

**ARMED FORCES TRIBUNAL, CHANDIGARH
REGIONAL BENCH AT CHANDIMANDIR**

-.-

OA 3393 of 2013

Lt Col Gorakh Nath Singh	Petitioner(s)
Vs		
Union of India and others	Respondent(s)

-.-

For the Petitioner (s) :	In Person
For the Respondent(s) :	Mr Sandeep Bansal, CGC

**Coram: Justice Prakash Krishna, Judicial Member.
Lt Gen (Retd) NS Brar, Administrative Member.**

-.-

**ORDER
27.02.2014**

-.-

The present petition has been filed under Section 14 of the Armed Forces Tribunal, Act 2007.

The petitioner claims that he was enrolled as Sepoy/Nursing Assistant in the Army in Army Medical Corps on 15.7.1977 and was promoted on 18.6.1983 to the rank of Nk/ORA. The Service Selection Board had prepared a list of 62 candidates and recommended eleven persons mentioned in the list, be commissioned in the Army. The petitioner's name finds place at Serial No. 40 of the merit list amongst 62 other candidates for the year 1986.

A new procedure was adopted by the office of DGMS(Army) in disregard to the practice prevailing earlier for this year. The office of DGMS(Army) prepared a final merit list on the basis of marks obtained in the selection interview by these candidates. The candidates who were higher in rank in the said list of DGMS(Army), were commissioned. The decision of DGMS(Army), ignoring the selection list prepared by the Service Selection Board, was subject matter of challenge at the instance of one Havildar Clerk Hans Raj Sharma and one Havildar Virender Singh in Civil Appeal No. 2563 of

1988 and Civil Appeal No.2362 of 1988 respectively. The aforesaid appeals were heard and decided by the Apex Court by accepting the contentions of the appellants therein that the merit list prepared by the S.S.B. is final. The Apex Court vide its judgment in the aforesaid appeals, while allowing the appeals, directed the respondents to allow Permanent Commission in the Army Medical Corps (Non Technical) to the appellants therein from the date it was granted to other candidates selected for 1986 quota. It was further provided that the appellants shall be entitled notionally to all consequential benefits including promotion and seniority, except the back wages. In addition, the Apex Court observed that while determining seniority of the appellants therein, the seniority or promotion given to any selected candidate who is already working on a promotional post, shall not be disturbed. Hans Raj Sharma and Virender Singh were granted commission accordingly.

One intervening fact took place. Two persons namely Lt Colonel Ashok Kumar Respondent No. 6 herein and Lt Colonel Mohan Singh Respondent No. 7 herein who had still chances to appear, appeared in the examination for the subsequent years and they were successful therein and were commissioned in the Army on their own merits even before the judgment of the Apex Court came into existence. Names of these two persons also did find place in the list, which was prepared by the Service Selection Board of 1986 year.

Later on, it appears that Lt Colonel Ashok Kumar and Lt Colonel Mohan Singh approached the office of DGMS (Army) for re-fixation of their seniority in the light of the judgment of the Apex

Court. These two persons having been placed above the present petitioner, it gave rise to cause of action to the petitioner to file the present petition. The petitioner claims that he being senior in the rank and joined the Army earlier, should have been placed above Respondents No. 6 and 7 and not below to them.

By means of present petition, the petitioner has sought the following two reliefs :-

“(a) It is humbly prayed that the respondents be directed to stay further action on award of the rank of Colonel (select) to NTR-16608Y Lt Col Ashok Kumar (respondent No. 6) which is falling vacant on 01 Sep 2013, so that the applicant be able to participate in the process of selection for consideration for promotion to Colonel (select) if found eligible after restoration of his correct and actual seniority.

(b) The applicant has been notified to retire on attaining the age of 56 year on superannuation vide order IHQ of MoD (Army) DGMS(Army) letter No. 66796/Ret/2013/DGMS-1A dt 25 Mar 2013 (Annexure A10 refers). The applicant is due to promotion to the rank of Colonel (Time Scale) on 15 Dec. 2013 which is again absolutely illegal discriminating, injustice and arbitrariness against all principles of natural justice and whereas Colonel (select) retire on attaining age of 57 years and Colonel (Time Scale) in the same cadre, same pay scale, same applets, performing same duties and responsibilities and almost placed in similarly situated in all matter. Then this discrimination also militates against fundamental rights guaranteed under Article 14 (equality before the law and equal treatment). Article 16 in the matter of employment and holding of public office, employment within the Govt. and right to life and liberty guaranteed under Article 21 of Constitution of India and on this ground applicant is entitled for praying for annulment of his retirement order dt 25 Mar 2013, which is absolutely illegal discriminating, injustice and arbitrariness against all principles of natural justice.”

On notice, a counter-affidavit on behalf of the respondents has been filed wherein they have come out with the case that the seniority

list has been rightly prepared. It has been pleaded that the respondents No. 6 and 7 were commissioned earlier in point of time than the petitioner, the petitioner has been rightly placed, in view of the judgment of the Apex Court below the Respondents No. 6 and 7. It has been further stated that the petitioner desirous of Commission in Army Medical Corps had appeared before Service Selection Board (In short SSB) on numerous occasions but was unsuccessful for grant of commission. He had appeared in the 19 SSB Allahabad, 17 SSB Bangalore, 20 SSB Bhopal but was 'not recommended' in any of these attempts. He had appeared before the SSB held in 1987 and was recommended by the SSB for the commission and was placed at merit position No. 40 amongst 62 other candidates. The respondents have also come out with the case that the seniority list recommended by the Board of Officers was convened on 11.1.2010 under the Chairmanship of DG(Org. & Pers.) and approved by the DGAFMS by means of letter dated 13.5.2010 uploaded on the Army Website/DGMS(Army) Website for dissemination to the persons concerned to verify the data and confirm its correctness. At no point of time, the petitioner had raised any grievance earlier to the said seniority list before filing of the present petition. They have spelt out the various other facts including the promotion policy etc. which will be considered at the appropriate stage, if the occasion so arises to justify the seniority list.

The petitioner has filed rejoinder reasserting the stand taken by him in the original petition.

Heard the petitioner in person and Mr Sandeep Bansal, CGC, learned counsel for the respondents. We were taken through the

various documents filed by the petitioner in support of his case. The crux of the argument of the petitioner is that in the merit seniority list prepared by the SSB, he was placed at Serial No. 40. In the said list, Ashok Kumar has been shown at Serial No. 17 and Mohan Singh at Serial No. 32. The submission is that since the petitioner was enrolled in the Army earlier, in point of time, to these persons, he should be treated as senior to them. Reliance was placed on a document filed as Appendix-D at page 39 of the paper book to show that seniority was granted to Mohan Singh and Ashok Kumar vide Ministry of Defence letter No. 32433/PC/NT-86/DGAFMS/DG-1A/2185/97/D(Med.) dated 3.10.97. While the petitioner was granted seniority vide letter No. 32433/PC/NT-86/DGAFMS/DG-1A/2488/95/D(Med.) dated 16.10.95. Elaborating the argument, it was submitted that originally the seniority was correctly fixed and the respondents committed illegality in re-fixing the seniority and placing the petitioner below these two persons. The other argument raised by the petitioner is with regard to grant of pay of Colonel (Select) and to retire him at the age of superannuation as applicable to Colonel(Select).

In reply, the learned counsel for the respondents supports the impugned action and submits that on a true and correct interpretation of the judgment of the Apex Court, the seniority of the petitioner has been correctly fixed. He submits that the petitioner's name was recommended by the SSB at Serial No. 40 and he was not selected by DGMS (Army). The petitioner kept quiet and never agitated the matter any further. The Army has shown good gesture by extending the benefit of the judgment of the Apex Court to the petitioner also and

now the petitioner is opening his mouth too wide to claim seniority over and above the private contesting respondents who succeeded in the subsequent examinations and got commissioned on their own merit. So far as the second relief claimed in the petition is concerned, he submitted that since the matter is under consideration before the Apex Court, we should await the decision of the Apex Court and if the Apex Court decides it by upholding the petitioner's stand herein, the final outcome of decision by the Apex Court shall be extended to the petitioner herein also.

Considered the respective submissions of the learned counsel for the parties and perused the record.

There appears to be no dispute that SSB proceedings for grant of commission in the Army Medical Corps(Non Technical) for the year 1986 batch was conducted in the year 1987 and a merit list was drawn. It consisted of 62 candidates out of them 11 vacancies were filled by the Government for 1986 batch. A new procedure was adopted by the DGAFMS which prepared another merit list on the basis of the marks obtained by the candidates in the selection interview. Resultantly, certain candidates who were higher in the list prepared by SSB could not maintain their position and came to lower down of the merit list and could not succeed to get the permanent commission. Such two persons namely Hans Raj Sharma and Virender Singh challenged the new procedure which was introduced in the year 1987 for 1986 batch by filing appeals before the Apex Court. The Apex Court, has allowed the appeals.

At this stage, it is appropriate to note a fact as to how the petitioner has come on the scene.

The appellants before the Apex Court namely Hans Raj Sharma and Virender Singh were granted commission as per order of the Apex Court. There appears to be no difficulty upto this stage. The difficulty arose as one person NK/NA A.K. Baukhandi, who had secured 44th position in S.S.B. list, had been granted commission as a result of final select list prepared by the DGAFMS. The DGAFMS, on the representations of some candidates who were higher in the select list of S.S.B., reconsidered and decided to grant commission to all such persons who were placed higher to A.K. Baukhandi (44th position) in the select list of S.S.B. The decision was taken in consultation with Ministry of Defence & L.A. (Defence). Accordingly, 14 more candidates including the petitioner were granted commission.

The petitioner is, now, raising the seniority dispute in the light of the judgment of the Apex Court. It would be appropriate to reproduce the operative portion from the judgment of the Apex Court as the said portion is being interpreted by the parties differently:-

“In the result, these appeals succeed and are allowed. The respondents are directed to allow Permanent Commission in the Army Medical Corps (Non Technical) to the appellants from the date it was granted to other candidates selected for 1986 quota. The appellants shall be entitled notionally to all consequential benefits including promotion and seniority, except the payment of back wages. It is, however, made clear that while determining seniority of the appellants therein, the seniority or promotion given to any selected candidate who is already working on a promotional post, shall not be disturbed. Parties shall bear their own costs.”

(Emphasis supplied)

The crux of the argument of the petitioner is that on true and correct reading of the sentence as contained in the above quoted portion which reads – “while determining seniority of the appellants therein, the seniority or promotion given to any selected candidate who is already working on a promotional post, shall not be disturbed”, would mean only this much that persons who were duly commissioned in the year 1986, on the merit list prepared by DGAFMS shall be above the appellants therein. To this limited extent, seniority of such duly permanent commissioned persons has been saved. The reading of the respondents’ counsel to the above quoted portion is that all those persons who were selected and given permanent commission and already working on promotional post on the date of the judgment, shall remain senior to the appellants therein. To put it simply, the private contesting respondents namely Ashok Kumar and Mohan Singh who got the permanent commission by the subsequent Selection Boards and were working as commissioned officers on the date of the judgment delivered by the Apex Court, their seniority shall not be disturbed as a result of the judgment of the Apex Court.

At the cost of repetition, it may be noted that one A.K. Baukhandi who had actually secured 44th position in the list prepared by SSB, was granted permanent commission as a result of the new Selection Policy adopted by the DGAFMS; his merit position was improved and got selection. After the above judgment of the Apex Court, the Army authorities, on the representations made by such persons who were ranked higher above AK Baukhandi in the SSB list, took a conscious decision to extend the benefit of the Apex Court’s

judgment to all such persons, who were above Baukhandi. Meaning thereby, just to address the grievance of such persons who were higher in the SSB list to AK Baukhandi, were also given permanent commission in the Army and the petitioner was one of such beneficiaries.

The dispute regarding the seniority and its determination in the light of the Apex Court judgment quoted above, arose as the private respondents Ashok Kumar and Mohan Singh who had still more chances to appear and they appeared and were commissioned in the succeeding examinations. Mohan Singh got permanent commission being successful in the next attempt on 30.6.1988 and similarly Ashok Kumar on 30.6.1989. Undoubtedly the day on which the judgment of the Apex Court came to be pronounced, they were already commissioned officers in their own right. The learned counsel for the respondents in order to buttress his argument that Ashok Kumar and Mohan Singh were superior even in terms of marks obtained by them in comparison to the petitioner, placed the record for our perusal. The relative marks obtained by them can be deciphered from the record which is as follows:-

<u>S.No.</u>	<u>Name</u>	<u>Marks</u>
1.	Lt Col Gorakh Nath Singh (Petitioner)	360
2.	Ashok Kumar	385
3.	Mohan Singh	366
4.	Jit Singh	361
5.	Jaimal Singh	408

The submission of the respondents is that even from this angle also (the marks obtained by the contesting private respondents), Ashok Kumar and Mohan Singh being more meritorious, are senior to the petitioner.

The fact which emerges from the above discussion is that Ashok Kumar and Mohan Singh had edge over the petitioner and the claim of the seniority put forward by the petitioner over these two persons, is untenable for the reason that in the above mentioned merit list prepared by the SSB, these two persons had secured higher marks and were placed higher than the petitioner. Even otherwise also, they succeeded and got permanent commission in the year 1988 and 1989 much before the notional grant of promotion to the petitioner. Thus these two persons rightly raised the grievance that taking into consideration the judgment of the Supreme Court or even otherwise, they should be placed over and above the petitioner in the seniority list, getting of their permanent commission in the year 1988 and 1989 notwithstanding. Alternately, the day when the judgment of the Apex Court was pronounced, these two persons were already commissioned officers and the true purport of the judgment of the Apex Court is not to disturb the seniority of any selected candidate who is already working as commissioned officer. This has not been denied and nor now could have been denied by the petitioner that these two persons were already working as commissioned officer on promotional post on the date of the judgment of the Apex Court.

Much emphasis was laid by the petitioner that he being senior while joining the Army, that seniority should be maintained

irrespective of merit or the marks obtained in the selection process. We find no merit in the said argument in view of the judgment of the Apex Court.

We find merit in the stand of the respondents that the officers who were actually commissioned in 1995 with notional seniority of 15.12.1987 based on the judgment of the Apex Court, could not be placed higher to the officers who had qualified for commission in AMC(NT) on their own merit in 1988 or 1989.

At this juncture, we are reminded of an observation of the Apex Court - justice demands that the person should not be allowed to derive undue advantage over other employees. The concept of justice is that one should get due to him or her. The concept of justice cannot be construed so as to cause heart burning to more meritorious candidates. **(K.C. Sharma & Ors. Vs Union of India & Ors. (1997) 6 SCC 721).**

Viewed as above, we do not find any merit in the present petition so far as it relates to relief (a) is concerned.

Now we take up the next point i.e. equality of Colonel (Time Scale) with Colonel (Select) with regard to date of retirement, which is 56 years in the case of Colonel(Time Scale) and 57 years in the case of Colonel (Select). We were informed by the learned counsel for the respondents that the said issue is already engaging attention of the Apex Court and the respondents have no objection if the said point is left open. The respondents shall abide by the judgment of the Apex Court even in the case of the present petitioner also. In view of this stand taken by the respondents, we are leaving it open and it will be decided in the light of the judgment of the Apex Court which may

come subsequently by providing that if the said issue is decided and ultimately it is held that Colonel (Time Scale) will be retiring at the age of 57 years, the petitioner will get the salary etc. in lieu thereof as admissible under law for the said period as also all the consequential benefits such as enhanced pension, if any, etc.

Subject to above, the petition is dismissed. But no order as to costs.

(Justice Prakash Krishna)

(Lt Gen (Retd) NS Brar)

27.02.2014

‘pl’

Whether the judgment for reference to be put up on website – Yes/No