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IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on: 20.08.2015

+ W.P.(C) 2557/2014

SARWAN KUMAR

..... Petitioner

Through: Mrs Rekha Palli, Sr. Adv with
Ms Ankita Patnaik, Ms Garima Sachdeva and
Ms Shruti Munjal, Advs.

versus

UNION OF INDIA AND ORS

..... Respondents

Through: Mr Bhagwan Swarup Shukla, CGSC
with Mr Suyash Kumar, Adv for R-1/UOI.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. The petitioner's grievance is two-fold—i) that he was wrongly overlooked for promotion on the basis of his ACR gradings; (ii) that his case was not considered for promotion to the rank and grade of Inspector General (IG) in the Sashastra Seema Bal (SSB) in terms of the SSB Group 'A' Combatised (General Duty) Director General, Additional Director General, Inspector General, Deputy Inspector General and Commandant Posts Recruitment Rules 2013 (hereinafter referred to as 'the Rules'), which were brought into force on 17.06.2013.

2. The facts are not disputed. The petitioner joined the SSB as an Assistant Commandant in November, 1984; he was subsequently promoted as Deputy Commandant and later as Second-in-Command and subsequently

in 2005 as Commandant. In the same year, he was promoted as Deputy Inspector General (DIG) in August, 2005. It is contended that the petitioner had earned Very Good/Outstanding ACRs throughout his career, but for a brief period of four months i.e. 01.04.2008 to 31.07.2008, the ACR was downgraded to 'Good', which was challenged before the Himachal Pradesh High Court. The petition before the Himachal Pradesh High Court was subsequently disposed of.

3. It is claimed that pursuant to an incident where sexual harassment was alleged against a senior officer by the wife of another senior officer, the petitioner had agreed to become the defending officer in a departmental enquiry against the complainant's husband. It is his contention that this was not taken kindly by the superior officers and his own involvement in a separate sexual harassment complaint was enquired into. During the pendency of these complaints, his case for promotion to the post of Inspector General (IG) came for consideration. On the basis of the complaints, the SSB sought to hold inquiry against the petitioner and communicated so to him in this regard on 05.12.2012. He, thereafter, approached this Court by filing W.P.(C) No.5569/2013. During the pendency of those proceedings, the Court had directed that promotional orders to the post of IG should not be issued. The departmental proceedings/complaint were held by the respondent as non-starter and no departmental proceedings were ultimately initiated. This was intimated to the Court on 14.02.2014 and this led to dismissal of the writ petition as infructuous. Soon thereafter, on the very same day, the fourth respondent was promoted as Inspector General. Petitioner challenges the said order and contends that his non-consideration, despite dropping of the departmental proceedings is unauthorized.

4. Learned senior counsel Mrs Rekha Palli submits that once the decks were cleared with the SSB itself deciding that no case for departmental proceedings was made out, his case should have been considered for promotion to the post of IG. The omission to appropriately reflect the dropping of departmental proceedings in the ACR, in fact, came in the way of the petitioner's due consideration as ACR grading and the related records remained the same as on 14.02.2014 when the fourth respondent was promoted.

5. It was next alleged that since the new rules came into force and fresh set of norms governed recruitment and promotion in terms of Column 11 to Serial No.3 (Inspector General) in the Schedule of the Rules read with Rules 3 and 4, the SSB was under an obligation to apply those norms and not the pre-existing norms. It was submitted that column 11 mandated as a condition of eligibility that only those DIGs with four years regular service in pay band of ₹37400-67000 with grade pay of ₹ 8900/- subject to total of 24 years Group 'A' service could be considered. Here, it was emphasized that since the vacancy arose on 01.10.2013 with the retirement of Mr.N. Buragohain (who superannuated on 30.09.2013), SSB was obliged to apply the new recruitment and promotion rules applicable in that regard which had come into force in the meantime on 17.06.2013. They have, however, proceeded with the old rules and appeared to have promoted the fourth respondent regardless of his lack of eligibility as on the date when the vacancy arose on 01.10.2013 by which time the new rules had come into force.

6. Counsel for the respondent did not dispute the basic facts. He also produced the relevant notings, particularly the noting of the concerned

officers, including the Additional Secretary. The relevant notings in this regard states that *“the sexual harassment enquiry has already been dropped against the officers (“B” at 8/N). DG, SSB has viewed that the other portion of adverse remarks in APAR does not pertain to the period of APAR (“C” at 8/C).*

In case the adverse remarks are removed from the APAR 01.04.2012-31.01.2013) of the officer as recommended by DG, SSB, the Court case may become infructuous. (“D” at 8/N). This will save time and money of the Government”.

7. It was submitted that in these circumstances with respect to the petitioner’s eligibility for consideration, the Court may pass appropriate orders. However, learned counsel stated that with respect to the eligibility of the fourth respondent, there could be no doubt because the DPC was conducted on 12.06.2013 when the Rules were not in force. The DPC was constituted in accordance with the Department of Personnel and Training (DoPT) instructions which required a common DPC for successive anticipated vacancies. In the present case, the vacancy which was filled by Mr. N. Buragohain occurred on 01.05.2013. Pursuant to the DPC recommendation of 12.06.2013, he was promoted. Soon thereafter, he retired on 30.09.2013. Therefore, the DPC’s recommendation with respect to the fourth respondent, who was eligible in terms of the old rules which did not require the four years’ regular service, was in force. Consequently, his promotion cannot be faulted.

8. It is apparent that so far as the first issue is concerned, a noting of the SSB dated 05.03.2015 (which appears to have been discussed right up to the level of Additional Secretary) states that the petitioner was eligible since the

deck has been cleared in the sense that impediment holding him back for due consideration for promotion to IG no longer exists. However, the ultimate view which appears to have prevailed is that since the adverse remarks were still on the record and this Court has not disposed of the proceedings; the matter may be kept in abeyance. Interestingly, the further noting of 11.03.2015 of the Additional Secretary is not only reasonable, but appears to be in line with what the Central Government should be doing in such circumstances, i.e., that since the departmental proceedings were a non-starter, it would be more appropriate to expunge the adverse remarks. However, this view was overruled by the Secretary.

9. This Court fails to appreciate the ultimate view which prevailed. It is apparent that as far back as on 05.03.2015, the official view itself was that there was nothing against the petitioner. This was on account of the official decision not to initiate any departmental proceedings taken as far back as on 14th February, 2014. Nevertheless, the Central Government arbitrarily and irrationally prevails and overrules the view of the SSB and its own senior officials that the adverse remarks ought to be expunged and this Court's view ought not to be awaited. Such inaction and omission cannot be appreciated since it amounts to casting undue burden on the Court and keeping the officials legitimately entitled to the service benefits waiting. We do not wish to comment more on such callousness and dwell on the matter, but it is easy to discern that it was deliberate since in this case several senior officials did recommend expunction of the remarks.

10. So far as the second issue is concerned, we are of the opinion that the decision cited by the petitioner, i.e., *State of Rajasthan vs. R. Dayal and Others* (1997) 10 SCC 419 is the most appropriate authority in the

circumstances. In that judgment, the question which the Court had to decide was whether the amendment of rules introducing a new eligibility criteria/qualifying service pre-condition for promotion apply to invalidate or render illegal, a DPC recommendation made earlier in the case of an anticipated vacancy which was to arise and did arise, but after the amendment came into force. The Court unequivocally held that even though the rules or instructions might require holding of DPC for several anticipated vacancies which could arise during the year, nevertheless, if amendments intervened to the recruitment rules or the relevant criteria, such altered criteria would have to be taken note of and would duly apply, at least on the date when the actual vacancy arises. The Court expressed this view in the following terms:-

“8.But the question is whether selection would be made, in the case of appointment to the vacancies which admittedly arose after the amendment of the Rules came into force, according to the amended Rules or in terms of Rule 9 read with Rules 23 and 24-A, as mentioned hereinbefore. This Court has considered the similar question in para 9 of the judgment above cited. This Court has specifically laid that the vacancies which occurred prior to the amendment of the Rules would be governed by the original Rules and not by the amended Rules. Accordingly, this Court had held that the posts which fell vacant prior to the amendment of the Rules would be governed by the original Rules and not the amended Rules. As a necessary corollary, the vacancies that arose subsequent to the amendment of the Rules are required to be filled in accordance with the law existing as on the date when the vacancies arose. Undoubtedly, the selection came to be made prior to the amendment of the Rules in accordance with law then existing since the anticipated vacancies also must have been taken into consideration in the light of Rule 9 of the Rules. But after the

amended Rules came into force, necessarily the amended Rules would be required to be applied for and given effect to.”

11. In the present case, although the DPC met on 12.06.2013 and cleared the appointment of the fourth respondent for a vacancy anticipated on 01.10.2013 (since the event of Mr.N. Buragohain’s retirement was known in advance), nevertheless, once the vacancy did occur on 01.10.2013, the amended rules, i.e., the essential qualifying service of four years had to be taken into account.

12. For the above reasons, we are of the opinion that the promotion of the fourth respondent cannot be sustained. It is hereby set aside. We also direct that the adverse remarks against the petitioner for the period 01.04.2012 to 31.01.2013 be expunged and all adverse comments in connection with complaint of his alleged sexual misconduct be likewise disregarded. The respondents are hereby directed to constitute a review DPC and consider the candidature of all eligible candidates, including the petitioner as on 01.10.2013 when the vacancy accordingly arose. The process shall be completed within eight weeks from today.

The writ petition is disposed of in above terms.

**S. RAVINDRA BHAT
(JUDGE)**

**DEEPA SHARMA
(JUDGE)**

AUGUST 20, 2015

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