

BRIG. NALIN KUMAR BHATIA vs. UNION OF INDIA

Citation : 2020 Latest Caselaw 142 SC

Date : **11 Feb, 2020**

Before :- L. Nageswara Rao and Hemant Gupta, JJ.

Civil Appeal No.5751 of 2017. D/d. 11.2.2020.

Brig. Nalin Kumar Bhatia - Appellants

Versus

Union of India And Ors. - Respondents

With

Civil Appeal No. 5629 of 2017.

For the Appellants :- Sarvesh Singh, Advocate.

For the Respondents :- Mukesh Kumar Maroria, Advocate.

JUDGMENT

L. Nageswara Rao, J. - Whether the non-empanelment of the Appellant for promotion to the rank of Major General was contrary to the promotion policy is the question that arises for consideration in the above Appeal.

2. The Appellant was commissioned in the Mechanised Infantry of Indian Army on 13.06.1981 and was subsequently transferred to the Corps of Intelligence in May, 1991. He was promoted as a Brigadier in September, 2008. His empanelment for promotion to the rank of Major General was placed before the Members of Selection Board on 24.04.2015. On 31.07.2015, he was declared as having not been empanelled for promotion to the rank of Major General. Being aggrieved by his non-empanelment, he filed Original Application No.64 of 2015 before the Armed Forces Tribunal, Regional Bench, Mumbai seeking the following relief:

"(a) Setting aside of the unpublished / unnotified policy of the respondents, if any, whereby the service profile / quantified merit of a candidate for promotion is required to be compared with that of the previous / earlier batch;

(b) Direction commanding the respondents to review their decision with regard to non-empanelment of the applicant for the said promotion and to empanel him for the promotion in accordance with the extant policy of batch wise consideration;

(c) Direction requiring the respondents to ignore and not to act upon, while so reviewing the applicant's case, any adverse / advisory remarks or any non-recommendation for promotion endorsed in any of his CRs, which have remained uncommunicated to him and forming ground to

deny him the promotion;

- (e) Setting aside of any adverse / advisory remarks or any non-recommendation for promotion endorsed in any of his CRs, which have remained uncommunicated to the applicant;
- (f) Setting aside of the order No. A/46001/584/MS (X) dated 28th November, 2014 retiring the applicant from service w.e.f. 30.09.2015 (A/N);
- (g) Direction requiring the respondents not to hold the Number 1 Selection Board in respect of Intelligence Corps 1982 Batch tentatively scheduled to be held in September, 2015."

3. It was contended on his behalf before the Tribunal that the Appellant has an excellent record of service. Being the only eligible candidate for empanelment for promotion to the rank of Major General, he ought not to have been ignored. The Appellant complained of arbitrary action on the part of the Respondents in comparing his service profile with persons belonging to the 1980 batch. It is relevant to mention that the Appellant belongs to the 1981 batch. According to the Appellant, his non-empanelment for promotion to the rank of Major General was a result of the arbitrary exercise of power on the part of the Respondents. The Appellant relied upon the guidelines issued pursuant to a policy decision dated 06.05.1997 which were not followed while considering him for empanelment.

4. On behalf of the Respondents it was contended before the Tribunal that empanelment of officers for promotion to higher ranks is governed by detailed instructions issued by the Army Headquarters in the Policy dated 06.05.1997. It was submitted before the Tribunal that quantified system was introduced w.e.f. 01.01.2009 to bring greater transparency and objectivity in the matter of selection for promotions. The Respondents submitted before the Tribunal that the Selection Board takes into account several factors such as War/ Operational Reports, Course Reports, Annual Confidential Reports', performance in Command and Staff appointments, honours and awards and disciplinary background. Respondent further submitted that selection is based upon the overall reckonable profile of an officer in comparative merit within the batch as evaluated by the Selection Board.

5. The Tribunal dismissed the O.A. filed by the Appellant by holding that there is no illegality or patent material irregularity in the constitution of the Selection Board or the procedure followed by the Selection Board. The Tribunal was convinced that the overall reckonable profile of the Appellant was taken into account by the Selection Board and the decision of the Selection Board did not warrant interference. The contention of the Appellant that his non-empanelment was vitiated by a malice in law, was not accepted by the Tribunal. The Tribunal drew a distinction between the Armed Forces personnel and persons holding civil posts under the State. The Tribunal observed that the decision of the Selection Board cannot be substituted by a court of law.

6. This appeal has been filed challenging the judgment of the Tribunal by which no relief was granted to the Appellant.

7. We have heard Mr. Dushyant Dave, learned Senior Counsel and Indra Sen Singh, advocate for the Appellants and Mr. R. Balasubramanian, learned Senior Counsel for the Respondents.

8. It was urged on behalf of the Appellant that his non-empanelment to the rank of Major General is arbitrary and violative of the instructions issued in terms of the promotion policy of the Respondents and hence contrary to Articles 14 and 16 of the [Constitution of India](#). Mr. Dave submitted that the Appellant is entitled for empanelment to the rank of Major General in accordance with the promotion policy. He took us through the promotion policy of the Respondents from 1987 onwards to contend that the Respondents have breached the procedure prescribed in the promotion policy. The action of the Respondents in not complying with the policy while considering the Appellant for empanelment

is arbitrary and vitiated by malice in law.

9. On the other hand, it was contended on behalf of the Respondents that the empanelment of the Appellant to the rank of Major General was considered by the First Board and later by a Review Board before he attained the age of superannuation on 30.09.2015 after following the procedure prescribed in the instructions issued by the Army Headquarters. The Selection Board consisting of senior officers considered the overall reckonable profile of the Appellant and found that the Appellant was not fit to be empanelled. The Respondents submitted that the Appellant was the only Brigadier from the Army Intelligence Corps who was considered for empanelment in the year 2015 and he was not compared to the officers of the earlier batch as apprehended by the Appellant. The Respondents submitted that no right to promotion inheres in any person, and that the only right that is conferred by Articles 14 and 16 of the [Constitution of India](#) is the right to be considered. As the Appellant was not empanelled only after a proper consideration in accordance with the instructions of the Army Headquarters, Courts cannot substitute their opinion by interfering in the matter of selection.

10. The only question to be considered is whether the Appellant was considered for empanelment for promotion to the rank of Major General in a fair manner. The selection system for promotion to the higher ranks in the Army was initially governed by a letter dated 06.05.1987 of the Army Headquarters. It is mentioned in the said instructions that the number of vacancies in the higher ranks decreases in the face of the pyramidal rank structure. It becomes necessary that only those officers whose record of service merits promotion, within a particular batch, are selected to fill up the vacancies available in higher ranks. All promotions above the rank of Major are done through the process of selection and the aim of the selection system is to serve the best interest of the service by selecting only those officers who are considered competent to shoulder the responsibilities of high ranks. Fair consideration of every officer who is eligible for promotion to ensure objectivity and impartiality was one of the aims of the selection system. Composition of the Selection Boards is dealt with in para 6 of the above instructions. No.1 Selection Board pertains to promotion from Brigadier to Major General. The Selection Boards are duty bound in accordance with the instructions to assess all eligible officers of a batch who reckon seniority during one calendar year, to screen officers of earlier batch who have been placed on reviews for promotion to the next rank, to assess the suitability of officers who have been approved earlier to the next higher rank whilst in low medical classification and to ensure selection through objectivity, impartiality and in the best interest of the service in accordance with the guidelines laid down by the Chief of the Army Staff. According to the guidelines of assessment in the above Army instructions, selection is to be based on the overall profile of the officers with special stress on the performance in criteria command appointment. Due consideration should be given to officers who show consistency in overall performance and they are given preference over late starters. Another criteria taken into account is consistent recommendations for promotion to the next rank and credit is to be given to those officers who have earned positive recommendations for promotion in their very first report in command. According to the guidelines of assessment the officer should have potential for being employed or being rotated in staff, instructional or ERE appointments. Character qualities, disciplinary background and decorations form an important input to the overall profile of the officer and due consideration should be given while assessing border line cases. There is a requirement that the officers have undergone PSC/PTSC/postgraduate courses and/or to have worked well in Staff/ERE/Instructional appointments. A cautionary note given by the Chief of the Army Staff with respect to the assessment of the officers is that such assessment should be as per the comparative merit of the overall profile of officers within

their own batch and grading by the Board is to be undertaken only from the material placed before it and not from any personal knowledge. The Members of the Selection Board were guided to invariably look for the overall performance of the officers, employability of the officer in the next higher ranks, important character qualities of the officer particularly drive and determination, decisiveness, initiative, dependability, integrity and loyalty while making an assessment. The other aspects which have to be taken into account by the Selection Board are management of resources and technical equipment and the professional knowledge and conceptual ability of an officer.

11. The proceedings of the Selection Committee are sent for approval to the Chief of the Army Staff and for final approval of the Ministry of Defence. The Ministry of Defence, in accordance with the instructions of the Army Headquarters has to scrutinize each case independently. The Confidential Reports' dossiers of the officers considered for empanelment are made available to the Ministry of Defence for their perusal.

12. Realising the need for greater objectivity and to enable discernment of the most deserving candidates for higher ranks, it was felt that a quantification system would be suitable in the matter of selection for empanelment to the higher ranks. On 31.12.2008, the quantification system was introduced by which it was decided that 95 per cent marks will be given for quantified parameters to include confidential reports (CRs), courses and honours and awards. 5 per cent marks will be kept for value judgment by the Selection Board Members for aspects that cannot be quantified out of a grand total of 100 marks. 91 marks are earmarked for CRs, 4 marks for courses and honours and awards. 5 marks are assigned for value judgment by the Selection Board. Primacy is given to the CRs by allocation of maximum marks of 91 out of a grand total of 100 marks. 5 per cent marks which have been set aside for value judgment by the Selection Board shall be allotted by following the parameters of performance, potential disciplinary awards/ administrative actions, recommendations for promotion and degree of difficulty.

13. The revised policy for conduct of the Selection Boards of quantification system was issued on 04.01.2011. Primacy of the CRs vis-e-vis other criteria like performance of courses, honours and awards has been maintained. All CRs in reckonable profile were directed to be quantified. "Look-two-down" principle of taking into consideration of CRs earned in the present rank and previous rank, will continue for No.3 Selection Board, No.2 Selection Board and No.1 Selection Board as before.

14. There was also a change in allocation marks. Apart from 2 marks allotted for the courses and 2 for honours and awards (gallantry), 19 marks were allotted for performance as Colonel, 8 for staff/Instr./others (Cols), 46 for Brigadier, 18 for Staff/Instr./others (Brigadier). The above allocation of marks would be included in the quantifiable total of 95, with 5 marks being allotted to value judgment. The guidelines issued for allotment of 5 marks earmarked for value judgment are on the basis of performance, potential, special achievements, honours and awards and recommendation for promotion. Para 19 of the letter dated 04.01.2011 postulates a review of the revised quantified model for Selection Boards after a period of five years. The policy dated 04.01.2011 superseded all earlier policies on the conduct by selection boards of quantification system.

15. The Appellant was considered for empanelment by the First Selection Board on 24.04.2015 in accordance with the guidelines laid down in the promotion policy dated 04.01.2011. The Appellant secured a total of 89.667 per cent marks. The record pertaining to the First Selection Board, held on 24.04.2015 was placed before us. The Selection Board did not recommend the Appellant for empanelment for promotion to the rank of Major General in Intelligence Corps. After examining the

complete profile of the officer, the Selection Board was of the opinion that the Appellant did not have the requisite potential and was not fit for promotion to the rank of Major General. The Appellant was considered again for empanelment in September, 2015 in which he secured 90.469 marks out of 100 but was not recommended for empanelment.

16. It is clear from the record that the Appellant was the only officer of 1981 batch who was considered for empanelment for promotion to the rank of Major General on 24.04.2015. The apprehension of the Appellant that he was compared with the merit of the earlier batch is unfounded.

17. Article 16 of the [Constitution of India](#) confers a right to be considered for promotion. There is no right for promotion, but the right that is conferred by Article 16 is to be considered for promotion fairly and in accordance with the extant rules or regulations governing promotions. Violation of rules/regulations or the policy governing promotions would entail in violation of Article 16 of the [Constitution of India](#). The contention of the Appellant that he deserved to be empanelled on the basis of the promotion policy needs to be considered. The quantification system for promotion was introduced to ensure objectivity and impartiality in the matter of promotions to higher ranks in the Army. It is clear from the policy that primacy is given to the CRs. Admittedly, the Appellant secured 89.667 marks in the first selection held in April, 2015 and 90.469 marks in the review selection held in September, 2015. He was the only eligible officer in the rank of Brigadier in Intelligence Corps belonging to the 1981 batch who was considered for empanelment to the rank of Major General. Responding to a query, Mr. Balasubramanian, learned Senior Counsel submitted that the Appellant was found not fit for promotion on a fair evaluation of his suitability and employability in rank of Major General. Though, only 5 marks have been earmarked for value judgment by the Selection Board, Mr. Balasubramanian submitted that there is nothing wrong in the decision of the Selection Board in not recommending the Appellant for empanelment to the rank of Major General after examining the complete reckonable profile of the officer. He justified the recommendation of the Selection Board by arguing that the Appellant was correctly refused empanelment on the ground that he lacked the requisite potential for promotion.

18. The earlier policy followed for promotion to higher ranks in the Army from 1987 was revised in the year 2008 to introduce a quantification system to be followed by the Selection Boards. The policy governing promotions to higher ranks in the Army was issued on 04.01.2011 in supersession of the earlier policy of the quantification system. Primacy is given to the CRs as is clearly mentioned in the policy. There is nothing mentioned in the policy that an officer can be ignored for empanelment only on the basis of the value judgment in spite of his securing high marks on the basis of the other criteria. We are unable to agree with Mr. R. Balasubramanian that the Selection Board can recommend non-empanelment of an officer on the basis of their value judgment without reference to the other marks that are allotted to him. If the submission of Mr. Balasubramanian is accepted, the reason for the change in the method of evaluation of officers by the Selection Board to a quantification model would be meaningless. In the instant case, the Appellant was the only eligible Brigadier of his batch for empanelment to the rank of Major General with a meritorious record of service. He could not have been deprived of his empanelment only on the basis of value judgment of the Selection Board.

19. Another submission of Mr. Balasubramanian is that the Selection Board consists of senior officers of the Army and deference has to be shown to the discretion exercised by them in the matter of promotion. We disagree. Lord Acton said: - "I cannot accept your canon that we are to judge Pope

and King unlike other men, with a favourable presumption that they did no wrong. If there is any presumption it is the other way against holders of power, increasing as the power increases^[1*].

[1* Letter to Mandell (later, Bishop) Creighton, April 5, 1887 Historical Essays and Studies, 1907.]

20. There is no presumption that a decision taken by persons occupying high posts is valid. All power vested in the authorities has to be discharged in accordance with the principles laid down by the Constitution and the other Statutes or Rules/Regulations governing the field. The judicial scrutiny of a decision does not depend on the rank or position held by the decision maker. The Court is concerned with the legality and validity of the decision and the rank of the decision maker does not make any difference.

21. Judgments of this Court have been cited to contend that officers in the Army are different from the civil servants. The submission made on behalf of the Respondent is that the law laid down in case of Government servants occupying civil posts cannot be applied to the Armed Forces personnel. We are not relying upon any judgment in favour of public servants in Government service for adjudicating the dispute in this case. The only point that is considered by us is regarding the non-empanelment of the Appellant being in accordance with the promotion policy of the Respondent. The non-empanelment of the Appellant for promotion as Major General is contrary to the promotion policy. He is entitled for reconsideration for empanelment by a Review Selection Board strictly in accordance with the promotion policy by keeping in mind the observations in this judgment. The Respondents are directed to complete this exercise within a period of six months from today.

22. For the aforementioned reasons, the judgment of the Tribunal is set aside and the Appeal is allowed.

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23. The Appellant was not empanelled for promotion to the rank of Major General in the year 2015, aggrieved by which he approached the Armed Forces Tribunal, Principal Bench, New Delhi. The Tribunal dismissed the Original Application filed by the Appellant. The facts of this Appeal are similar to the facts in Civil Appeal No.5751 of 2017. The Appellant was the only eligible Brigadier to be considered for promotion for empanelment for the post of Major General in the year 2015. In spite of his securing 87.973 marks out of a grand total of 100 marks, he was deprived of empanelment for promotion to the rank of Major General on the ground that he was not fit for promotion on the basis of value judgment of the Selection Board. This appeal is allowed in terms of the judgment in Civil Appeal No.5751 of 2017.