmental examination. The reason for this reference was set out in para 5(b) in the following terms:-

5(b). It is revealed from the Ibid case that the officer has already undergone the procedural formalities. However, this case is held up since the officer is a Lt. Col. Post AVSC and there is a requirement of a dispensation to be obtained from the Ministry of Defence."

43. In para 5(c), the Deputy Military Secretary – 14 had specifically stated that the *“officer's case merits consideration since he is adequately qualified, has passed departmental examination and is eligible for the inter arm/service transfer subject to a disposition granted to him as a one time measure. This proposal is legally sustainable and in the organisational interest especially when the Judge Advocate General's department is deficient of officers (16 officers) as on date”*.

The reference endorses the fact that the reference and case of Lt. Col. Dev had the approval of the Military Secretary.

44. Interestingly, on this recommendation, the Under Secretary to the Government of India by a communication dated 27th September, 2006 conveyed the Presidential decision and grant of the waiver. The relevant portion of the letter dated 27th September, 2006 is reproduced hereinbelow:-

“I am directed to say that the President is pleased to decide that notwithstanding anything contained in Para 82 of the Regulations for the Army, the Inter Arm Transfer of IC-4629N Lt. Col Mukul Dev is sanctioned as a one time measure from Artillery to the JAG's Department provided the officer is in possession of Bachelor's Degree in Law from any recognized University. ”

45. Lt. Col. Dev was constrained to file the above writ petition for the reason that the respondents failed to process his application for transfer despite the presidential sanction. It is evident from the above narration that the Presidential sanction did not relate to the stipulation with regard to a valid LL.B. degree or eligibility of

enrollment as an advocate and consequently the distinction sought to be drawn by the learned counsel for the respondents in the present case is unjustified.

46. We have noticed hereinabove the reference made by the Military Secretariat of the respondents so far as Lt. Col. Dev's case is concerned not only accepted but endorsed and recommended his eligibility premised on the law degree obtained by him from the recognised university. The only waiver which had been sought and which was the subject matter of the presidential sanction was to the extent that he was holding a higher rank than was permissible under para 82 of the Regulations. In this background, the distinction sought to be drawn between this judicial precedent and the present case is wholly misplaced and untenable.

47. We are informed by learned counsel for the respondents that no challenge was laid to the judgment of the Division Bench in Lt. Col. Dev's case and the same has attained finality. The inter service transfer of Lt. Col. Mukul Dev has been effected.

48. So far as the facts of Lt. Col. Mukul Dev are concerned, we find that the judgment dated 16th August, 2007 in W.P.(C) No. 17025/2006 records that he had candidly admitted that he did not have the prescribed attendance and thus had not fulfilled the essential attendance criteria of 2/3rd of total number of lectures delivered, as set down by the Bar Council of India.

From the above, it would appear that the respondents have not insisted on any requirement of an attendance percentage

before granting of permanent transfer to the JAG department to other officers, as is being done in the case of the petitioner.

49. The above discussion would show that the criteria insisted upon by the respondents before us is not prescribed in the applicable rule/regulation. The respondents have also accepted the eligibility of an army personnel possessed of the rank of a major or below possessing a valid bachelor of law degree from a recognised university as sufficient for the inter arm/service transfer to the JAG department till 2007, when they set up the plea of attendance requirement for the first time in the case of Lt. Col. Mukul Dev (*supra*). Such stipulation by the respondents was unequivocally rejected by the court and the decision of this court was accepted and stands duly implemented by the respondents.

50. A plea of individuous discrimination would not create any right in a person to seek the same treatment, unless the discrimination was based on treatment accorded to the other person was in accordance with law. Before us, it is not complained by the respondents that the petitioner was differentially placed as these other officers or that the petitioner was not eligible under the applicable para 82 of the Regulations under which their inter arm/service transfer has been effected. There is, therefore, substance in the contention of the petitioner that he has been arbitrarily and legally discriminated against.

51. We may notice that in the counter affidavit placed in the present writ petition, the respondents have raised the very

objections which were raised in Lt. Col. Dev's writ petition and stood categorically rejected by the court in the judgment dated 16th August, 2007. In fact, the only additional pleas which have been taken herein are also those which have been specifically rejected in paras 4 to para 8 of the judgment in Lt. Col. Mukul Dev's case (*supra*). To say the least, such stand is not only unreasonable but unfortunate and valuable judicial time has been caused to be expended on a settled issue.

52. Mr. Sanjeev Sachdeva, learned counsel for the respondents has urged that the petitioner does not have any vested right to the permanent transfer and that the respondents have the absolute discretion not to appoint him even if he may meet the criterion prescribed under para 82 of the Regulations.

53. Article 14 of the Constitution of India enshrines the concept of equality as a fundamental right. Article 16 embodies the fundamental guarantee that there shall be an equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. The Supreme Court in ***E.P. Royappa vs. State of Tamilnadu & Anr.*** and also in ***Maneka Gandhi case (1978) 2 SCR 621*** reiterated that the basic principle which informs Articles 14 & 16 is equality and inhibition against discrimination. Bhagwati, J, in the majority judgment reported at ***AIR 1974 SC 555 E.P. Royappa Vs. State of Tamil Nadu & Anr.*** in paras 85 & 86 observed that any attempt to truncate the all embracing scope and meaning of these equalising

principles cannot be countenanced. So far as the arbitrariness in exercise of discretion is concerned, the same would guide consideration of the respondents' stand in the present case and deserve to be considered in extenso. The relevant portion of paras 85 & 86 of this pronouncement deserves to be considered in extenso and read as follows:-

“85. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and Constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on equivalent relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice : in fact the latter comprehends the former. Both are inhibited by Articles 14 and 16.

.....

86. It is also necessary to point out that the ambit and reach of Articles 14 and 16 are not limited to cases where the public servant affected has a right to a post. Even if a public servant is in an officiating position, he can complain of violation of Articles 14 and 16 if he has been arbitrarily or unfairly treated or subjected to mala fide exercise of power by the State machine. It is, therefore, no answer to the charge of infringement of Articles 14

and 16 to say that the petitioner had no right to the post of Chief Secretary but was merely officiating in that post. That might have some relevance to Article 311 but not to Articles 14 and 16.”

These salutary principles would guide consideration of the legality and validity of the action of the respondents in non-consideration of his inter arm/service transfer and the reason therefore in the instant case.

54. The action of the respondents has to be free of arbitrariness even in matters relating to employment. In this regard, the observations of the Supreme Court reported in **AIR 1979 SC 1628 Ramana Dayaram Shetty Vs. International Airport Authority of India & Ors.** are topical and instructive and deserves to be considered in extenso and the same reads as follows:-

“10. xxx It is a well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. This rule was enunciated by Mr. Justice Frankfurter in *Viteralli v. Seton* 359 U.S. 535 : 3 L.Ed. 1012 where the learned Judge said:

An executive agency must be rigorously held to the standards by which it professes its action to be judged. Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword.

This Court accepted the rule as valid and applicable in India in *A.S. Ahluwalia v. Punjab* [MANU/SC/0363/1974](#) : (1975)ILLJ228SC and in subsequent decision given in *Sukhdev v. Bhagatram* [MANU/SC/0667/1975](#) : (1975)ILLJ399SC Mathew, J., quoted the above-referred observations of Mr. Justice Frankfurter with approval. It may be noted that this rule, though supportable also as emanation from Article 14, does not rest merely on that article. It has an independent existence apart from Article 14. It is a rule of administrative law which has been judicially evolved as a check against exercise of arbitrary power by the executive authority. If we turn to the judgment of Mr. Justice Frankfurter and examine it, we find that he has not sought to draw support for the rule from the equality clause of the United States Constitution, but evolved it purely as a rule of administrative law. Even in England, the recent trend in administrative law is in that direction as is evident from what is stated at pages 540-41 in Prof. Wades Administrative Law 4th edition. There is no reason why we should hesitate to adopt this rule as a part of our continually expanding administrative law. xxx xxx xxx

xxx It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes not difference whether the exercise of the power involves affection of some right or denial of some privilege.
xxx xxx xxx

12. We agree with the observations of Mathew, J., in *V. Punnath Thomas v. State of Kerala* [MANU/KE/0020/1969](#) : AIR1969Ker81 that : "The Government is not and should not be as free as an individual in selecting the recipients for its largess. Whatever its activity, the Government is still the Government and will be subject to restraints, inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal". The same point

was made by this Court in Erusian Equipment and Chemicals Ltd. v. [State of West Bengal](#) [MANU/SC/0061/1974](#) : [1975]2SCR674 where the question was whether black-listing of a person without giving him an opportunity to be heard was bad? xxx xxx xxx

xxx But the Court, speaking through the learned Chief Justice, responded that the Government is not like a private individual who can pick and choose the person with whom it will deal, but the Government is still a Government when it enters into contract or when it is administering largess and it cannot, without adequate reason, exclude any person from dealing with it or take away largess arbitrarily. The learned Chief Justice said that when the Government is trading with the public, "the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions. The activities of the Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure." This proposition would hold good in all cases of dealing by the Government with the public, where the interest sought to be protected is a privilege. It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largess, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largess including award of jobs, contracts, quotas, licences etc., must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory."

55. In the judgment reported at **(2009) 15 SC 620 : JT 2009**

(11) SC 472 Chairman cum Managing Director, Coal India Limited & Anr. Vs. Mukul Kumar Choudhari & Ors., the court while considering the issue of proportionality of the punishment imposed by an administrative body, commented on arbitrariness in the exercise of discretionary power. This court placed reliance on *Halsbury's Laws of England (4th Edn.)*, Vol. 1(1) pp. 144-45, para 78, wherein it was stated that the court would quash exercise of discretionary powers in which there is no reasonable relationship between the objective sought to be achieved and the means used to that end. The observations of the Apex Court on this aspect in para 21 deserve to be considered in extenso and read as follows:-

“21. The doctrine has its genesis in the field of administrative law. The Government and its departments, in administering the affairs of the country, are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without abuse of discretion. There can be no “pick and choose”, selective applicability of the government norms or unfairness, arbitrariness or unreasonableness. It is not permissible to use a “sledgehammer to crack a nut”. As has been said many a time; “where paring knife suffices, battle axe is precluded”.”

56. Thus, in view of the above noted pronouncements, the stand of the respondents of having absolutely untrammelled power and discretion is completely misdirected and legally untenable. Arbitrary exercise of discretion is not only liable to be corrected in exercise of extraordinary jurisdiction under Article 226 of the Constitution of India but cannot be countenanced under any circumstance.

57. Our attention has also been drawn to the recommendation dated 31st July, 2006 by Major General Nilender Kumar, the Judge Advocate General with regard to the reference to the President seeking dispensation as a special case with regards to Lt. Col. Mukul Dev. This recommendation also made a reference to the waiver sought in view of the provisions of para 82(a) of the Regulations for the Army (DSR) which envisaged transfer only in the rank of Major and below. The Judge Advocate General had confirmed that the proposal was legally sustainable and in organisational interest especially where there is acute shortage of 16 officers with the JAG. The petitioner stood attached with the JAG department since 19th July, 2004. His satisfactory performance of duties was endorsed and accepted by the Deputy JAG. The proposal to post the petitioner back to the artillery unit was kept in abeyance by an order made on 21st September, 2007. Long before this date, the petitioner (alongwith Lt. Col. Dev) had already successfully undertaken the JAG departmental examination for the inter arm/service transfer. His application for permanent transfer was pending with the respondents. The only reason for repatriating him to his artillery posting in this background, appears to have been his pending application for permanent inter arm/service transfer to the JAG department.

58. Sh. S.S. Pandey, learned counsel for the petitioner has placed reliance also on the pronouncement of the Apex Court in **AIR 1976 SC 376 Sh. Krishnan vs. The Kurukshetra University,**

Kurukshetra to contend that if the university authorities acquiesced in the infirmities which the admission form contained and allowed the candidate to appear in the examination, then by force of the university statute, the university had no power to withdraw the candidature of the candidate. Applying this principle, it is urged that the respondents have no power or authority to go behind the degree.

59. The respondents do not raise any objection that the petitioner was not fit to perform the duties of the JAG department or for any organisational reasons. The petitioner is stated to have regularly attended two years classes and his shortfall in the third year was by a short number of classes at the most. It is stated that the petitioner secured a first division in the course.

60. Be that as it may, in the light of the above discussion and the principles laid down in **Lt. Col. Mukul Dev vs. UOI & Ors. (supra)**, the objection of the respondents premised on attendance in the classes is of no legal consequence and effect.

61. No amendment has been effected by the respondents to para 82 of the Defence Service Regulations. Lt. Col. Mukul Dev undertook and cleared the same JAG Departmental Service examination as the petitioner. So far as the eligibility requirement is concerned, there is not an iota of distinction or difference between the two cases. The petitioner is entitled to the same treatment as this officer.

62. In these circumstances, we have no hesitation in holding that the respondents have been unjust and unfair so far as the petitioner is concerned and their action is legally unsustainable.

63. The admitted position, therefore, is that the petitioner is in possession of a bachelor degree in law from a recognized university which is also a professional degree. The respondents have accepted and admitted that the petitioner satisfies all requirements under para 82 of the Defence Service Regulations for the Inter Arms/Service Transfer to the Judge Advocate General branch and there is no impediment to the same.

64. The petitioner has prayed for setting aside of the signal dated 20th December, 2008 whereby he was posted from the Headquarters Western Command JAG to the 193 FD Regiment and was required to report at the new appointment on 19th February, 2009. This posting order stands implemented during the pendency of the writ petition and as such, the prayer made in respect thereof is rendered infructuous.

65. In the above fact, however, the petitioner is entitled to a favourable consideration of his application dated 10th August, 2006 (Annexure P-1) reiterated in the second application dated 23rd September, 2008 (Annexure P-3) for the Inter Arms/Service Transfer to the JAG's department without the requirement of any certificate with regard to the minimum attendance in the bachelor of law degree course or any other condition not specifically stipulated under para 82 of the Regulations for the Army (Defence

Service Regulation).

66. The principles laid down by the binding judicial precedent in Lt. Col. Mukul Dev (supra) squarely apply to the instant case and the petitioner was entitled to a favourable consideration of his request for the Inter Arms/Service Transfer which has been wrongly denied to him. In this view of the matter, the present wholly unnecessary litigation has been generated for the failure of the respondents on settled legal principles. The respondents are, therefore, required to bear the costs of the present litigation.

67. In view of the above discussion, we direct as follows :-

(i) The respondents shall pass appropriate orders with regard to the inter arm service transfer of petitioner to the Judge Advocate Department as made in the application dated 10th August, 2006 (annexure P-1) reiterated in the application dated 23rd September, 2008 (annexure P-3) without insisting upon certificate of attendance in the course or any other documentation or undertaking which is not stipulated in para 82 of the Defence Service Regulations as applicable when the application was made within a period of four weeks from today.

(ii) It is clarified that this decision shall not entitle the petitioner to enrollment as a part or to any other appointment which prescribes that an incumbent should be eligible for enrollment as an advocate in order to be considered for appointment in that employment.

(iii) CM No.553/2009 shall stand disposed of in terms of this decision.

(iv) The petitioner shall be entitled to costs of the present case which are quantified at Rs.25,000/- to be paid within four weeks from today.

The writ petition is allowed in the above terms.

Dasti to parties.

GITA MITTAL, J

J.R. MIDHA, J

SEPTEMBER 13th, 2010

kr/aa