

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 5th February, 2010

+ **W.P.(C) 8618/2007**

ANAND SINGH YESSONG Petitioner
Through Mr. Amitesh Kumar, Adv.

versus

UOI & ORS. Respondents
Through Mr. Saleem Ahmed, Adv.

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL
HON'BLE MR. JUSTICE VIPIN SANGHI

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 (Oral)

1. The writ petitioner was enrolled in the Indo-Tibetan Border Police Force on 18th November, 1990 as an Assistant Commandant. After successfully undergoing rigorous training at Mussoorie, district Dehradun, till date the petitioner was posted from time to time at different places, most of which have been identified as hard postings. The postings given to the petitioner till the filing of this writ petition are as follows:-

<i>Sl. No.</i>	<i>Place of Posting</i>	<i>Batta-lion</i>	<i>Period</i>	<i>Designat-ion</i>
1.	Leh, Laddakh, Extreme Hard Area	21 Bn ITBP	12/1991 to 4/1994	AC
2.	Patiala (Pb)	16 th Bn	5/1994 to 7/1995	AC
3.	Daksham (J & K) Valley Extreme Hard Area`	19 th Bn	8/1995 to 6/1997	AC

<i>Sl. No.</i>	<i>Place of Posting</i>	<i>Batta-lion</i>	<i>Period</i>	<i>Designat-ion</i>
4.	Mirthi Hard Area	10 th Bn	7/1997 to 6/2000	AC
5.	Leh Extreme Area	Ladakh 21 st Bn Hard	7/2000 to 4/2002	AC
6.	Saboli	SS Bn.	4/2002 to 5/2003	DC
7.	Kasovo	UN Mission	5/2003 to 5/2004	DC
8.	Lohitpur (Arunachal Pradesh Area) Hard	9 th Bn.	27-5-04 to till date	DC

2. Learned counsel for the petitioner has submitted that since 2009, the petitioner stands posted in Chhatisgarh and is involved in the anti-naxalite operations. These facts are not disputed before us.

3. In the year 1994, the petitioner appears to have suffered from fever. A medical examination was conducted on him at the I.T.B.P. Base Hospital at Tigri Camp, New Delhi which brought out the diagnosis that the petitioner was suffering from “Gilberts Syndrome”. While recording the diagnosis, Dr. M.V.K. Rao, the Chief Medical Officer (SG) has clearly recorded the following note on 29th of October, 1994:-

“Recommended to be placed in SHAPE-1 in above disease. Fit for all duties. No Board required.”

4. The respondents accepted these recommendations and have treated the petitioner as so fit for all duties. This is evident from the fact that in August, 1995, he was again posted in Daksham (J & K) Valley an extremely hard area.

5. The writ petition has been necessitated in view of the

vacillating stand of the respondents. So far as the medical condition of the petitioner is concerned, there is also no dispute that the petitioner is suffering from the Gilberts Syndrome. However, the respondents have ignored the recommendations of the medical experts so far as the petitioner's fitness for duties and the fitness/medical category in which he is to be placed. For this reason, the respondents have denied him consideration for promotion at the appropriate stage on two occasions and he stands superseded.

6. In the year 1997, the petitioner developed fever while undergoing courses at Belgaum for which he was treated at the Military Hospital and placed in low medical category P2 (T-24) w.e.f. 21st January, 1997 which was continued till 3rd December, 1998. In 1998, the petitioner was downgraded to permanent low medical category P-2 w.e.f. 4th December, 1998 which was continued by a subsequent medical board held on 12th December, 2000. Interestingly, despite this categorisation, no special consideration was shown as far as the petitioners posting is concerned, and he continued to perform his duties at hard postings in difficult areas as noticed above. During the period from July, 1997 to June, 2002, the petitioner was posted in Mirthi, which is also considered a hard area.

7. The petitioner made a grievance that he was entitled for consideration and appointment to the post of Deputy Commandant in the year around 2000-2001. However, despite the petitioner being fit in all respects, the respondents referred

him for a review medical board and medical opinion to the army hospital known as 153, General Hospital at Leh on the 22nd June, 2001 for opinion with regard to the Gilberts Syndrome. The doctor at this General Hospital referred the matter for review opinion to the Department of Hepatology of the Postgraduate Institute of Medical Education & Research (PGIMER) at Chandigarh. The petitioner was accordingly examined by Dr. Y. Chawla, Professor and Head of the Department of Hepatology at the PGIMER, Chandigarh. The respondents have stated that after investigation, Dr. Y. Chawla had confirmed the diagnoses as Gilberts Syndrome with the opinion that the petitioner can perform all duties and he is fit for posting at all places.

8. Taking the specialist opinion into consideration, the unit sought approval of the Deputy Inspector General (J & K) for sending the petitioner to 153 General Hospital for a fresh opinion and constitution of a Sector Medical Board. Such Board was accordingly constituted which conducted a premature review of the petitioner's fitness.

9. The medical opinion from the Head of the Department of PGI was considered by the Lieutenant Col. Dr. Arun Tyagi at the General Hospital, Leh who again recorded an opinion on 26th June, 2001 recommending that the petitioner be upgraded to medical category of P-1 of SHAPE. This doctor had advised that the factum of the petitioner being a case of Gilberts Syndrome be endorsed in all his medical documents.

10. It is apparent from the above narration that so far as the

fitness of the petitioner is concerned, the same is not disputed by any of its expert. Despite the petitioner suffering from Gilberts Syndrome, it was confirmed that he was fit for performing all duties and he was categorised as medical category P1 of SHAPE. This fact is manifested from the postings which were assigned to the petitioner. The respondents at no point of time have considered the petitioner unfit for normal and hard duties. It is not disputed at all, that the petitioner's suffering from the Gilberts Syndrome has not impacted his fitness for, or actual performance of duties in any manner.

11. As a result of the above opinions, the Sector Medical Board upgraded the petitioner to the medical category SHAPE 1 on 5th July, 2001.

12. The respondents considered the petitioner's case for promotion only upon his upgradation to SHAPE 1 in the DPC held on 21st March, 2002 and promoted him to the rank of Deputy Commandant/GD w.e.f. 11th April, 2002.

13. The petitioner made representations seeking protection of seniority from the retrospective date when his juniors were promoted. These representations were rejected by the competent authority by the orders 13th June, 2002 and 23rd June, 2004. The petitioner makes a grievance that this was in violation of the OM No.I-45024/4/2001MS-110-60 dated 5th January, 2002 issued by the Government of India.

The office memorandum dated 5th January, 2002 deserves to be considered in extenso and reads as follows:-

“Please refer to our Endr. No.1-46024/4/2001/MS—4509-69 dated 10.10.2001 which is regarding above cited subject.

The following paras may please be added after para in MHA UO No.45420/45/99 II dated 27.7.2001.

17. If the actual promotion of a force officer is delayed because of his low medical category and he is required to regain medical category Shape-I, the person below him can be promoted but the officer will regain his seniority immediately on his promotion.
18. A fresh BPG cannot be convened for filling up the vacancies remain unfilled because of inclusion of officers with low medical category in the panel till such time the concerned officer of low medical category is unable to attain Shape I medical category.”

It is evident from the above Office Memorandum that on delay of the promotion of an officer to a post, on account of his being in a low medical category, on regaining the medical category SHAPE 1 and on being promoted, the seniority of the officer (in the promoted post) would be restored above the other officers, who though junior to the former, may have been promoted earlier because of the former being in low medical category at the time of consideration of the cases for promotion. In the seniority list for the promotional post i.e. Deputy Commandant/GD, the petitioner was required to be placed accordingly.

14. It has been submitted on behalf of the petitioner that again, despite his being medically fit at the stage when his promotion to the post of second-in-command became due, the respondent

directed a review medical board. This board was held on 18th August, 2005 which opined that the petitioner is having a disease which is congenital in nature and there will be intermittent jaundice which has a prepondance of exaggeration with strenuous work, hence the petitioner be put on category of P-2 (permanent) for the reason that he was suffering from the Gilbert Syndrome. The petitioner was accordingly put in the low medical category P-2 (permanent).

15. The petitioner represented against his medical down gradation again. In view of his representations, he was reviewed on the 4th March, 2008 by the Sector Medical Board at the Composite Hospital, Chandigarh. Again, a medical opinion of fitness was given by Dr. A.K. Mukhopadhyay, Chief Medical Officer, SG resulting in upgradation of the petitioner again to SHAPE 1 as on the previous occasion. Only thereafter, the case of the petitioner for promotion as second-in-command was considered and he was promoted to that post vide communication dated 9th April, 2009.

16. It is not disputed that medical fitness is an essential eligibility condition for promotion of all combative personnels in all groups and cadres in the force. The above narration discloses that even though the petitioner was suffering from the Gilbert Syndrome, the experts in the field including the Head of the Department of Hepatology at PGI, Chandigarh and the experts who form part of the medical board which examined the petitioner, have expressed a clear opinion that the petitioner was

fit for the purposes of performing all postings and duties. The facts as noticed above, demonstrate the manner in which the respondents have treated the sickness of the petitioner and that the same has not come in the way of his postings at hard postings. The petitioner is being admittedly assigned difficult jobs in hard terrain for the reason that the respondents accept his capability and fitness in this regard.

17. We find that there is no difference in the diagnoses since 1994. It is pointed out that the recommendations of the Board held on 18th August, 2005 were contrary to that made by PGI; that the arduous assignments undertaken by the petitioner had not reflected any of the above observations and further that despite the afore-noticed observations, the petitioner was posted in hard postings and relentlessly discharged professional functions ably.

18. Undoubtedly, the medical opinion of the experts would bind consideration of the petitioner's medical fitness and we are not competent to override the same. The respondents have also accepted this position for the reason that they have themselves also upgraded the petitioner's status based on medical opinion which has been received. Another factor which emerges from the above facts is that the change in the medical gradation of the petitioner, so far as the medical fitness is concerned, from SHAPE 1 to SHAPE 2 and vice versa is not based on any change in his medical condition, degradation or improvement of health and fitness. The diagnosis of the petitioners condition remains the same. In these facts, the downgradation is not supported by

either the expert medical opinion or the physical status of the petitioner and appears to be wholly unwarranted and unjustified. For this reason, the petitioner was entitled to consideration for promotion at the time when his juniors were considered for promotion.

19. Our attention is drawn to the Standing Order No.4/2002 dated 29th May, 2002 issued by the respondents keeping in view a circumstance where a person may be medically downgraded. The manner in which promotion and seniority of such person is to follow on the assumption of a medical status has been clearly delineated by the Government. The relevant extract of the office memorandum dated 29th May, 2002 provides as follows:-

“SHAPE I medical category will be mandatory for the purpose of promotion to Group `A' posts in ITBP. In case of those, whose illness is of permanent nature and who are not SHAPE-1, they will be considered for promotion by DPC but will be declared unfit for promotion, even if, they are otherwise fit for promotion. In case of those personnel, whose illness is of temporary nature, after considering their cases for promotion alongwith others, if they are otherwise fit, the DCP will grade them as `fit' for promotion subject to attaining SHAPE-I medical category. As and when they regain the SHAPE-I medical category, they will be promoted as per recommendations of DPC. However, they will not be entitled to back wages but retain their seniority.”

20. This standing order has been placed by the respondents before the us. There is no dispute that this memorandum also binds the respondents so far as the consideration of the case of the petitioner is concerned. In the light thereof, the petitioner would be entitled to seniority in the post of Deputy Commandant

and in the post of second-in-command.

21. The above discussion shows that the petitioner was considered after his juniors and his promotion to the posts of Deputy Commandant and Second-in-Command delayed on grounds of medical gradation as SHAPE 2.

22. Needless to say, the petitioner was entitled to the consideration for promotion to the post of deputy commandant and second-in-command as well at the same time his juniors were considered for promotion. In terms of the office memorandum dated 5th January, 2002 and the standing order No.4/2002, the petitioner would not be entitled to the back wages, but would be entitled to retain his seniority.

23. It is pointed out by learned counsel for the petitioner that juniors of the petitioners have now been considered for promotion to the post of commandant. However, the petitioner had been wrongfully ignored for the same in the above facts and circumstances.

24. In view of above discussion, it is apparent that the petitioner would be entitled to the relief (a) in the writ petition being the challenge to the order dated 18th August, 2005 placing the petitioner in category P 2 (permanent). However, the respondents have themselves reviewed the same. No further orders are required to be passed in view thereof in respect of the said prayer.

25. So far the relief of fixation of seniority, payment of the promotional scale and consequential benefits are concerned, the same is required to be moulded in the light of the facts which

have been intervened hereinabove.

Accordingly, we direct the respondents as follows:-

- (i) the respondents shall grant seniority to the petitioner in the post of Deputy Commandant and Second-in-Command in the light of the Office Memorandum dated 5th January, 2002 and the Standing Order No.4/2002 dated 29th May, 2002, and, so far as his promotion to the post of Commandant is concerned, the petitioner would be entitled for consideration of his case forthwith in view of the office memorandum and standing order noticed hereinabove; &
- (ii) the orders and action in terms of the directions at serial no. (i) above shall be passed within twelve weeks from today; &
- (iii) the petitioner shall be entitled to the costs of the present petition which are quantified at Rs.10,000/-. The costs shall be paid within a period of four weeks from today.

Dasti to parties.

GITA MITTAL, J

VIPIN SANGHI, J

FEBRUARY 05, 2010
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