

(2013) 02 DEL CK 0343

Delhi High Court

Case No: Writ Petition (C) 356 of 2013

Sh. P. Suresh Kumar

APPELLANT

Vs

Union of India and Others

RESPONDENT

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**Date of Decision:** Feb. 28, 2013**Acts Referred:**

- Constitution of India, 1950 - Article 14

**Hon'ble Judges:** Sudershan Kumar Misra, J; S. Ravindra Bhat, J**Bench:** Division Bench

**Advocate:** A.K. Mishra with Mr. Ajay Tiwari and Mr. K.K. Upadhyay, Item Nos. 12 and 14-26 and Mr. Ankur Chibber, Item Nos. 5-13, for the Appellant; Ravinder Agarwal, CGSC with Mr. Amit Yadav, Advocate for respondents in Item Nos. 8, 9, 12, 13, 14-27, Mr. Himanshu Bajaj, CGSC on behalf of respondent Nos. 1 and 2 in item nos. 7 and 8 and Mr. Amrit Pal Singh, CGSC for respondent nos. 1-4 in Item nos. 10, 11 and 28. Mr. Sachin Datta, CGSC with Ms. Ritika Jhurani, Advocate for respondent nos. 1-4 in Item No. 5, for the Respondent

**Final Decision:** Allowed

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**Judgement**

S. Ravindra Bhat, J.

In all these proceedings, the petitioners, who are members of various paramilitary/armed forces of the Union of India, such as the Central Reserve Police Force (CRPF), Border Security Force (BSF), Assam Rifles; Indo Tibetan Border Police (ITBP) and Central Industrial Security Force (CISF) have questioned the policy dated 18.05.2012 issued by the Central Government, Ministry of Home Affairs, regulating the continuance of colour blind personnel in such forces, as well as terms and conditions of their services. The present litigation appears to be part of a series of previous cases which were decided by the Court. In the first judgment delivered in W.P. (C)11855/2009 (Mohan Lal Sharma v. Union of India) dated 16.03.2011; the Court had the occasion to consider the impact of the previous policies of the Central government on the issue of colour blindness, and on the strength of a Circular

dated 11.03.2011, held that the petitioners in this case were entitled for promotion as claimed. The Court, after examining the relevant Circulars put before it, held as follows:-

7. Petitioner HC M.L. Sharma was inducted as a Constable on 6.7.1981. It is apparent that he joined service prior to 17.5.2002. He has earned promotion firstly as a L/Nk. and thereafter as a Naik. The post of Naik stands merged as that of a Havaldar.

8. Petitioner's entitlement to the post of Sub-Inspector came into the turbulent waters on the issue of colour blindness. Since the issue has been resolved in favour of the petitioner, respondents are directed to pass necessary orders with respect to petitioner's promotion to the rank of Sub-Inspector w.e.f. the date persons junior were promoted with all consequential benefits except back wages.

In the subsequent judgment dated 22.03.2011 passed in *Sudesh Kumar & Ors. v. Union of India & Anr.* (W.P. (C) 5077/2008) and other connected cases decided on 22.03.2011, the Court had an occasion to consider elaborately all the previous Circulars/Instructions governing the paramilitary forces/armed forces of the Union of India on the issue. These included the Circulars issued by the Government from time to time, i.e., dated 16.5.1991; 12.6.1997; 17.5.2002 and 29.10.2008. The Court after an elaborate discussion on the effect and intent of these Circulars and Instructions, and after independently examining the effects of colour blindness, and the possible use of such personnel found under such disability, and having regard to its peculiar needs, held that cumulatively, all the Circulars indicated that those recruited by the respondents from time to time were entitled to the same treatment as was extended to those not suffering from such condition, i.e., colour blindness. The Court especially underlined the effect of the Circular of 17.05.2002 followed up with the clarificatory Circular dated 31.07.2002. It categorically ruled that in these circumstances, the petitioners who had approached it could not be deprived of their promotional chances and prospectus solely on the basis of their colour blindness condition.

2. After the above judgment in *Sudesh Kumar's* case (supra) was delivered, the respondents appeared to have issued an entirely new set of guidelines which in effect sought to nullify the declaration issued by the Court in *Mohan Lal Sharma's* case (supra), vis-à-vis colour blind personnel who had not approached the Court. It also sought to mandate that those who were suffering from colour blindness and found to be as such had to be boarded out and terminated from the service if they belong to a particular category (characterised as CP-V). It also sought to categorize the colour blind condition and for the first time introduced the concept of colour perception. The petitioners, consequently, approached this Court complaining that the latest policy of 18.05.2012 had adversely impacted their promotional prospects. In some cases, the petitioners had been selected and ordered to report and had even undergone the promotional courses anticipating the promotion order. Further, in some cases promotion orders too were issued. However, the respondents

thereafter intervened and said that such promotions could not be given in view of the policy Circular of 18.05.2012. The petitioners, therefore, approached the Court seeking appropriate directions for quashing of such orders, and also challenging the Circular dated 18.05.2012.

3. After notice was issued, learned counsel for the respondents endeavoured to have the matter resolved to the best satisfaction of all parties such as the petitioners and the concerned authorities of the respondents forces. The court accommodated the respondents-and also the petitioners to explore the possibility of resolving these issues to the satisfaction of all concerned. As a consequence, this Court was informed during the course of hearing today that a fresh set of instructions-in the form of an order No. F. No. I-45024/1/2008-pers. II) dated 27.2.2013 has been issued which in effect supersedes all previous orders that created the possibility and had adversely impacted some of the serving colour blind personnel in these forces. The said Circular is extracted below:-

Dated, the 27 the Feb., 2013

#### ORDER

Subject: New Policy Guidelines on recruitment/retention in respect of Central Armed Police Forces (CAPFs) and Assam Rifles (ARs) personnel having defective vision including colour blindness-regarding.

The standing policy of the Government is that only persons who are fully fit in all respects i.e. in SHAPE-I are to be recruited to the CAPFs and AR. It is and has always been the standing policy of the Government that if any member of the CAPFs & AR is declared permanently unfit while in service, he is boarded out from service. The reasons for this are very clear. The personnel of the CAPFs and AR are issued with lethal weapons and are expected to use lethal force against insurgents and terrorists. If any of the personnel of the CAPFs & AR is not fully fit, he will either not be able to protect himself or his colleagues in a battle with insurgents/terrorist groups or he will run the risk of killing innocent people especially if his eyesight is weak and he cannot distinguish between uniforms, etc. The policy of boarding out personnel who had been declared unfit applies to all types of unfitness whether it be unfitness in physical parameters or in any other SHAPE component and that is how it should have remained. However, in the years 1991, 1997, 2002, 2008, 2011 and 2012, various orders were issued saying that those who had been recruited prior to a particular date and were found to be colour blind at a later stage, would not be boarded out while those recruited after that date would be boarded out. This marked a departure/an exception from the standing policy and this departure/exception was not in the public interest-these departures were also bad in law because no policy could apply retrospectively. For the above reasons, it has been decided as follows:-

(i) The circulars/orders/instructions issued by the Ministry of Home Affairs or by any of the Central Armed Police Force (CAPFs) & Assam Rifle (AR) vide communication No. R.II-31/91-E-II dated 16.5.1991, No. R.II-31/97-E-II dated 12.6.1997, No. I-45020/52/2001-Pers-II dated 17.5.2002, No. I-45024/1/2008-Pers-II dated 29.10.2008, No. I-45024/1/2008-Pers-II dated 11.3.2011 and No. I-45024/1/2008-Pers-II dated 08.12.2011, are withdrawn with immediate effect. Further, any reference to the colour blindness especially Para-5 & 6, including those for the gazetted officers contained in New Visual Standard Policy No. I-45024/1/2008-Pers-II dated 18.5.2012 also stands withdrawn with immediate effect.

(ii) Any person who has defective vision or is colour blind will not be recruited in future. If any person is wrongly recruited despite having defect in vision or despite being colour blind, he will be promptly removed from service as soon as the defect is noticed. The Doctor who declared him fit will be proceeded against in Departmental Proceedings for major penalty. The person who was wrongly recruited will not be allowed to continue to take advantage of this wrong act, and the Govt. Cannot be bound by the wrong act of any of its functionaries.

(iii) It is however, clarified that the present directions will only apply prospectively. Those personnel recruited earlier and thereafter found to be colour blind will not be boarded out on account of colour blindness. But, it is reiterated that, any person recruited herein after, if found colour blind even after recruitment shall promptly be boarded out of service. Keeping in view the directions of the Hon"ble High Court and in public interest, the services of the colour blind personnel recruited prior to 18.05.2012, would be utilised for the jobs where public safety issues are not involved. Some of the posts/cadres identified for such personnel by CAPFs are enlisted in the Annexure-I.

(iv) As the Colour Blindness is a congenital disease, to obviate the induction of colour blind personnel in CAPFs & Assam Rifles by error or by manipulation in any of the future recruitments, an undertaking shall be taken from all the selected candidates at the time of joining that if at any stage of their service career, if they are found to be colour blind, they will be boarded out as per the SHAPE Policy in vogue.

4. Learned counsel for the petitioner argued that even though the Circular in question has addressed the issue of continuation in service of colour blind personnel; and has the effect of doing away with the categorization sought to be made for the first time through the Circular dated 18.5.2012, nevertheless, their grievance with regard to the promotions and further career progression in terms of the existing policies of the respondents have not been clearly spelt out. He argued that the right which inured in individuals and employees serving in the various forces as a consequence of the declaration in Mohan Lal Sharma and Sudesh Kumar"s case (supra) crystallized into a vested right that such employees were not to be discriminated and treated differently from those not suffering from such

condition. Particularly, relying upon the Circulars dated 17.5.2002, 31.7.2002 and 11.3.2011, it was emphasized that the latest Circular has virtually taken away the rights which crystallized in favour of the personnel who are and were situated similarly to the petitioners in Mohan Lal Sharma's case since the Circular dated 11.3.2011 formed the basis of the judgment in Mohan Lal Sharma's case delivered on 16.3.2011. It was submitted that the respondents cannot, therefore, now after accepting the equality between those deemed colour blind for the first time after 2002, turn the clock back and state that such personnel would be denied further promotional prospects.

5. Counsel for the respondents submitted that the petitioners' apprehensions are not well founded. He highlighted paragraph-2 and 3 of the annexure to the Circular dated 27.2.2013 to say that the concern of serving colour blind personnel vis-à-vis their further promotion and promotional chances have been well addressed. It is submitted that the armed forces of the Union, i.e., the respondents are alive and sensitive to the issues and have, apart from identifying the several posts, clearly stated that further posts would be identified in which such personnel would be accommodated after their promotion and even in the present grades they occupy.

6. From the preceding discussion, it is evident that the Circular of 27.02.2013 is categorical and removes any lingering doubts as to the right of the respondents to, "board out", any personnel who have been in its employment all this while. However, having regard to the previous history of litigation and series of instructions issued by the respondents-at times conflicting and contradicting, the petitioners' apprehensions appear to be well founded.

7. The first Circular dated 17.5.2002 relevant to the question of promotion, provided as follows:-

Reference this Ministry's UO No. 145020/52/2001-pers-II dated 17.05.2002 wherein following has been mentioned.

The question of promotion of Force personnel recruited with colour blindness has been examined in this Ministry and it has been decided that his disability, ignored at the time of their recruitment, cannot be held against them now. All such force personnel, recruited with colour blindness are therefore eligible for promotion, despite their being in medical category SHAPE 2 (Permanent) on their turn, if they are otherwise fit for promotion.

The above Circular followed up with the clarificatory order/policy Circular dated 31.7.2002; the relevant extracts of that Circular is as follows:-

2. This has been examined in this Ministry. Attention is invited to this Ministry's U.O. of even number dated the 17th May, 2002 which does not distinguish between force personnel, in whose cases, colour blindness was a disqualification or otherwise. It simply states that whosoever has been selected with colour blindness, whether by

ignorance or otherwise, cannot be treated differently after putting so many years of service. The illness cannot be held against them and therefore they will be eligible for promotion despite their colour blindness, if they are, otherwise fit for promotion.

For the first time, on 29.10.2008, there was a deviation in the official thinking. In that, the respondents directed that if the concerned personnel cannot be accommodated in the suitable position, he should be removed after giving them opportunity to defend his/her case. The relevant portion of that Circular reads as follows:-

If any person considering the requirement of the CPFs and in the interest of the person he or she should be boarded out on account of physical disability. At the same time, if the person has served for a number of years in a force, it may not be fair to remove him summarily. It has therefore, been decided that in all such cases which came to light where a person was appointed prior to 17.05.2002 with colour blindness, the concerned Force will try to adjust such a person in non technical security force where colour blindness may not be a disqualification. However, if the CPFs is not able to find out a suitable position for the person in the force he/she may be removed from service after giving due opportunity to defend his/her case. The cases of colour blindness if detected in the appointees in the period after 17.05.2002 such person shall be placed in SHAPE-V and be boarded out as per the laid down procedure for disability.

The effect of the above three Circulars were ultimately reviewed and on 11.3.2011, the respondents issued yet another Circular which was relied upon by the Court and found the basis of its direction in Mohan Lal Sharma's case (supra). This Circular of 11.03.2011 pertinently states that:-

a) "All duties where use of fire arms/identification of various types of coloured signals/identification of criminals in mob/use of specialized equipments are not regularly required and public safety is not involved, may be defined as non-technical duties.

b) In MHA UO of even number dated 29.10.2008, word "Non-technical Security Force" implies for "Non-technical Security Duties" within the Force and does not mean creation of any separate Non-technical Security Force.

2. It is further clarified that promotion of all such force personnel recruited with colour blindness prior to 17.5.2002 will continue to be governed by this Ministry's UO No. I-45020/52/2001-Pers-II dated 17.5.2002.

3. This issues with the approval of Secretary (IS).

Sd/-

8. It is, therefore, evident from the above extract that right from 2002 to 2008, the respondents were sensitive and alive to the fact that colour blind personnel

recruited prior to 2002 could not be treated differently from their other colleagues who did not suffer from this disability as far as promotion and other conditions of the service were concerned. The doubts expressed from time to time, which were sought to be allayed in the form of Circular dated 29.10.2008 resulted in greater uncertainty and possibly some conflict. All these were given a quietus by the Circular dated 11.3.2011 which reiterated that promotional prospectus of colour blind personnel recruited by any of the forces would not be prejudicially or adversely affected. One would have thought that in such state of affairs and with two adverse judgments by Division Bench, the matter would have ended. This Court is also conscious that the appeals by the respondents through special leave to the Supreme Court against the directions in Sudesh Kumar's case (supra) were unsuccessful; the SLPs were dismissed. It meant that not only did the petitioners in Mohal Lal Sharma and Sudesh Kumar cases acquire a right in the form of a declaration that they would not be treated differently from their other non-colour blind colleagues, such right also vested and inured in all similarly situated employees and personnel of all the forces. Such being the case, the respondents cannot now argue that in the form of the mere Circular-of 18.5.2012 or in that matter of 27.2.2012, the present petitioners, or those who had not approached the Court, but are found to have the same conditions as the petitioners in Mohal Lal Sharma's case, can be in any manner discriminated against. That some approached the Court whilst the others felt no compulsion to do so, can be no rationale for a valid classification. In fact, the entire class of colour blind personnel under such circumstance is indistinguishable. The respondents cannot treat the equals unequally by separating those who approached the Court and continue to give them promotions and other such benefits while denying the same to those who had not approached the Court and perhaps had no occasion to approach the Court on account of the declaration given. That would be plainly violation of Article 14 of the Constitution of India.

9. As a consequence of the above discussion, it is held that though the respondents have to some extent stated that posts suitable for colour blind personnel have been identified and allocated to accommodate their claims for promotion; it is hereby declared and directed that the effect of the previous judgments of the Court based on the respondents' own thinking contained in the three Circulars dated 17.5.2002, 31.7.2002 and 11.3.2011 would continue to bind the parties. There is, in fact, no denial in the facts situation warranting any different thinking. The petitioners and all others like them would be entitled to full benefits of promotions as is extended to those who do not suffer from colour blindness impugned in the previous directions of this Court in Mohal Lal Sharma and Sudesh Kumar's case.

10. In view of the above discussion, all the directions and orders impugned in the present case which denied or deprived the petitioners the chance or right to occupy the promotional posts are hereby quashed. The respondents are directed to issue consequential orders wherever the promotions have been actually effected with

effect from the date the petitioners' juniors were promoted. The petitions are allowed to the above extent. No costs.