

**IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH
NEW DELHI**

T.A NO. 405 OF 2010
(WRIT PETITION (CIVIL) NO. 6466 OF 2007)

MAJ. GEN. V.K JAIN, S/O LATE S.C JAIN,
R/O 22, PANDIT RAVI SHANKAR SHUKLA LANE
KASTURBA GANDHI MARG
NEW DELHI

THROUGH: MR. V.K GUPTA, SR. ADVOCATE WITH
MR. ANIL SRIVASTAVA, ADVOCATE

... APPELLANT

1. UNION OF INDIA THROUGH SECRETARY
MINISTRY OF DEFENCE, SOUTH BLOCK
NEW DELHI.
2. CHIEF OF ARMY STAFF
ARMY HEADQUARTERS,
SOUTH BLOCK, NEW DELHI
3. MILITARY SECRETARY TO CHIEF OF ARMY STAFF
ARMY HEADQUARTERS
SOUTH BLOCK, NEW DELHI.
4. LT. GEN. A.K LAMBA
DG MP & PS
A.G BRANCH, ARMY HEADQUARTERS
SOUTH BLOCK, NEW DELHI.

THROUGH: MS. JYOTI SINGH, ADVOCATE

... RESPONDENTS

CORAM

HON'BLE MR. JUSTICE S.S KULSHRESTA, MEMBER

HON'BLE LT. GEN. S.S DHILLON, MEMBER

JUDGMENT

23.07.2010

1. Maj. Gen. V.K Jain filed W.P (C) No. 6466 of 2007 before the Delhi High Court for directing respondents 1 to 3 to promote him to the rank of Lieutenant General on the basis of the approved empanelment by the Appointment Committee of Cabinet (ACC) and to restore his inter se seniority over Lt. Gen. A.K Lamba (Respondent No.4), who was junior to him in the batch of 1969. The writ petition was received on transfer from Delhi High Court, in view of the provisions contained in Section 34 of the Armed Forces Tribunal Act 2007.

2. According to the petitioner, he was commissioned in Indian Army on 21.12.1969 and because of his excellent service records, he was granted substantive rank of Major General on 2.2.2004 while Respondent No.4 got his substantive rank on 3.2.2004. On 25.7.2006, the Promotion

Board for 1969 was held, in which three officers, viz. Maj. Gen. Gautam Dutt, Maj. Gen. Harjot Sehgal and Maj. Gen. A.K Lamba were empanelled vide notification dated 28.12.2006. The petitioner was not empanelled and made a non-statutory complaint against his non-empanelment for promotion to the rank of Lieutenant General on 10.1.2007. There were certain minor inconsistencies/aberrations/subjective assessments in one of the confidential reports, which were removed on 17.4.2007 and the petitioner was considered for promotion by the Special Selection Board on 18.4.2007. The petitioner's case was recommended for promotion to the rank of Lieutenant General maintaining his original seniority. Knowing well that the petitioner was to retire on 31.8.2007, Respondent Nos.1 to 3 deliberately delayed the promotion process with mala fide intention to deny him promotion. On 14.8.2007, despite the recommendation by the Board to promote the petitioner, Respondent No.4 was given promotion, nearly four months after the recommendation only to defeat the claim of the petitioner. If there was no delay in the processing of his promotion, the petitioner would have got two more years service in the rank of Lieutenant General. There were instances of creating additional vacancies and/or giving extension to the officers to ensure their promotion before

retirement. But, in the case of the petitioner, no such action was taken. To the contrary, Respondent No.4 was promoted ignoring the seniority of the petitioner.

3. Respondents 1 to 3 contended, inter alia, that the petitioner was not empanelled on 25.7.2006 along with his 1969 batchmates. But, in that list, Respondent No.4's name figured as one of the empanelled officers. The non-statutory complaint of the petitioner was favourably considered by the COAS and his case was recommended to be considered afresh by the Special Review Board. The seniority of the empanelled officers after reconsideration by the Special Review Board is as under:

Special Review Fresh Cases – 1969 Batch

1. IC 23375 Maj. Gen. KPD Samanta, Arty
2. IC 23799 Maj. Gen. VK Jain, Arty
3. IC 24219 Maj. Gen. AKS Chandele, EME
4. IC 24706 Maj. Gen. KR Rao, Arty
5. IC 24718 Maj. Gen. PK Goel, Arty.

The first two names were inserted on the basis of the special review. As per the existing policy, the officers approved in “Staff Only Stream” can hold upto six appointments to the rank of Lieutenant General. As on 31.8.2007, all six posts were filled up and occupied by the following officers:

Sl. No.	IC No. Rank & Name	Appointment	DOR
(i)	IC 24465 Lt Gen AK Saini	DGRR	31.08.07
(ii)	IC 19886 Lt Gen YK Jain	DG MAP	29.02.08
(iii)	IC 23011 Lt Gen IJ Koshy	DG DC & W	31.05.09
(iv)	IC 23266 Lt Gen Gautam Dutt	COS Cntl. Command	30.09.09
(v)	IC 23486 Lt Gen HS Sehgal	COS ARTRAC	30.04.09
(vi)	IC 23801 Lt Gen AK Lamba	DG MP&PS	31.08.09

At that time, no vacancy was available to accommodate the petitioner. The first vacancy fell on 1.9.2007 after the retirement of Lt. Gen. A.K Saini, which was to go to Maj. Gen. KPD Samanta, who was admittedly senior to the petitioner in the approved list. Mere approval of the name for promotion would not confer any indefeasible right to the petitioner to get

promotion. Even Respondent No.4 Lt. Gen. Lamba was promoted much prior to the approval of the Promotion Board results and so the petitioner cannot say that the said vacancy ought to have been given to him. Further, empanelment of the petitioner in the month of April 2007 was subject to the approval of the ACC, in view of Para 108 of the Regulations of Army. The empanelment of the petitioner in the month of April 2007 would not give any right to him for the post of Lieutenant General until the results got the approval of ACC.

4. It is an undisputed fact that there was one vacancy in the rank of Lieutenant General as on 18.4.2007 at the time of empanelment of the petitioner. But the empanelment by the Selection Board is only subject to approval by ACC. Para 108 of the Regulations of Army provides that the competent authority can accept, modify, alter and repeal recommendation of the Selection Board. Para 108, relevant to the extent, is extracted below:

“(d) The assessment of the Selection Board shall be recommended in nature and not binding until approved by

the competent authority viz. the COAS or the Central Government as the case may be.

(e) The Central Government or COAS have the inherent power to modify, review, approve with variation or repeal recommendations of the Selection Boards.”

It is thus clear that the recommendation made by the Selection Board is not binding unless it is approved by the competent authority viz. the COAS or the Central Government, as the case may be. That apart, the Central Government or the COAS has powers to modify, review, approve with variation or repeal the recommendations of the Selection Board. It is true that there was a delay of about four months in the promotion process. But it was with mala fide intention is a matter to be established by the petitioner, which has not been done in this case. One who alleges mala fides has to prove it and it is difficult to draw dubious inference from such allegations to say that the mala fide has been established. While dealing with the question of mala fides, the apex Court in **E.P Royappa v. State of Tamil Nadu** (1974(4) SCC 3) observed:

“91. Now, when we examine this contention we must bear in mind two important considerations. In the first place,

we must make it clear, despite a very strenuous argument to the contrary, that we are not called upon to investigate into acts of maladministration by the political Government headed by the second respondent. It is not within our province to embark on a far-flung inquiry into acts of commission and omission charged against the second respondent in the administration of the affairs of Tamil Nadu. That is not the scope of the inquiry before us and we must decline to enter upon any such inquiry. It is one thing to say that the second respondent was guilty of misrule and another to say that he had malus animus against the petitioner which was the operative cause of the displacement of the petitioner from the post of Chief Secretary. We are concerned only with the latter limited issue, not with the former popular issue. We cannot permit the petitioner to sidetrack the issue and escape the burden of establishing hostility and malus animus on the part of the second respondent by diverting our attention to incidents of suspicious exercise of executive power. That would be nothing short of drawing a red herring across the trail. The only question before us is whether the action taken by the respondents includes any component of mala fides; whether hostility and malus animus against the petitioner were the operational cause of the transfer of the petitioner from the post of Chief Secretary.

92. Secondly, we must not also overlook that the burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility. Here the petitioner, who was himself once the Chief Secretary, has flung a series of charges of oblique conduct against the Chief Minister. That is in itself a rather extraordinary and unusual

occurrence and if these charges are true, they are bound to shake the confidence of the people in the political custodians of power in the State, and therefore, the anxiety of the Court should be all the greater to insist on a high degree of proof. In this context it may be noted that top administrators are often required to do acts which affect others adversely but which are necessary in the execution of their duties. These acts may lend themselves to misconstruction and suspicion as to the bona fides of their author when the full facts and surrounding circumstances are not known. The Court would, therefore, be slow to draw dubious inferences from incomplete facts placed before it by a party, particularly when the imputations are grave and they are made against the holder of an office which has a high responsibility in the administration. Such is the judicial perspective in evaluating charge of unworthy conduct against Ministers and other high authorities, not because of any special status which they are supposed to enjoy, nor because they are highly placed in social life or administrative set up—these considerations are wholly irrelevant in judicial approach—but because otherwise, functioning effectively would become difficult in a democracy.”

5. Further, the delay of about four months in processing the matter cannot be said to be inordinate, in view of the scrutiny at different levels. In the case of Respondent No.4, though he was empanelled on 28.12.2006, he was promoted only on 14.8.2007, after about eight months.

6. It has next been contended that when the respondents knew that the name of the petitioner was recommended on 18.4.2007, they ought not to have proceeded to promote Respondent No.4, because in the event of approval of the petitioner's name by the ACC, his seniority would be restored. In other words, it is contended that the respondents ought to have waited for the clearance of the ACC when the name of the petitioner was recommended by the Selection Board. Whatever be the position, it would not confer any right on the petitioner.

7. The petitioner was approved for promotion to the rank of Lieutenant General on 31.8.2007, on which date no vacancy was available and if there was vacancy prior to that date and Respondent No.4 was given promotion, it shall not be construed to be an appointment made arbitrarily. However, it is true that the petitioner was approved for appointment to the rank of Lieutenant General on 31.8.2007. Merely because his name is included in the select list, he does not acquire any legal right to be appointed (see **Pitta Naveen Kumar and others v. Raja**

Narasaiah Zangiti and others - 2006(10) SCC 261 and **Batiarani Gramiya Bank v. Pallab Kumar and others** - 2004(9) SCC 100). In **Pitta Naveen Kumar's case** (supra), the apex Court observed:

“41. In *Shankarsan Dash* (1991(3) SCC 47) this Court stated the law in the following terms:

‘7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court and we do not find any discordant note in the decisions in *State of Haryana v. Subash Chander Marwaha* (1974(3) SCC 220), *Neelima Shangla v. State of Haryana* (1986(4) SCC 268), or *Jatinder Kumar v. State of Punjab* (1985(1) SCC 122).’

(See also *Food Corporation of India v. Bhanu Lodh* (2005(3) SCC 618) and *Punjab SEB v. Malkiat Singh* (2005(9) SCC 22).”

In **S.S Balu and another v. State of Kerala and others** (2009(2) SCC 479), it was held that merely on the basis of the inclusion of the name in the select list, the candidate does not get the indefeasible right to appointment. However, as has already been pointed out by counsel for respondents 1 to 3, the first vacancy, which was available on account of the retirement of Lt. Gen. AK Sahni, was given to Maj. Gen. KPD Samanta, who was senior to the petitioner. Even the vacancy, to which Lt. Gen. Lamba was promoted, could not in any way be kept reserved for the petitioner and legitimately had to be given to the seniormost Major General approved by the ACC for the rank of Lieutenant General on the date of the vacancy, who was Respondent No. 4.

8. Lastly, it is said that the petitioner, who was put through the Selection Board in April 2007, which was subsequently approved by the ACC and necessary communication made to Army HQ on 31.8.2007, had legitimate expectation to be promoted even by rotating the postings and/or by creating additional post for the purpose. As has been noticed

above, there is no unreasonable action on the part of the Central Government in making the processing of the case of the petitioner even if no vacancy is available. Such a situation is not uncommon in the Army. There had been occasions where officers had to retire from service in spite of their empanelment for promotion because of non-availability of vacancy. A few examples of such cases are:

Staff Stream Non General Cadre

Year

Maj Gen VB Batra, Arty	Nov 2000
Maj gen Manmohan Singh, Sigs	Sep 2003

General Cadre

Maj Gen KC Vig, Arty (GC)	Dec 2003
Maj gen Dalvir Singh, Inf	Apr 2004
Maj Gen RK Singh, Inf	Jun 2005
Maj Gen TK Kaul, Inf	Sep 2005
Maj Gen A Parmar, Inf	Sep 2005

Brigs

Brig Kanwar Lal, AAD	Mar 2003
Brig DS Virk, Sigs	Jun 2006
Brig RS Brar, Mech Inf	Nov 2005
Brig SK Sud, AAD	Aug 2007

9. In view of the above, we do not find any merit in the petition.

In the result, the petition is dismissed.

(S.S DHILLON)
MEMBER

(S.S KULSHRESTHA)
MEMBER