IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH AT NEW DELHI

O.A.No. 548 of 2010

Lt. Col. S.R. Desai .....Petitioner
Versus
Union of India & Ors. .....Respondents

For petitioner : Mrs. Tamali Wad, Advocate.
For respondents: Ms. Jyoti Singh, Advocate.

CORAM:

HON'BLE MR. JUSTICE A.K. MATHUR, CHAIRPERSON.
HON'BLE LT. GEN. M.L. NAIDU, MEMBER.

O R D E R
10.01.2011

1. The petitioner by this petition has prayed that the impugned order of 05.02.2010 be quashed in which the Central Government has rejected his statutory complaint qua seniority for Major and time scale Lieutenant Colonel. He also prayed that the records pertaining to the case of Colonel (then Major) Javed Iqbal be examined, and Para 82 (e) of the Defence Service Regulation 1962 be set aside and quash the MS Branch letter dated 04.08.2006.

2. The petitioner was commissioned in JAG Branch on 24.08.1991 as a Short Service Commissioned Officer, he was granted Permanent Regular Commission and his seniority was subsequently fixed as of 23.04.1992.

3. He was required to pass a promotion exam applicable to the JAG Officer within eleven years of reckonable commissioned service that is with effect from 23.04.1992 in order to become a Substantive Major.

4. On 16.12.1994 he was summoned for an interview for selection to an U.N. mission. He was eliminated during the selection processes. He was ill from 1998 to 2001 because of some

ailment. He was posted to Institute of Military Law Kamptee in April 2002. Thereafter he was selected for being posted to Botswana and he left for this assignment in October 2002.

5. AV Singh Committee Award was made effective by the government on 16.12.2004 which granted him the respite of having to pass the said promotion exam meant for JAG Officers before thirteen years of service without incurring any loss of seniority.

6. The officer was denied permission to come to India on duty in April 2003 in order to take the promotion exam in April 2003, which was his last mandatory chance to pass in order to protect his seniority along with his batch mates. He was given permission to come to India to take the promotion exam at his own expense which he could not afford to do so because of the financial liabilities that he had incurred in the process of settling down in Botswana.

7. Subsequently he returned to India in 2005 and appeared and cleared his promotion exam in April 2006. Consequently he was penalised by loss of seniority of two years, seven months and nineteen days and his revised seniority was thus fixed as from 11.12.1994.

8. The Learned Counsel of the petitioner argued that since the officer was abroad and not physically present in India when the exam was to be conducted in April 2003, he should be given a dispensation so that his seniority is protected. He has suffered financial loss by not becoming a Substantive Major/Lt. Col. till the date of passing the exam is acceptable to him. He quoted the case of Col. Javed Iqbal of JAG Branch who was under similar circumstances granted one year's waiver when he went for an U.N. assignment. Despite the fact that the officer was present in the country on 10.04.2000, the date on which the exam was to take place he had been asked to report to the Army Headquarters in Delhi. The officer chose to report to Delhi for preparation to go to U.N. mission instead of seeking permission to take the promotion exam at Kamptee. On

his return his one year's loss of seniority was condoned by the Ministry Of Defence consequent to his statutory complaint.

9. Learned Counsel, submitted that the petitioner was similarly situated, except that he was little different in the sense that he was physically away from India and there was no means by which he could have come back to take the exam. Therefore similar latitude should be given to the petitioner which was given to Col. Javed Iqbal as referred to above.

10. The Learned Counsel further argued that the MS Branch issued a letter on 04.08.2006. Para 4 of the letter reads as under:

"Officers will be eligible for grant of substantive rank of Lieutenant Colonel on qualifying promotion examination Part 'D'. Subject to this, seniority in service of officers will be protected until they complete 13 years reckonable commissioned service. Loss of seniority for non-qualification in promotion examination already awarded will continue to hold good. Qualification in Part 'D' examination will no longer be mandatory for grant of substantive rank of Major. Promotions accruing from para 2 above shall also be subject to the officers fulfilling other criteria to be notified immediately by the Army Headquarters through Army Orders."

11. Interpreting this provision the counsel argued that consequent to AV Singh Award and this policy letter of 04.08.2006 it is clear that the promotion exam needs to be passed by the petitioner within thirteen years of service. Any period taken by the petitioner over and above the thirteen years of reckonable service shall affect the seniority of the officer. In view of this he argued that instead of loss of seniority of two years, seven months and nineteen days the loss should only be reckonable from April 2005. Since the officer has appeared and passed the promotion exam in April 2006 consequently his seniority should suffer a loss of one year only.

12. The Learned Counsel of the respondents argued that there is no case to compare the case of Col. Javed Iqbal with that of the petitioner. Col. Javed Iqbal was on an U.N. assignment. Specific policy exists to protect the time spend by an officer on an U.N. mission which is normally for one year vis a vis an officer posted on a training assignment abroad which is for three years. The letter of 16.12.1994 deals with grant of additional chances to officers deployed in U.N. missions abroad. It clearly lays down the policy of granting a waiver. Besides, Col. Javed Iqbal was ordered by Army Headquarters to report to New Delhi on 10 April 2000 for pre-despatch formalities for the UN assignment the day on which he was scheduled to take the promotion exam in Kamptee. He could not have been at two places simultaneously, hence Col. Javed Iqbal chose to adhere to the later order and reported to Army headquarters accordingly. Hence there can be no comparison between the petitioner's case and that of Col. Javed Iqbal.

13. The Learned Counsel for the respondent also argued that while being detailed to go Botswana the officer had given a willingness certificate which stated that:-

"I will accept any adverse effect on my future career in terms of:-

(a) Not being Adequately Exercised.

(b) Non detailment on career course/subsequent courses.

(c) Await placement in present rank.

(d) Delay in subsequent promotion.

(e) Premature reversion.

(f) Non placement on Criteria/Command appointment."

14. The Petitioner was also eligible to come back on leave even though it was to be at his own expense in 2003 while he chose not to do so. He could have again come on leave and this time perhaps on government expense in order to take the exam in April 2004. The petitioner

again did not do so for reasons best known to him. The officer completed his tenure in October 2005, officer retuned to India in October 2005 and took the exam in April 2006. His seniority therefore has been calculated based on his passing the promotion exam in April 2006.

15. Referring to the MS Branch letter of 04.08.2006, the Learned Counsel for the respondent stated that Para 4 read carefully indicates that ***"loss of seniority for non qualification in promotion examinations already awarded will continue to hold good"*** he also pointed out the appendix to this letter which gives out an illustration to show that how the loss of seniority will be calculated. It transpires that the Petitioner had eleven years of reckonable service in April 2003. Since he did not pass the promotion exam in April 2003, his seniority was downgraded to the next batch. Since the Petitioner had not passed the examination till April 2006, he kept on losing his seniority in the rank of Substantive Major till such time the AV Singh Award was announced on 16.12.2004 and on December 2004 the officer had already lost two years of reckonable seniority thus putting him with the batch of August 1994. Since the petitioner did not pass the promotion exam till April 2006 he therefore lost one more year and thus loss of seniority for the officer was calculated to be two years, seven months and nineteen days.

16. Having heard both the counsels at length and examined the documents, we are of the opinion that the petitioner's case cannot be compared with that of Col. Javed Iqbal because Col. Javed Iqbal was on U.N. assignment for which provision of dispensation for one year exists as per policy. The petitioner was posted to Botswana on training assignment, for which terms and conditions are different to that of an U.N. assignment and no provision for dispensation exists.

17. We further opined that the officer's seniority had already suffered consequent to his not passing the promotion exam in April 2003. The AV Singh Award was announced only on 16.12.2004. It is clearly stipulated in the policy of August 2006 that cases in which loss of

seniority has already taken place before the issue of that letter of 6.08.2006, will not be reopened. Since this is a policy decision by the government in the process of the implementation of the AV Singh Award, we are not inclined to interfere in the matter the case is dismissed. No order as to costs.

A.K. MATHUR
(Chairperson)

M.L. NAIDU
(Member)

New Delhi
January 10, 2011.