

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

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TA 164 of 2012 (arising out of CWP 12580 of 1998)

Bhim Singh (deceased) through **Petitioner(s)**
LRs

Vs

Union of India and others **Respondent(s)**

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For the Petitioner (s) : Mr Navdeep Singh, Advocate

For the Respondent(s) : Mr. Vibhor Bansal, GGC.

Coram: Justice Prakash Krishna, Judicial Member.
Air Marshal (Retd) SC Mukul, Administrative Member.

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ORDER
21.02.2014

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The file of the above case has been received by transfer from Punjab and Haryana High Court, transferring the record of CWP No. 12580 of 1998, to the Armed Forces Tribunal, Chandigarh.

Bhim Singh (now deceased) filed the above mentioned writ petition on the allegations that he was enrolled in the Army on 24.3.62 was promoted as Naib Subedar in March, 1978, was commissioned as an SL Officer on 27.7.81 and was promoted as Major on 27.7.94 vide Gazette Notification dated 1.5.1995. He retired as Major on 30.11.95 and pension was fixed in the rank of Major.

The petitioner claims that he got three kinds of injuries during the service which were attributable to and aggravated by Army service. The Release Medical Board was held on 31.3.95 prior to his release from service and found the following diseases:-

(1) Primary Hypertension aggravated 30%

(2) IHD aggravated 30%

(3) Obesity neither attributable nor aggravated 15-19%

The Release Medical Board assessed the IDs at 50% for two years composite. Being dis-satisfied with the findings of the Release Medical Board, the petitioner carried the matter in appeal with regard to non-grant of disability pension qua obesity. The appeal met the same fate and was dismissed by the Government of India and was communicated vide order dated 21.6.96. The petitioner again represented the matter in the month of December, 1996. Thereafter he filed the present writ petition wherein the petitioner has claimed quashing of the impugned orders dismissing the appeals Annexures P-2 and P-3 as Relief No. 1.

At the very out set, learned counsel for the petitioner, Sh. Navdeep Singh, stated that he does not want to press the aforesaid relief. In view of the above stand, the petition so far as relief No. 1 is concerned, stands dismissed as not pressed.

The other relief claimed is a writ of mandamus directing the respondents to release the arrears of pension to the petitioner in the rank of Major. The petitioner claims that he was given the rank of Major on 27.7.94 and retired as Major on 30.11.95. In para 10 of the writ petition, it has been pleaded that the petitioner was shocked to receive a corrigendum PPO (Pension Payment Order) reducing the rank of the petitioner from Major to Captain and consequently also reducing his pay and pension to the rank of Captain and further made an order of recovery of the said amount from the petitioner. A true copy of the said corrigendum PPO has been attached as Annexure P-2. The petitioner has sought a writ of mandamus directing the respondents to pay him pension as admissible to the rank of Major.

In reply, the respondents have come out with the case that as per policy prevalent for granting promotion to the rank of Major, the petitioner was required to pass Examination known as Part 'D' Examination which the petitioner admittedly did not pass. Under the policy known as "Promotion Examinations Parts A and B" filed as Annexure R-1, such examination was necessarily required to be cleared before grant of Rank of Major. In this connection, reliance has been placed on a letter dated 14.11.95 wherein name of the petitioner finds at Serial No. (a). It was detected that the officers whose names find in the letter, have been granted promotion to the substantive rank of Major with the presumption that they belong to SL category(EMAE/SA) (exemption category) which makes them eligible for exemption from passing of promotion examination Part 'D', under the existing instructions. Since the petitioner had not passed the Part 'D' examination, substantive rank of Major granted to the petitioner was de-notified vide corrigendum notification dated 27.1.1996. The name of the petitioner was deleted from the Gazette Notification of Government of India dated 12.8.95 under the heading "Regular Army" Permanent Commission and sub-heading Captain to be Major vide Draft Gazette Notification No. 37569/JUL 94/MS/8C dated 14.11.95. In this view of the matter, petitioner's pay was reverted to Captain w.e.f. 27.7.94. As a result of reduction in the rank of Captain, the recovery for the excess payment made for Major's rank amounting to Rs. 6785/- was recovered from the petitioner's pay account for the month of January, 1996. The petitioner was duly informed of reduction of rank vide letter dated 27.1.1996.

Heard Sh. Navdeep Singh, learned counsel for the petitioner and Sh. Vibhor Bansal, learned CGC for the respondents. Learned counsel for the petitioner submits that there is no dispute that the petitioner was given the rank of Major on 27.7.94. A Gazette Notification in this regard was also issued by the Government of India. He having retired on 30.11.95, subsequently a corrigendum PPO was issued reducing the rank of the petitioner to Captain which was not permissible under law. Before reverting the petitioner to the rank of Captain, any opportunity of hearing was not afforded to him. Nor any show cause notice was served. Difference in the salary of the two ranks of Major and Captain, has been unauthorisedly recovered by making the deduction, which legally could not be done. The reversion of the petitioner to the rank of Captain has civil consequences, therefore, opportunity of hearing should have been afforded to him. Reliance has been placed on certain decisions of the Apex Court which will be referred to at the appropriate place.

In reply, the learned counsel for the respondents submits that the petitioner as per promotion policy could not have given the rank of Major because he was not eligible to fall under the exemption clause, granting exemption from appearing in the examination known as Part 'D'. The mistake was committed and as soon as the mistake was detected, necessary steps were taken to rectify the same and the petitioner cannot get any advantage of the mistake. It was further submitted that the rank of Major of the petitioner was de-notified under intimation to him on 27.1.1996. The petitioner has not challenged the order of de-notification then and there and all the time

he was harping for the grant of disability element of pension with regard to Obesity part. In other words, the petitioner accepted the stand of the respondents that it was a case of mistake. For the first time, after about two years, the present plea has been raised during the course of arguments without laying any foundation that no opportunity of hearing was afforded to him and order has been passed against principle of natural justice in the writ petition. The writ petition lacks necessary pleadings and details and such plea cannot be permitted to be raised for the first time in the arguments.

Considered the respective submissions of the learned counsel for the parties and perused the record. The learned counsel for the petitioner has relied upon the following cases in support of his submission:-

- (1) D.K. Yadav Vs M/s J.M.A. Industries Ltd. 1993(3) S.C.C 259; that “An order visiting the employee concerned with the civil consequences, jeopardising his right to livelihood and career cannot be passed without complying with the principles of natural justice”
- (2) Ram Ujarey Vs Union of India AIR 1999(SC) 309 wherein it has been laid down that if after giving benefit of previous service rendered in other department of the same establishment, an employee is allowed to pass different trade tests and given promotions also on that basis, he cannot be reverted without notice and opportunity of hearing merely

under the garb of correction of mistake that he was not entitled to the benefit of previous service towards seniority;

- (3) Special Leave to Appeal(Civil) No(s) 24607 of 2010 – State of Punjab and others Vs Krishan Kumar Bansal and others decided on 2.8.2013 wherein the Apex Court supplied the additional reasons for not entertaining the Special Leave Petition and one of the reasons is that the show cause notice, if any, issued to the respondents proposing recovery of the amount paid to them and the orders passed by the competent authorities for recovery of the alleged excess amount paid to the respondents have also not been produced with the special leave petitions.

On scrutiny of the writ petition, it is crystal clear that the main grievance raised by the petitioner therein is with regard to his claim for disability pension for the disease obesity. However incidentally the petitioner has also stated in para 10 that he was served with Corrigendum PPO reducing the rank of the petitioner from Major to Captain and consequently also reducing his pay and pension to the rank of Captain. The said paragraph has been very cleverly drafted, and the date when the said corrigendum PPO was served on him, is missing. Pointedly, the petitioner's counsel was asked to refer pleadings with regard to petitioner's grievance, if any, reducing the

petitioner from the rank of Major to the rank of Captain and the grounds of challenge. He could refer, besides Para 10 of the petition (we have already referred it to above), Para 15, part of Para 16 and part of Para 19. For the sake of convenience, Para 15 of the writ petition is reproduced below :-

“Para 15. That the action of the respondents in denying disability pension in respect of the obesity and further reducing the rank of the petitioner as Captain and making an order of recovery without giving any reasons is wholly illegal, erroneous, contrary to law and facts on record, unconstitutional, arbitrary and violative of principles of justice equity and good conscious and the petitioner is entitled to the relief in view of the grounds mentioned herein before and other grounds submitted at the time of arguments.”

A bare reading of the above quoted paragraph would show that reduction in the rank of petitioner as Captain and making an order of recovery without giving any reasons is wholly illegal, has been set out. But there is no such pleading nor such point was raised that the said order was passed ex-parte or without giving any opportunity of hearing. Here again the petitioner has very cleverly not disclosed the date of alleged reversion of the order. He then relied upon Para 16 - “the points of law” which according to the petitioner arise in the writ petition, have been framed. This is the state of affairs of the pleadings - With regard to the question as to whether an opportunity of hearing was given to the petitioner or not.

The up-shot of the above discussion is that the pleadings of the petitioner are bereft of plea of violation of principle of natural justice. Vague and misleading averments, without disclosing the true and

correct facts that the petitioner was given promotion due to some mistake, has not been set out.

The learned counsel for the respondents rightly invited the attention of the Court towards Para 10 of the written statement filed on behalf of the respondents. For the sake of convenience, Para 10 of the written statement is reproduced below :-

“That in reply to this para it is submitted that the paying controller of the petitioner i.e. the Controller of Defence Accounts (Officers) Pune, is responsible for maintaining the records of pay/promotion/demotion etc.

The Controller of Defence Accounts (Officers) Pune under letter No. VII/66/158819/LWI dated 04.12.95 and No. Arch/PC/G-COR/11.95/158819 dated 7.12.95 amended this rank of the petitioner from Major to Captain. Copies of these letters were also endorsed to the petitioner, addressing him as Capt. Bhim Singh. Accordingly on the basis of amended emoluments the petitioner's pension was reassessed and notified in this office PPO No. M/Corr/006077/96.

The name of the petitioner was deleted from Gazette of India dated 12/8/95 under head “Regular Army” permanent commission and sub heading Capt. to Maj. vide Draft Gazette Notification No. 37569/July-94/193 8 C dated 14/11/95. As such the officer's pay was reverted to Capt. w.e.f. 27/7/94. As a result of reduction in rank, the recovery for the excess payment made for Maj's rank amounting to Rs. 6785/- was recovered from the officer's pay account for the month of 1/96. The officer was duly informed of reduction of rank vide this office letter No. VII/66/158819 dated 4/12/95 and DO Arch/Singh/158819 dated 21/7/98. Further necessary amendment to original LPC was also issued showing rank as Capt. in the amended LPC cum Data Sheet. The amendment was intimated vide Arch/PC/1073/12-95/158819 dated 7/12/95.”

In the above quoted para, it has been specifically set out that Controller of Defence Accounts(Officers), Pune through their letter dated 7.12.95 amended the rank of the petitioner from Major to

Captain and the copies of these letters were also endorsed to the petitioner addressing him as Capt. Bhim Singh. There is no denial by the petitioner that the copies of the letters which were endorsed to him, (the petitioner) received them in normal course. It appears that the petitioner gracefully accepted the position as it was a case of mistake to his knowledge also. Our these observations find support from the petitioner's own documents. Along with the writ petition, the petitioner has annexed a copy of his letter dated 6.12.96 addressed to the Under Secretary, Sena Bhawan, New Delhi, titled as "Appeal against claim to Disability Pension in respect of SL-2876-Capt Bhim Singh". At the bottom of the letter, he has signed it as Capt. Bhim Singh. Even in the letter of the Government of India, Ministry of Defence dated 21.6.96 dismissing the claim of disability in respect of the petitioner under the heading "Subject", the rank of the petitioner is mentioned as Capt. Bhim Singh. The petitioner, it is clear, never objected to it.

The other aspect of the case is that the petitioner has claimed a writ of mandamus directing the respondents to release his pension in the rank of Major and the writ petition was filed in the year 1998. The petitioner was informed by the respondents about his correct rank as of Captain in the year 1998 itself and a corrigendum was published on 27.1.1996. The Government of India issued the corrigendum in the Gazette dated 27.1.1996, the petitioner was issued the corrigendum PPO in the month of January, 1996. The petitioner maintained silence and did nothing for a period of around three years and filed the present writ petition in the year 1998 raising the said dispute also for the first

time. There is no reason as to why the petitioner came out of slumber after such a long time. He did not file any representation or statutory or non-statutory complaint for redressal of his grievance, if any, that he has been wrongly placed in the rank of Captain after retirement. Apparently the petitioner was fully aware about the mistake committed by the respondents and had no say in the matter. Therefore he kept quiet for all this period and raised the issue for the first time and the present writ petition is after thought.

Coming to the promotion policy i.e. Promotion Examinations Part C & D which is Appendix-B to SAI 1/85. Relevant provision is Provision No. 14 under the heading "Exemption from Passing Promotion Examination(s). It has three columns. Column No. 1 contains Arm/Service, Column No. 2 contains Category of Officers and Column No. 3 contains Exemption. Reliance has been placed of clause (g) and (h) of Arm/Service. The petitioner submits that he belongs to EMEA(SA) Officers category wherein examinations in Parts A, B, C & D are exempted for promotion from Captain to Major. In Paras 3 and 4, the respondents have come out that the petitioner was considered for the rank of substantive Major presuming that he belongs to SL(EMAE)(SA category) which is exempted from passing of Promotional Examination Part-D and as such the petitioner was granted substantive rank of Major w.e.f. 27.7.1994. On a query from Controlling Group(MS:EME) regarding seniority of the officer, it was found that the petitioner belongs to SL(EMAE) category which is a different category and is not exempted from passing of promotional examination Part-D. The petitioner had not passed the such

examination, substantive rank of Major granted to him, was denotified on 27.1.1996. The only plea which has been put forward by the petitioner is that there was some confusion in interpreting the promotion policy and since the petitioner was never asked to appear in the said examination, no fault lies at the end of the petitioner. Be that as it may, in the absence of any plea of mala fide etc., the petitioner cannot get the advantage of the mistake committed by the respondents especially in writ jurisdiction which is extraordinary remedy and discretionary one.

This is acknowledged legal position that writ is issued to correct an error and not to prevent the other side to correct un-intentional mistake. In other words, no writ can be issued directing the respondents not to rectify the mistake. 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 are of the opinion that here is a case where by mistake, some advantage was conferred by granting the rank of Major. Correction of said mistake cannot be questioned by taking recourse to writ petition under Articles 226 and 227 of the Constitution of India. The jurisdiction to issue writ has been conferred on High Courts for a different purpose with the idea that whenever there is injustice, the hands of the Court are not tight. It does not mean that the

power should be exercised to retain some undue benefit which is not admissible under law.

So far as the decisions relied by and referred to above, by the learned counsel for the petitioner, we are of the opinion that they have no application to the facts of the present case. It has already been demonstrated that there is no evidence to show that the corrigendum PPO was issued behind the back of the petitioner or he was not informed. At no point of time, the petitioner did raise his voice against restoring him to the rank of Captain. An order in violation of principle of natural justice may be void depending on the facts and circumstances of the case. Reference can be made to *Jagdambika Partap Narain Singh Vs CBDT*, AIR SC 1816, *Maneka Gandhi Vs UOI* SCC 597, *Krishan Lal Vs State of Jammu & Kashmir*, 1994(4) SCC 422, *State Bank of Patiala Vs S.K. Sharma*, 1996(3) SCC 364, *Union of India Vs Mustafa & Najibai Trading Co.* 1998(6) SCC 79 and *Vishnu Dutt Vs State of Rajasthan*, 2005(13) SCC 592.

In *Viveka Nand Sethi Vs Chairman, J&K Bank Limited and others*, (2005) 5 SCC 337, the Apex Court has held that the principles of natural justice are required to be complied with having regard to the fact situation obtaining therein. It cannot be put in a straitjacket formula. It cannot be applied in a vacuum without reference to the relevant facts and circumstances of the case. The principle of natural justice, it is trite, is no unruly horse. When facts are admitted, an enquiry would be an empty formality. Even the principle of estoppel will apply. The above ratio is fully applicable to the facts of the case as there is no dispute by the petitioners that he could not be promoted to

the rank of Major and was wrongly granted exemption from appearing in Part-D Examination.

In **Mohd. Sartaj and another Vs State of U.P. and others,, (2006) 2 SCC 315**, the Apex Court has dealt with the matter in detail. In this case, it has reproduced a paragraph from the case of S.L. Kapoor Vs Jagmohan, (1980) 4 SCC 379 which is appropriate to the present case also. The same is reproduced below :-

“14. However, in S.L. Kapoor v. Jagmohan this Court has also observed as under: SCC p. 395, para 24)

“In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person who has denied justice is not prejudiced. As we said earlier where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice but because courts do not issue futile writs.”

In nut-shell, the relied upon decisions by the petitioner is of no assistance to him.

Now comes the last point i.e. with regard to deduction of excess payment made to the petitioner i.e. the difference in the pay-scale of Major and Captain. The contention of the learned counsel for the petitioner is that the deduction has been made unauthorisedly by deducting the amount from the pension amount of the petitioner. The respondents in their written statement in Para 10 (already reproduced above), have stated that recovery of the excess amount, amounting to Rs. 6785/- was made from the Officers Pay Account for the month of

January, 1996. The petitioner having worked and retired in the rank of Major was entitled and rightly paid the salary as applicable to such rank holder, there was absolutely no justification for making any deduction from the pensionary or any other amount payable to the petitioner in the month of January, 1996. This was unilateral action of the respondents which cannot be justified. Taking into consideration that the petitioner had retired by that time and now he is no more and his heirs have been substituted in his place, we find some force in the above argument of the petitioner in this regard. The categorical stand has been taken that no opportunity of hearing was afforded to the petitioner before making the deduction. A reading of the written statement and reply on behalf of the respondents does not contradict the said stand. To this limited extent, the deduction of the differential amount from the pension of the petitioner is held arbitrary and illegal and the respondents are commanded to refund the said amount to the heirs of the petitioner without any delay preferably within a period of three months from today. If the amount is not refunded within a period of three months, the respondents shall also pay simple interest thereon at the rate of 6% per annum from February, 1996 till the date of actual payment.

In the result, TA No. 164 of 2012 succeeds and allowed in part as indicated above. The T.A. is dismissed for the other part. No order as to costs.

(Justice Prakash Krishna)

(Air Marshal (Retd) SC Mukul)

21.02.2014 'pl'

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