

**COURT NO. 1
ARMED FORCES TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

90.

OA 538/2018

Maj Vishal

... Applicant

Versus

Union of India & Ors.

... Respondents

For Applicant

: Ms. Garima Sachdeva, Advocate

For Respondents

: Mr. Harish V Shankar, Advocate

CORAM :

HON'BLE MR. JUSTICE RAJENDRA MENON, CHAIRPERSON

HON'BLE LT GEN P.M. HARIZ, MEMBER (A)

**ORDER
14.09.2023**

Invoking the jurisdiction of this Tribunal under Section 14, petitioner seeks his appointment as a Permanent Commission Officer based on the departmental promotion commission recommendation made in the Board that met in June 2012. Applicant is a Short Service Commission (SSC) Medical Officer, who joined the Armed Medical Corps (AMC) on 14th February, 2010 and when he invoked the jurisdiction of this Court in the year 2018, he was in the 8th year of service as a Short Service Commissioned AMC officer. The procedure for considering the SSC as per selection board or DPC for grant of Permanent Commission is laid down in various SOPs issued from time to time. It is the case of the applicant that since last few years, the number of vacancies granted for Permanent Commissioned medical officers to be filled up from serving SSC officers are laid down in Para 2 of the letter issued by the Ministry of Defence- Respondent No.-1 on 3rd September, 1998 and according to this

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letter 115 vacancies were to be filled up in the category of Permanent Commission from SSC officers from the AFMC as well as from the open market through the Directorate General Armed Forces Medical Services. However, this was reduced to 100 vacancies for the year 2012 and further to 50 vacancies in each of the selection boards to be held in June and December 2012.

2. After the applicant had joined the service, the SOP dated 30th November, 2009 was issued to lay down the guidelines and procedure for grant of Permanent Commission to AMC officers. According to this SOP, out of 180 Permanent Commission vacancies available maximum 65 were to be filled up by AFMC officers and the remaining were to be filled up by officers from other branches.

3. On 14th February, 2012, the applicant was eligible to be considered for grant of Permanent Commission as he was within the age limit and the service bracket as required for grant of permanent commission. Respondents invited applications for serving SSC Medical Officers from the Army, Navy and Air Force and the applicant being eligible applied for being considered in the Board (DPC) to be held in the month of June 2012 and the applicant was directed to report to the office of DGAFMS, New Delhi for interview. The applicant participated in the process and the results were declared in November 2012 but only 15 candidates of the DPC held in June 2012 were found eligible for appointment, the applicant kept waiting for the result of this consideration but did not receive any intimation. In March 2014,

similarly placed SSC officers who were also aggrieved by the actions of the respondents in filling up only 15 posts instead of 50 vacancies that were available in the Departmental Permanent Commission approached this Hon'ble Tribunal in OA 262/2014 and challenged the arbitrary reduction of number of vacancies from the number 50 to 15 in the Board conducted in June 2012. Applicant relying on this judgment available on record in the case of Major Mallikarjun S Biradar Vs. Union of India (OA 262/2014) Annexure A-3 decided on 15th October, 2015, to say that reduction of vacancies from 50 to 15 in the Board held in June 2012 was directed to be illegal and 50 vacancies sanctioned for the Board to be held in June 2012 were directed to be filled up by the candidates who appeared in the Board held in June 2012.

4. It is the case of the applicant that in the order passed by this Tribunal on 15th October, 2015, the act of the respondents in reducing the vacancies from 50 as notified earlier to 15 was held to be illegal and after judgment was rendered to fill up 50 sanctioned vacancies, only 33 vacancies were filled up and still 17 vacancies were available. It is the case of the applicant that in the Selection Board conducted in the June 2012, applicant's name appeared at Serial No. 53 and as only 33 vacancies were filled, the applicant who is at waitlist should be granted appointment and accordingly, the prayer in the application is made as under.

“(a) Grant Departmental Promotion Commission to the applicant who can be considered in the Board of June 2012;”

5. Placing reliance on the law laid down by the Coordinate Bench of the Tribunal in the case of Major Mallikarjun S Biradar Vs. Union of India. Learned counsel invited our attention to the facts stated in the order passed by this Tribunal on 15th October, 2015 vide Para 1, the case of the applicant before the Tribunal as indicated in Para 3, arguments advanced as indicated in Para 4 (D), Para 7,8, and 9, the observations made in Para 11 took us through the discussions and various aspect of the judgment, the principles of legitimate expectations carved out from Para 14 onwards and relied upon the finding recorded in Para 16 and 17 which reads as under:-

“16. Hon’ble Apex Court in the case of *Suseela Vs. UGC (2015, 8 SCC 129, Para 21)* have stated, “A legitimate expectation must always yield to larger public interest.” In the present case, we do not find any reason to infer that giving PC to 50 most meritorious doctors selected by a Promotion Board who have already served the army with distinction and proved themselves by their performance can be considered as a decision against larger public interest.

17. In view of the above, we allow the petition. The applicants who qualify on the basis of comparative merit may be considered for Permanent Commission based on the sanctioned number of 50 PC posts as approved by the DGAFMS on 21.06.2012 based on which the Selection Board was held in respect of the applicants.”

to argue that in the said Board which met in June 2012, the sanctioned number of post being 50 and as the respondents are duty bound to fill up the 50 posts based on the legitimate expectation available, the applicant is also entitled to the same benefit.

6. Respondents have refuted the aforesaid contentions. The facts are not in dispute, however, it is the case of the respondents, as a matter of

arguments, even if, it is accepted that by virtue of the order passed by this Tribunal on 15th October, 2015 in the case of Maj Mallikarjun S Biradar (supra), legitimate expectations were available, the same is only for the first 50 selected candidates as per merit. It is the contention of the learned counsel for the respondents, Mr. Harish V. Shankar, Advocate that the legitimate expectation can be available only to the 50 candidates as per merit list and not to any other person. The applicant was admittedly beyond the list of 50 persons, his name appears at 53rd serial number, he being low in the merit could not be selected in the DPC and as a waitlisted person does not have the right to be selected no grievance can be made by the applicant. Learned counsel for the respondents argued that merely by inclusion in the panel, it does not give any right to a selected candidate to seek appointment. It is well within the discretion of the employer to fill up the number of vacancies and even if vacancies are available, the employer, on administrative consideration and various other considerations on the basis of exigencies of service requirement can refuse to appoint the selected candidate. Further, learned counsel argues that if the judgment of this Tribunal in the case of Maj Mallikarjun(supra) issued on 15th October, 2015 has taken note of it, based on the principles of legitimate expectation gives a right only to the 50 candidates who were within merit and not to anybody else.

7. We have heard learned counsel for the parties and we find that as far as the facts are concerned, they are not disputed, it is the fact that in the Promotion Board which was held in June 2012, SOP

dated 30th November, 2009 was in force which clearly prescribed that 115 vacancies for Permanent Commission will be filled up from serving SSC officers. It is also admitted position that on 17th June, 2008, the Ministry of Defence has sanctioned change of ratio between PC and SSC officers of the AFMC to 60:40 without any increase in existing cadre strength. In view of this policy, the Directorate General Armed Forces Medical Service in June 2012 had approved reduction of 15 DPC vacancies resulting in the Permanent Commission vacancies being reduced from 115 to 100. 50 Vacancies to be filled up from serving SSC officers on the basis of Board to be held in June 2012 and 50 to be filled up in the Board to be held in December 2012.

8. Accordingly, when the Board met in June 2012, the Board considered the vacancies over on 50 and recommended 50 persons as per the merit list for appointment. However, after the DPC was held, the respondents have reduced the vacancies from 50 to 15 and in the case of Maj Mallikarjun (Supra), the only controversy which was there before this Tribunal was reduction of vacancies for Permanent Commission to SSC officers from 50 to 15 after the Board was conducted in June 2012 was appropriate or whether it was illegal arbitrary and against the legitimate expectations available to the applicant who were before the Tribunal. After evaluating various aspects of the matter, the only question pressed has been answered by the Tribunal by holding that reduction of vacancies from 50 to 15 after selection process was completed, was not proper. The applicant who had aggrieved on the basis of the comparative

merit had a legitimate expectation and this has to be fulfilled by the Departmental Authorities and therefore it was directed that based on the comparative merit, the 50 posts should be filled up from the 50 candidates available.

9. The respondents while implementing the judgment appointed only 33 persons against the 50 vacancies available as per merit and now the question before is as to whether the applicant, whose name appeared beyond the list of 50 at serial No. 53, is entitled to the relief claimed.

10. It is a well known settled principle of law that merely because the candidate is available in the panel, no right accrues to the candidate merely on the basis of inclusion in the panel to seek appointment. The government may fill the vacancy and it is not mandatory to fill up all the vacancies available. The principles laid down by the Hon'ble Supreme Court in the case of Punjab Electricity Board Vs. Malkit Singh (2004) AIR SCWS 708 and All India SC and ST Employees' Association and Another Vs. A. Arthur Jeen and Others (2001) 6 SCC 380 may be taken note of which reads as under:-

"10. Merely because the names of the candidates were included in the panel indicating their provisional selection, they did not acquire any indefeasible right for appointment even against the existing vacancies and the State is under no legal duty to fill up all or any of the vacancies as laid down by the Constitution Bench of this Court, after referring to earlier cases in *Shankarsan Dash v. Union of India*. Para 7 of the said judgment reads thus:

“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 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. Subhash Chander Marwaha*, *Neelima Shangla vs. State of Haryana* or *Jatinder Kumar v. State of Punjab*.”

11. Hon’ble Supreme Court in the case of *Raj Rishi Mehra v. State of Punjab* (2013) 12 SCC 243 has held as under

“15. The question whether the candidates whose names are included in the waiting list are entitled to be appointed against the unfilled posts as of right is no longer res integra and must be answered in negative in view of the judgments of this Court in *Union of India v. Ishwar Singh Khatri*, *Gujarat State Dy. Executive Engineers’ Assn. v. State of Gujarat*.....*Ram Avtar Patwari v. State of Haryana* and *Rakhi Ray v. High Court of Delhi*.”

12. Similarly, with regard to the right of waitlisted candidate, it has been held by the Hon'ble Supreme Court that a waitlisted candidate does not have any legal enforceable right. A candidate whose name appears on the waitlist or reserve list cannot seek appointment as a matter of right.

13. Analyzing the facts and circumstances of the case in the backdrop of the aforesaid legal principle, we find that in this case the applicant claims, right based on the judgment rendered by this Tribunal on 15th October, 2015 in the case of Maj Mallikarjun (supra). As indicated in the preceding paragraph, the Board that was held in June 2012 considered all the candidates who had appeared before the Selection Board and based on the merit, approved 50 candidates as per merit for appointment or grant of Permanent Commission. This Tribunal in the aforesaid judgment in Para 14 has held that the applicant who appeared before the Selection Board had a legitimate expectation of being selected if they on the basis of their merit occupied a position in the top 50 in the DPC held in June 2012. It was found by this Tribunal that in the merit list of the 50 candidates prepared the applicant in the case of Maj Mallikarjun (supra) were at serial number 34, 32, 39 and 22 respectively that fell within the vacancy notified, i.e. 50. It was because of this reason that the Tribunal in Para 16 held that a legitimate expectation was available to the 50 candidates and the Tribunal did not find any reason for not granting Permanent Commission to the 50 most meritorious persons selected by the Promotion Board. It is, therefore, clear from a combined reading of the judgment and Para 16 and 17 as reproduced

hereinabove that it was only with regard to 50 candidates that the legitimate expectations theory and principle was applied and they were granted the benefit of appointment based on the selection held in June 2012. The applicant cannot claim the benefit of legitimate expectation as this Tribunal with regard to the same selection has clearly held that it is only the 50 most meritorious candidates who had the legitimate expectations that being so the applicant who was not within the 50 meritorious candidate instead was on Serial no. 53 cannot have the legitimate expectation and, therefore, the judgment in the case of Mallikarjun (supra) does not help the applicant and based on that judgment, applicant cannot claim appointment based on the contention that he is at serial no. 53 of the waitlist and only 33 appointments were made.

14. Accordingly, we are of the considered view that the contention of the applicant that he is entitled to be granted appointment based on the principles laid down in the case of Maj Mallikarjun (supra) is wholly misconceived and cannot be accepted even otherwise, if the general principles for seeking appointment as detailed by us hereinabove is applied. The respondents can fairly refuse to appoint a candidate who may be in the panel or in the waitlist even if vacancies exist, the law does not mandate the respondents department to fill up all the vacancies. Filling up a vacancy being discretion of the respondent no such directions can be issued. That apart as already held, the applicant being the 53rd candidate cannot claim appointment in the facts and circumstances as

detailed hereinabove, accordingly, we find no reason to grant any indulgence into the matter.

15. Application is therefore stands dismissed.

[RAJENDRA MENON]
CHAIRPERSON

[P.M. HARIZ]
MEMBER (A)

Priya