(2006) 10 SC CK 0051

Supreme Court of India

Case No: Civil Appeal No. 4619 of 2006 (Arising out of S.L.P. (C) No. 10045 of 2006)

Major General R.S. Balyan		APPELLANT
	Vs	
The Secretary, Ministry of Defence, Government of India and Others		RESPONDENT

Date of Decision: Oct. 31, 2006

Citation: (2006) 10 SCALE 589 : (2007) 1 SCC 513 : (2007) 1 SCC(L&S) 381 : (2006) 7 SCR 894 Supp : (2007) 3 SLJ 257

Hon'ble Judges: Lokeshwar Singh Panta, J; Arijit Pasayat, J

Bench: Division Bench

Advocate: U.U. Lalit, Col. A.S. Chauhan, Bikas Kar Gupta and V. Sivasubramanian, for the Appellant; Vikas Singh, A.S.G., S. Wasim A. Qadri, D.S. Mehra, Anil Katiyar, Col. G.K. Sharma, Pawan Kumar Bahi, Rajiv Sharma and Goodwill Indeever, for the Respondent

Final Decision: Disposed Of

Judgement

Lokeshwar Singh Panta, J.
Leave granted.

2. The challenge in this appeal by special leave is to the final judgment and order dated 29.05.2006 of the High Court of Delhi, whereby the Writ Petition No. 5214/2005 filed by Maj. Gen. R. S. Balyan-appellant herein came to be dismissed. By the order coming under challenge, the High Court held that seniority of the appellant and Maj. Gen. Rakesh Puri (Respondent No. 5) and Maj. Gen. P.K. Mago (Respondent No. 6) ought to be determined according to Para 2 of the Government of India O.M. No. 2(4)/92/D(Inspection) dated 04.05.1993, as amended vide O. M. No. 21(4)/92/D(Inspection) dated 22.12.1993 and not by Para 68 of the Regulations for the Army, 1962 (revised edition 1987).

3. Briefly stated, the facts are as follows.

The appellant was commissioned in the Army on 09.06.1968 whereas the Respondent No. 5 was commissioned in the Corps of Engineering on 25.12.1966 as Second Lieutenants. In the common seniority list of Second Lieutenants, respondent No. 5 was senior to the appellant. The appellant was promoted to the rank of Substantive Major on 09.06.1981 and the respondent No. 5 was promoted to the rank of Substantive Major on 25.12.1979 in the Directorate General of Quality Assurance (DGQA). The DGQA has following four disciplines:

(1) Armament

(2) Vehicle & Engineering

(3) Electronics

(4) Stores

4. The appellant joined the Armament discipline while the respondent joined the Vehicle & Engineering discipline. The name of the appellant was at Sl. No. 49 in the Gradation list of 1988 whereas the name of respondent No. 5 was at Sl. No. 45 being senior to the appellant. The appellant superseded three officers who were senior to him in Armament discipline, whose names were held at Sl. Nos. 28, 38 and 46. According to the appellant, an officer who gets "A" Grade (Outstanding) would get accelerated and out-of-turn promotion over his seniors who got only "B" Grade. If only one vacancy is available, the officer who gets "A" Grade alone would be promoted ignoring his seniors who get only "B" Grade. As the appellant was given "A" Grade, he got accelerated promotion to the available vacancy in the Armament discipline as Brigadier on 07.11.2000 but the respondent No. 5, who got only "B" Grade, could not be promoted to the rank of Brigadier for want of vacancy in his discipline and he was promoted as Brigadier only on 11.02.2000. The appellant was again considered for promotion as Major General and he was given the substantive rank of Major General w.e.f. 25.05.2002 in accordance with para 68 of the Regulations for the Army, 1962. The respondent No. 5 was granted substantive rank of Brigadier w.e.f. 11.2.2002 and substantive rank of Major General w.e.f 1.10.2004.

5. After 1998, seniority in the DGQA had never been published, accordingly the other officers, who were adversely affected by the wrong conferment of seniority to the appellant, were not aware as to how the same had been done. It was only on 18.08.2004 when the seniority list was published that the officers adversely affected became aware about the wrong conferment of seniority to the appellant. Major General S. C. Gulati made a representation objecting to the placement of the appellant in the seniority list contrary to the instructions governing the DGQA. At that stage, a complete review of seniority within the DGQA was carried out and in such review, it was decided that the appellant should be given substantive rank of Brigadier w.e.f. 05.04.2002 and that on that

basis he was considered for further promotion to the rank of Major General along with eight other officers viz., Brig. R. Khosla, Brig. M. Kashyap, Brig. R. Puri (respondent No. 5), Brig. T. S. Rao, Brig. P. K. Mago (respondent No. 6), Brig. B. V. Murthy, Brig. K. P. Sinha and Brig. J. D. Sapatnekar. In the said consideration, the appellant is given "B" grading, i.e. "fit for promotion", which is the same grade as was given to respondent Nos. 5 and 6 respectively. On the basis of the assessment of the grading of the appellant and respondent Nos. 5 and 6, the Board conferred seniority to respondent No. 5 w.e.f. 01.10.2004, respondent No. 6 w.e.f. 31.01.2005 and the appellant w.e.f. 01.03.2005 respectively as Major Generals. The respondent-authorities issued a revised seniority list dated 16.03.2005 whereby the appellant was demoted as a Brigadier and was made junior to the respondent No. 5.

6. The appellant filed the above-said Writ Petition in the High Court of Delhi which came to be decided on 29.05.2006 holding that the appellant was junior to respondent No. 5 in the substantive rank of Major, therefore, his claim for seniority over respondent No. 5 founded merely on the Gazette Notification cannot be sustained in view of the interpretation put by the Court on the respective effects of Para 68 and O. M. dated 04.05.1993 as amended by O. M. dated 22.12.1993. The Division Bench further said, "Since both the petitioner and the respondent No. 5 were slated for retirement by the end of June 2006, the plea for promotion to the rank of Lt. General in accordance with this judgment should be considered expeditiously and not later than 20th June, 2006. Even if there is any procedural delay in considering the case of the petitioner and respondents No. 5 and 6 in accordance with the law laid down by this judgment, then notwithstanding the fact that any of the protagonists retires in the meanwhile, the consideration for the post of Lt. General shall be done and if any candidate is found fit for promotion, such promotion shall be granted with effect from 1st June, 2006." Consequently, the Writ Petition was dismissed and stood disposed of accordingly.

Feeling aggrieved and dissatisfied by the judgment and order of the High Court, the appellant has filed this appeal.

7. We have heard learned Counsel for the parties and with their assistance examined the entire material on record. Mr. V. Sivasubramanian, learned Counsel appearing on behalf of the appellant, contended the following three-fold submissions.

(1) The appellant had superseded respondent Nos. 5 and 6 due to the appellant having been graded "A" twice by the two QASBs in the years 2000 and 2002, even though at the time of their permanent secondment in the DGQA, the appellant as well as the respondent Nos. 5 and 6 were inducted with their original seniority in the Army;

(2) When the appellant was promoted as Major General on 30.01.2002 he superseded other Brigadiers, who were senior to respondent No. 5, who was still only a Colonel; and

(3) The High Court has erred in ignoring the applicability and consideration of the Army Headquarters'' letter dated 09.03.1965 where a limited protection is given to an officer who is senior in the lower rank, but who could not be promoted because of want of vacancy in his discipline while his junior was given promotion who was fortunate to have a vacancy in his discipline in the higher rank. The appellant was given promotion to the rank of Major in his own discipline over and above the respondent No. 5, who was in other discipline on the basis of his grading ''A'', the appellant''s promotion as substantive Brigadier as notified by the Gazette Notification dated 18.05.2001 and subsequent substantive Major General notified by the Gazette Notification dated 03.01.2004, could not be cancelled by the respondent-authorities without consulting the Appointments Committee of the Cabinet and issuing notice to the appellant as per Para 68 of the Regulations of the Army.

Per contra, the learned Counsel appearing for the respondents contended that the appellant erroneously was given seniority over 16 other officers holding the rank of Brigadiers belonging to other disciplines including respondent No. 5, who was at Sl. No. 45 whereas the appellant was at Sl. No. 49 in the Gradation List of 1998. They stated that the appellant could not claim accelerated promotion to place him above respondent No. 5, who admittedly was senior as Major and was never considered for promotion along with the appellant in terms of policy contained in O. M. dated 04.05.1993 (Annexure P-4) and Gradation List of 1998 as well.

8. The admitted facts are that the appellant was commissioned in the Armament discipline on 09.06.1968 whereas the respondent No. 5 was commissioned in the Engineering discipline on 25.12.1966. The consideration for promotion up to the rank of Brigadier as a rule was held within its own discipline of the appellant (Armament) with officers of the same discipline, the appellant superceded three officers whose names were held at serial Nos. 28, 38 and 46. The appellant was placed above serial No. 28 (Col. R. E. Chawan) thereby erroneously gaining seniority over 16 officers of other disciplines, including Respondent No. 5 who was at serial No. 45 of the Gradation List dated 20.07.1998 (Annexure R - 6) in respect of service officers permanently seconded to DGQA organization as on 30.06.1998. The respondent No. 5 and other 15 senior officers were never considered with the appellant at the time of granting substantive rank of Brigadier to him and later on as Major General earlier than respondent No. 5 as his seniority was reckoned ahead of serial No. 28 of 1998 seniority list.

9. The stand of respondent Union of India in its counter affidavit is that, the seniority conferred upon the appellant to the substantive rank of Brigadier was erroneous and it was only on 18.08.2004 when the seniority list was published that officers adversely affected became aware of the wrong conferment of the seniority to the appellant. The respondent authorities after 1998 had never published seniority list in the DGQA. Maj. Gen. S. C. Gulati made a representation objecting to the placement of the appellant in the seniority list contrary to the instructions governing the DGQA organisation. A complete review of seniority within the DGQA was carried out and in such review it was decided

that the appellant should be given substantive rank of Brigadier w.e.f. 05.04.2002 and that on that basis he was considered for further promotion to the rank of Major General along with 8 other officers, namely, Brig. R. Khosla, Brig. M. Kashyap, Brig. R. Puri (respondent No. 5), Brig. T. S. Rao, Brig. P. K. Mago(respondent No. 6), Brig. B. V. Murthy, Brig. K. P. Sinha and Brig. J. D. Sapatnekar. On reconsideration at the stage of complete review of seniority list, the appellant is given "B" grading, i.e., "fit for promotion", which is the same grade given to respondent Nos. 5 & 6. On the basis of the fresh assessment, the Board conferred seniority to respondent No. 5 w.e.f. 01.10.2004, respondent No. 6 w.e.f. 31.01.2005 and the appellant w.e.f. 01.03.2005 as Major General. As a result of review of seniority list, we find from the record that one higher rank which had been conferred upon the appellant earlier and which had remained unnoticed because of non-publication of seniority list was corrected by the Union of India at the first available opportunity when the seniority list was published on 18.08.2004 in the DGQA cadre and when the irregularity in the seniority list was noticed by the affected officers, who made representations against the irregularity, committed in the seniority list giving promotion to the appellant over and above them. In DGQA organization, officers due for promotion, who may not be from the same batch, are considered within their disciplines only and promoted as per their inter se seniority in the substantive rank of Major as has been laid down in O. M. No. 21(4)/92/D (inspection), Government of India, Ministry of Defence, dated 04.05.1993 (Annexure P-4) on the subject "GUIDELINES FOR PERMANENT SECONDMENT OF SERVICE OFFICERS OF THE RANK OF MAJOR AND LT. COL. IN THE DGQA ORGANIZATION". As per the said O.M., it was decided by the Government of India, Ministry of Defence, D.D.P.S., that the criteria as contained in the said O.M. should be adopted for permanent secondment of the officers of the rank of Lt. Colonel (including Lt. Col./TS) and Majors. Clause 2 of the Memorandum emphasizes that final orders for Permanent Secondment shall be issued only after the selected officers" willingness has been obtained in writing. The officers once permanently seconded will continue in the organization till their retirement and shall be included in the Cadre Seniority List of Permanently Seconded Service Officers as per their dates of seniority as substantive Major, as modified based on the penalties/loss of seniority in the parent Corps and shall come up for consideration for promotion to higher ranks based on availability of vacancies in respective disciplines. In the teeth of this specific criteria laid down in the above referred to Memorandum, we are of the view that letter No. 30386/MS/(X) Army Headquarters, dated 09.03.1965 (Annexure P-1) dealing with the subject of system of grading officers (excluding MC, Dental Corps and those permanently transferred to RD & P/I organization) for promotion to the rank of Lt. Col. and above relief upon by the appellant has no application in the DGQA organization. Para 2 of O.M. dated 04.05.1993 (Annexure P- 4) is self-explanatory. It is applicable through out the service career of an officer from the time of his permanent secondment to the DGQA organization till the retirement of the officer. Therefore, the contention of the learned Counsel for the appellant that the High Court has gravely erred in not applying the policy instructions dated 09.03.1965 (Annexure P-1) does not merit acceptance, as Annexure P-1 deals with system of giving grading to officers belonging to regular Army only and those instructions

as such have no application to the Army officers permanently seconded to the DGQA organization.

10. Para 68 of the Regulations for the Army deals with the effective date of substantive promotion. It does not deal with the grant of seniority. The appellant was promoted to the acting rank of Brigadier on 07.11.2000 in the Armament discipline because of the availability of the vacancy in the said discipline, whereas the respondent No. 5 was promoted to such rank in the Engineering discipline on 11.02.2002 on the then availability of the vacancy in that discipline. However, the appellant being junior in the substantive rank of Colonel as per seniority list as on 30.06.1998, continued to remain junior to respondent No. 5 in the substantive rank and that is why the substantive rank of Brigadier was rightly granted to respondent No. 5 w.e.f. 01.10.2004 and to the appellant only w.e.f. 01.03.2005, in the seniority list as on 01.03.2005 impugned before the High Court. The appellant has not placed on record any proof to substantiate his claim that he was granted accelerated promotions to the ranks of Brigadier and Major General. Thus, it is clear that due to the availability of the vacancy in the Armament discipline to which the appellant belonged, he was promoted to the acting rank of Brigadier on 07.11.2000, whereas the respondent No. 5, who was in the Engineering discipline, was promoted to the acting rank of Brigadier on 11.02.2002 due to the availability of the vacancy in the Engineering discipline. The prior promotion of the appellant to the acting rank of Brigadier in contrast to the respondent No. 5 in his respective discipline does not make the appellant senior to the respondent No. 5 since the substantive rank of Brigadier was granted to the appellant w.e.f. 01.03.2005 and to the respondent No. 5 w.e.f. 01.10.2004 in terms of Para 2 of the Govt. of India O.M. No. 21(4)/92/D(inspection) dated 04.05.1993 as amended vide O.M. No. 21(4)/92/D(inspection) dated 22.12.1993.

11. The High Court has rightly observed that Para 68 of the Army Regulations does not qualify as a general rule for determining the seniority. On a plain reading of Para 68 of the Army Regulations extracted by the High Court in Para 12 of the impugned judgment, it simply says that if an officer is fit for promotion to the rank of Colonel and above on a particular date but assumes office later, then for purposes of seniority it will be the date when the officer was found fit and notified in the Gazette, which shall be the relevant date for counting seniority notwithstanding the assumption of office on a date later than the date of assumption of office. The High Court, in our view, has rightly concluded that the seniority of the appellant and respondent No. 5 is to be determined in terms of Para 2 of the Govt. of India O.M. No. 21(4)/ 92/D(inspection) dated 04.05.1993 as amended vide O.M. No. 21(4)/92/D(inspection) dated 22.12.1993 and not on the basis of the interpretation of the impact of Para 68 of the Army Regulations as relied upon by the appellant. The Union of India is competent to correct the mistake of ranking the appellant senior to respondent No. 5 in the substantive rank of Brigadier when such mistake or irregularity has come to its knowledge through representation having been made by the affected Army Officers in 2004.

12. We, therefore, find no infirmity or perversity in the order of the High Court impugned in this appeal. Therefore, the contentions noticed above raised by the learned Counsel for the appellant cannot be sustained.

For the reasons aforementioned, we find no merit in this appeal, which is dismissed accordingly. However, parties are left to bear their own costs.