

IN THE GAUHATI HIGH COURT
(The High Court of Assam, Nagaland, Meghalaya, Manipur, Tripura,
Mizoram and Arunchal Pradesh)
SHILLONG BENCH

W.P.(C) No. (SH) 13 of 2010.

No. JC 93816N, Subedar/GD
Shri Chatur Singh Thapa
Son of Late DS Thapa
Resident of HQ 9th Assam Rifles
C/o 99 APO
Presently residing at Assam Rifles
Bazar, Happy Valley, Shillong
East Khasi Hills District
Meghalaya. : Petitioner

-Vs-

1. The Union of India represented
by the Secretary, Ministry of Home
Affairs, Govt. of India,
New Delhi.

2. The Directorate General of
Assam Rifles, Laitkor,
Shillong, Meghalaya-793010

3. The Brigadier (Pers)
HQ : Directorate General
Assam Rifles, Laitkor,
Shillong, Meghalaya

4. The Section Officer (Adm &
Docu) Record Branch,
HQ : Directorate General Assam
Rifles, Laitkor,
Shillong, Meghalaya-10

5. No. 93996 Sub/GD
Mohan Singh Pharswan
HQ: 9th Assam Rifles
C/o 99 APO : Respondents

BEFORE
THE HON'BLE MR JUSTICE T VAIPHEI

For the Petitioner	:Mr R Jha, Mr K Kharmawphlang Mr G Marak, Ms P Dhar, Advocates
For the Respondents	:Mr SC Shyam, CGC
Date of hearing	: 14.12.2010
Date of Judgment	: 4.2.2011

JUDGMENT AND ORDER

In this writ petition, the petitioner is aggrieved by his non-promotion to the rank of Subedar Major/GD in Assam Rifles and of his supersession by the respondent No. 5, who is junior to him. The factual matrix is not really in dispute. He was initially enrolled as a recruit in the Assam Rifles on 7-2-1973, was promoted to the rank of Lance Naik (GD) on 24-2-1979 and was further promoted to the rank of Naik/GD on 1-12-1980. He was again promoted to the rank of Havildar/GD on 21-10-1983, was then promoted to Naib Subedar (GD) on 1-11-1989 and was further promoted to the rank of Subedar (GD) on 1-10-1996. On 31-10-2009, the vacancy for the post of Subedar Major arose following the retirement on superannuation of Subedar Major, Shri K.M. Gurung. As a senior-most Subedar, he was allowed to officiate in the post of Subedar Major with effect from 1-11-2009. In the meantime, the process for promoting him to the post of Subedar Major got started: he was strongly recommended by his Commandant by forwarding his case along with the relevant documents to the Directorate-General of Assam Rifles (respondent 2). He was also strongly recommended by all formation Headquarters i.e. Commander Headquarters, 7th Sector, Assam Rifles, Inspector General of Headquarters and Inspector General of Assam Rifles. However, much to his consternation, the respondent No. 5, who is junior to him, was promoted to the post of Subedar Major with effect from 1-11-2009 vide the impugned order. On coming to know of this development on 5-2-2009, he promptly on 8-2-2010 submitted his representation to the respondent No. 2 through proper channel. He is admittedly not only the senior-most in his battalion but

also in the entire Assam Rifles. This is how this writ petition came to be filed by him.

2. As the petitioner has been admittedly superseded his junior, it is necessary to find out the justification of the respondent authorities by referring to the affidavit-in-opposition filed by them, who have contested the writ petition. At the outset, they point out that a candidate for promotion to the rank of Subedar Major (General Duty) is required to meet the eligibility criteria laid down in Appendix 'B' to the Assam Rifles Record Officer Instructions No. 4/2002 issued by the Directorate General of Assam Rifles. According to them, though the petitioner meets most of the criteria laid down therein, he did not fulfill criteria © of Clause 4, which stipulates that out of the last five Annual Confidential Reports, the two reports must be from Bn/ARTC&S/NSG. It is also the case of the answering respondents that one of the essential qualifications for promotion to the rank of Subedar Major is passing Army Certificate of Education-One or matriculation examination from a recognized Board of School Education. According to the answering respondents, in the year 1989, the petitioner produced a Certificate of High School Leaving Certificate Examination along with the mark sheet from the Central Board of Higher Education, Uttam Nagar, New Delhi-110059, which, on verification from the Central Board of Secondary Education vide their letter dated 10-2-2006, was found to be issued by a fake Board. The petitioner was obviously procuring a fake matriculation certificate to secure promotion, for which a case of forgery initiated against him is pending and being finalized soon. The petitioner again produced another matriculation certificate from National Institute of Open Schooling issued in the year 1989, which is yet to be verified. It

is contended by the answering respondents that the recommendation of the Departmental Promotion Committee are merely advisory in nature and not binding upon the appointing authority: the Director General of Assam Rifles, who is the appointing authority, is not the rubber stamp of the Departmental Promotion Committee. The appointing authority, after due scrutiny of the DPC proceedings with reference to the educational qualifications, ACRs criteria, medical and discipline criteria in accordance with the standing instructions at Annexure-R/1, found the petitioner unfit for promotion to the rank of Subedar Major (General Duty). On the contrary, the respondent No. 5 fulfilled all the criteria and was accordingly promoted to that post from the date of vacancy i.e. on 1-11-2009. Thus, no interference is called for in the impugned promotion order, which is in order and does not suffer from the vice of illegality, procedural impropriety or irrationality.

3. On reading the pleadings of the parties and after hearing Mr. R. Jha, the learned counsel for the petitioner, and Mr. S.C. Shyam, the learned CGC appearing for the respondent authorities, it becomes apparent that the principal question for determination in this writ petition is whether the petitioner is eligible for promotion to the rank of Subedar Major. It is the contention of the learned counsel for the petitioner that the denial of promotion to the petitioner, who is undoubtedly the senior most Subedar not only in the battalion but also in the seniority list of all Subedars in the Assam Rifles itself, is arbitrary and illegal. He also submits that the petitioner is an employee of Central Para-Military Force under the Ministry of Home Affairs, and is accordingly governed by the Central Civil Service Rules read with Instructions for Compilation of Confidential Reports-JCOs in so far as

conditions of service is concerned and is not in any way regulated by the Army or Defense Regulations and cannot, therefore, be denied the promotion by importing the service jurisprudence of military service. According to the learned counsel, as the petitioner was found by a regularly constituted DPC to be fit for promotion to the rank of Subedar Major, the appointing authority, in the absence of any infirmity in the proceedings of the DPC, was duty bound to promote him: no material infirmity could be pointed out by the respondent No. 2 to ignore the recommendation of the DPC and appoint the respondent No. 5, who is admittedly junior to the petitioner. He, therefore, contends that the impugned promotion of respondent 5 be quashed and the petitioner be promoted in his place with effect from the date the respondent No. 5 was promoted with all consequential benefits. On the other hand, Mrs. S.C. Shyam, the learned CGC, supports the impugned order of promotion and contends that the petitioner was rightly denied the promotion as he did not fulfill the criteria for promotion, namely, he, not being GD personnel forming part of any AR team of any discipline attached to AR/Army formation, did not have two of his five ACRs from Bn/ARTC & S/NSG nor did he pass matriculation examination or obtain Certificate of Army Education. In any case, according to the learned CGC, the defense services have their own peculiarities and special requirements, and the considerations which apply to other government servants in the matter of promotion cannot as a matter of course be applied to para-military personnel of the petitioner's category and rank. He strongly relies on the decision of the apex court in *Dev Dutt v. Union of India*, (2008) 8 SCC 725 to buttress his contention. Contending that the writ petition is bereft of merits, he vehemently urges this Court to dismiss the writ petition with costs.

4. As observed by the Apex Court in *Tata Cellular v. Union of India*, (1994) 6 SCC 651, the power of judicial review is exercised to rein in any unbridled executive functioning. The restraint has two contemporary manifestations. One is the ambit of judicial intervention; the other covers the scope of the court's ability to quash an administrative decision on merits. These restraints bear the hallmarks of judicial control over administrative action. Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself. It is thus different from an appeal. When hearing an appeal, the Court is concerned with the merits of the decision under appeal. Since the power of judicial review is not an appeal from the decision, the Court cannot substitute its own decision. Apart from the fact that the court is hardly equipped to do so, it would not be desirable either. Where the selection or rejection is arbitrary, certainly the Court would interfere. It is not the function of a Judge to act as a superboard, or with the zeal of a pedantic schoolmaster substituting its judgment for that of the administrator. The duty of the court is thus confine itself to the question of legality. Its concern should be:

- a) Whether a decision-making authority exceeded its powers?
- b) committed an error of law,
- c) committed a breach of the rules of natural justice,
- d) reached a decision which no reasonable tribunal would have reached or,
- e) abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in fulfillment of that policy is fair. It is only concern with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to

case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

- (i) Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.
- (ii) Irrationality, namely, Wednesbury unreasonableness. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at. The decision is such that no authority properly directing itself on the relevant law and acting reasonably could have reached it.
- (iii) Procedural impropriety.

The above are the only grounds but it does not rule out addition of further grounds in course of time. Another development is that referred to by Lord Diplock in *R. V. Secretary of State for Home Deptt., ex Brind*, viz. the possible recognition of the principle of proportionality. Two other facets of irrationality may be mentioned: (1) It is open to the court to review the decision-maker's evaluation of facts. The court will intervene where the facts taken as a whole could not logically warrant the conclusion of the decision-maker. If the weight of facts pointing to one course of action is overwhelming, then the decision the other way, cannot be upheld. (2) A decision would be regarded as unreasonable if it is impartial and equal in operation as between different classes. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention". I have to extensively quote the Apex Court to guard against exceeding my jurisdiction under Article 226 of the Constitution. Those are the general principles available at the hands of a writ court to adjudge the validity of normal administrative action. But another dimension is added when the impugned decision is one

taken by military and para-military authorities. The reason is not far to seek. Para-military forces like defense forces have their own peculiarities and special requirements: maintenance of discipline is of paramount consideration. The considerations which apply to other government servants in the matter of promotion cannot as a matter of course be applied to para-military force personnel.”

5. It is against the aforesaid legal principles that I propose to examine the legality of the denial of promotion to the petitioner. As per Appendix 'B' to ROI 04/2002, three out of the last five ACRs should be "Above Average" or above, while the remaining two ACRs should not be below 'High Average'. Then again, out of the last five ACRs, two must be from Bn/ARTC & S/NSG (Not applicable to GD personnel forming part of any AR team of any discipline attached to AR/Army formation]. Furthermore, he should be recommended for promotion in his last three ACRs. It is the pleaded case of the petitioner that he fulfilled all the above criteria, and the denial of promotion to him is consequently contrary to law. On perusing the service record of the petitioner, it is quite clear that his services as Subedar were mostly utilized at No. 1, Construction Company at Assam Rifles, Laitkor from 1-4-2004 to 4-11-2007, which resulted in a shortfall of one CR for the year 2007 for the purpose of promotion vide the statement of the case prepared by the Commandant dated 27-10-2009. Interestingly, this is the official who recommended the promotion of the petitioner. But this official also, while strongly recommending the promotion of the petitioner, has also remarked that the vacancy caused by the retirement of the incumbent on 1-11-2009 be kept pending for the duration of two months i.e. from 1-11-2009 to 1-1-2010 so as to enable him to become eligible for the promotion on 1-1-2010 by earning one requisite CR from the unit. This

clearly shows that when the vacancy occurred, he was not yet fit for promotion. In this connection, I have also perused the notings of the respondent authorities produced by the learned CGC. The noting dated 30-12-2009 prepared by the Lieutenant Colonel, OIC (Legal Cell) indicated that as per the promotion policy, a vacancy in the higher rank could not be kept vacant for the reason stated by the unit. The reason is found at para 7 of ROI 04/2002, which says that personnel qualified between 1st January and 31st December can be considered for promotion in the next year's DPC. According to the respondent authorities, as the petitioner would be eligible for promotion only on 1-1-2010 by earning the required ACR from his unit, he could not be considered for the promotion and it was under the aforesaid circumstances that the private respondent, who was qualified in all respects, was promoted to the rank of Subedar Major by overlooking the case of the petitioner. These observations were apparently the basis of the impugned order of promotion. In my opinion, the view taken by the respondent authorities in denying promotion to the petitioner and, conversely, in promoting the private respondent does not suffer from the vice of illegality, irrationality or procedural improprieties warranting the inference that something has gone wrong of a nature and degree which requires the intervention of this Court.

6. For the reasons stated in the forgoing, there is no merit in this writ petition, which is accordingly dismissed. However, on the facts and in the circumstances of the case, the parties are directed to bear their respective costs.

JUDGE

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