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* IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment Reserved on: July 25, 2012

Judgment Pronounced on: August 06, 2012

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WP(C) 4411/2012

MAJ.GEN.S.P.SINHA

..... Petitioner

Represented by: Mr.S.S.Pandey, Advocate.

versus

UOI & ORS.

....Respondents

Represented by:Mr.Ankur Chhibber, Advocate.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE MANMOHAN SINGH

PRADEEP NANDRAJOG, J.

1. The petitioner was commissioned in the Army Ordinance Corps on December 24, 1972 and had an unblemished record; earning promotions upto the rank of Major General. He is a recipient of honors like Vishisht Seva Medal, which he received in the years 2005.

2. Pertaining to his ACR grading for the year 2007-2008 and 2008-2009 as also his non-empanelment for promotion to the rank of Lt.General on August 07, 2008 and secondly on August 12, 2009, petitioner made a statutory representation on March 29, 2010 to the Central Government, which partially succeeded, when as per order dated July 23, 2010, the ACR gradings for the years 2007-2008 and 2008-2009 were set aside on technical grounds and this resulted in the petitioner

being required to be re-appraised for promotion as a case of first review.

3. Accordingly, the case of the petitioner was considered on August 20, 2010 as one of : fresh case; but consideration to be as of August 07, 2008 as also August 2009.

4. Admittedly, there was only one vacancy to the post of Lt.General in the Ordinance Corps as of August 07, 2008. When the appraisal was done on August 07, 2008, Major General Anil Swaroop, a batch mate of the petitioner, was also considered and was empanelled for promotion, but could not be promoted due to DV ban. Accordingly, when the Board met on August 20, 2010, it re-appraised the service record of the petitioner and Major General Anil Swaroop. With reference to the bench mark achieved by Major General Anil Swaroop, i.e. in comparison with the service profile with that of Major General Anil Swaroop, the petitioner was found less meritorious and hence was declared unfit for promotion; needles to state this was after ignoring the offending ACR gradings.

5. Pertaining to the year 2009, when the Board had met in August 2009, admittedly there were two vacancies. At that time three officers being : the petitioner, Major General G.S.Narula and Major General Pradeep Bhalla were considered for promotion and on a comparative merit i.e. considering the service profile of the three officers, Major General Pradeep Bhalla and Major General G.S.Narula were recommended for promotion in said order of merit. Thus, while reconsidering the candidature of the petitioner as of August 2009 when the Board re-assembled on August 20, 2010, ignoring the offending ACR gradings of the petitioner, his profile was compared with that of Major General G.S.Narula, for the reason said officer had been ranked at No.2 when the Board had earlier met in August 2009

and thus, at best, the petitioner could have earned a grading above him. The petitioner was appraised below Major General G.S.Narula.

6. The petitioner marched before the Armed Forces Tribunal and filed an Original Application praying therein that the comparative assessment appraisal was not warranted by any Army Rule or Order and as long as an officer achieved the bench mark, promotion had to follow.

7. But, what was the bench mark? The petitioner pleaded none.

8. The petitioner relied upon a : '*Vacancy based selection system*'. As per him, since Major General Anil Swaroop came under the DV ban, though subsequently, he i.e. the petitioner was the sole eligible candidate to be considered as of the year August 2008 when the Review Board met on August 2010. Thus, the petitioner pleaded that his merit had to be considered sui generis. Same was the argument predicated with respect to the vacancy as of August 2009.

9. As per the respondents, there exists a promotion policy as of June 20, 1996 which requires : '*A comparative merit referred to as "Internal Batch Assessment" will be drawn and expressed as 4/107, 5/107 and so on (for an assumed batch strength of 107 officers). This will be provided to the Board after their initial screening and utilized for validation.*'

10. To put it simply, as per the respondents it was comparative merit which governed the field of assessment.

11. The view propounded by the respondents has found favour with the Armed Forces Tribunal.

12. At the hearing of the writ petition, learned counsel for the petitioner was at pains to urge that the Office Order in question, upon which the petitioner relied i.e. the Office Order

of the year 1998, which according to the petitioner obviously superseded the Office Order of June 20, 1996, was ignored by the Armed Forces Tribunal.

13. Now, the Office Order on which the petitioner relies, which we find is dated September 30, 1998, only states that the vacancy related selection system, which has always been in vogue, needs to be institutionalized and nowhere, directly or impliedly supersedes the Office Order of June 20, 1996. We highlight that the Office Order dated September 30, 1998 does not prescribe any bench mark.

14. Learned counsel for the petitioner had kept on arguing that the Office Order of September 30, 1998, prohibited a comparative assessment and as per the said Office Order, upon a bench mark being achieved, promotion had to follow. But what was the bench mark? Learned counsel gave no answer.

15. In service jurisprudence, for a promotional post, and that to at the top level; and in the instant case we are concerned with a promotion to the one but top slot in the armed forces i.e. the post of a Lt.General; there must be a bench mark to be achieved which must be of the highest standard and alternatively a comparative merit review. To put it differently, the best standard i.e. the highest standard achieved in a batch by a person would be a good bench mark. This would logically mean that if there are two posts and two persons have been empanelled, they must be the two best and this logic would take us to the position that where ex-post facto appraisals have to be done with respect to a person wronged, his assessment by way of appraisal would be on a comparison with the last empanelled candidate.

16. It was then urged that since Major General Anil Swaroop was not promoted, the vacancy against which Major General

Anil Swaroop was empanelled had to be treated as available for the next panel year. Accordingly, it was submitted that while reviewing the panel as of August 2009, said vacancy ought to have been considered.

17. The submission ignores the fact that the vacancy against which Major General Anil Swaroop was empanelled was not available in the subsequent year for the reason Major General Anil Swaroop was simply facing a DV ban and if he was cleared at the enquiry being held, the post in question had to be his. The vacancy would have been available if by the year the review panel met, Major General Anil Swaroop stood indicted and as a result lost the right to be promoted.

18. Learned counsel for the petitioner sought to urge that we should summon the record and ourselves appraise the petitioner and the other candidates with reference to their service record.

19. As the petitioner earned promotions to the post of Major General, so did the others and thus there is nothing special about the petitioner earning promotion to the post of Major General. We are not experts. In the decision reported as 2008 (2) SCC 649 Surinder Shukla vs. UOI & Ors., the Supreme Court frowned upon courts acting as experts.

20. The writ petition is dismissed but without any order as to costs.

(PRADEEP NANDRAJOG)
JUDGE

(MANMOHAN SINGH)
JUDGE

AUGUST 06, 2012
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