

UNION OF INDIA AND ORS.  
v.  
AVTAR SINGH AND ORS.

AUGUST 29, 2001

[S. RAJENDRA BABU AND SHIVARAJ V. PATIL, JJ.]

*Service Law :*

*Armed Forces—Promotion from Brigadier to Major General—Adverse remarks in annual confidential reports—Officer eligible but not promoted due to non-availability of vacancies—Adverse remarks sustained by High Court since respondent was empanelled for promotion—Direction by High Court to promote respondent by creating a post—Maintainability of—Held, expunging of adverse remarks rightly rejected by High Court—No interference called for—Vacancy position in the rank of Major General not properly understood by High Court—Hence, its direction regarding promotion not sustainable.*

Respondent 2 gave certain adverse remarks in the annual confidential report of Respondent 1, a Brigadier in the Army, for the period between September 1990 to August 1991. As a result of the said remarks, he was not considered for promotion to the rank of Major General. On appeal, the Chief of Army Staff expunged the adverse entries from the confidential report. Subsequently, respondent 2 gave another confidential report with adverse remarks for the period between September 1991 to June 1992 and on appeal, the Chief of Army Staff expunged only certain adverse remarks from the confidential report. Respondent 1, being eligible, was selected for the promotion to rank of Major General by the Selection Board of the Army in April 1995. However, he was not actually promoted to the rank as there were no vacancies. He filed a Writ Petition before High Court in April 1995 on two grounds—(1) for removal of adverse entries made in the confidential report of the latter period and (2) for promotion to the rank of Major General as he was due to retire as Brigadier in December 1995. The High Court did not consider fit to expunge the adverse entries in the confidential report of Respondent 1 since he was already empanelled for promotion to the rank of Major General. However, the High Court, after examining various statements and records relating to the number of vacancies in the rank of Major General during the relevant period, came to a finding that due to misinterpretation

**A** of Government communications relating to allocation of vacancies, though there was one vacancy in the rank available since December 1994, Respondent 1 was not promoted solely with the object of depriving him the promotion. Thus the High Court directed the appellants to promote Respondent 1 to the rank of Major General against any available vacancy in the Army or to create a vacancy if none exists and to keep him in service until he is actually promoted as Major General. Hence the appeal by Union of India. Special Leave Petition has been filed by Respondent 1.

Allowing the appeal and dismissing the Special Leave Petition, the Court

**C** HELD : 1.1. The High Court has not understood the vacancy position in the Army correctly and therefore the directions given by the High Court for promoting Respondent 1 cannot be sustained. [309-D]

**D** 1.2. With regard to claim by Respondent 1 for removal of adverse entries made in the confidential reports, the High Court rightly rejected the same as the said adverse entries did not affect Respondent 1's promotion chances. Hence no interference is called for. [309-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7698 of 1996.

**E** From the Judgment and Order dated 19.4.96 of the Jammu & Kashmir High Court in W.P. No. 1005 of 1995.

WITH

Special Leave Petition (C) No. 20345/1996.

**F** Mukul Rohtagi, Additional Solicitor General, W.A. Qadri R.N. Verma, C.Radhakrishna, B.V. Balram Das and Anil Katiyar for the appellants and Respondent in SLP (C) No. 20345/96.

K.V. Vishwanathan, Atul Kumar Sinha and K.V. Venkataraman, for the Respondents in C.A. No. 7698/96 and Petitioner in SLP(C) No. 20345/96.

**G** The Judgment of the Court was delivered by

**H** **RAJENDRA BABU, J.** Respondent No.1 was holding a rank of Brigadier in Indian Army having been commissioned in the service on June 13, 1963 in the Regiment of Artillery. In the 1965 Indo-Pak war, he was fighting in a theatre on the western front in which he sustained serious injuries to various parts of his body and ultimately his right arm and the left index

finger had to be amputated later on. By international medical standards, he was classified as having 90% disability. But on account of the policy adopted by the Government of India all officers who had sustained such injuries or battle casualty officers should be retained in service to avoid demoralisation by sending out young disabled officers from service. However, that was only a poor consolation for no other relaxation was provided to them for promotion in service or compensation for the disability. Such officers had to compete with able-bodied officers to get their future promotions notwithstanding of the injuries sustained by them.

For the period between September 1990 to August 1991, ACRs of respondent No.1 were recorded by respondent No.2 but the adverse comments made by him and non-approval of the promotion to the rank of Major General in the selection board to be held in October 1994 was set aside on appeal and for another period from September 1991 to June 1992, the Chief of the Army Staff granted a limited relief of expunging of those entries which had 5-point awarded in the relevant column by the intimating officer and there is no need to grant any further interview in regard to the same and thus he became eligible for consideration to the post of Major General. He filed a writ petition challenging the adverse entries made in the ACRs for the latter period.

In that writ petition, second grievance made by respondent No.1 is that in the selection board held in April 1995, he was empanelled but he was not actually or physically promoted to the rank of Major General and he was due to retire on December 31, 1995 in the rank of Brigadier. In other words, inasmuch as he has been approved for promotion to the rank of Major General in the second selection board along with another officer who picked up the rank of Major General by the time the writ petition was filed, respondent No.1 was not able to do so as no vacancy of Major General was available in the AOC and, therefore, he had to retire as a Brigadier on December 31, 1995 without availing the benefits and consequences of his approval for promotion as Major General. However, it must be noticed that an interim order was passed by the High Court on 19.12.1993 that respondent No.1 shall not retire from service despite his impending superannuation which stood affirmed on appeal subject to slight modification in regard to posting. The resultant position is that respondent No.1 continued to be in service even though in the rank of Brigadier despite having reached the age of superannuation in that rank on December 31, 1995. However, the High Court examined the original ACRs of the two relevant years as had been recorded by respondent No.2 and noticed that in respect of the first ACRs all the entries recorded by him stood

A expunged and insofar as the second entry is concerned, he had been graded by giving him the three marks. On this aspect of the matter, the learned Single Judge of the High Court stated that the superior officers have found respondent No.1 to be of outstanding and exceptional eminence and did not approve the attitude of respondent No.2 in under-rating and under-mining him and grading him lower in ACRs. However, the High Court found that the

B ACRs recorded by respondent No.2 would not mean that they are subjective, biased and prejudicial assessment and the Chief of the Army Staff gave limited relief to him regarding the second ACR with the result that the entries in the second ACR came to be considered by the selection board when respondent No.1 was first considered for promotion in October 1994. However,

C ultimately, the High Court found that on account of the fact that respondent No.1's name stood approved in April, 1995, he was not inclined to disturb the finding of the selection board held in October 1994 merely on the ground that respondent No.1's second ACR was before the selection board entries wherein are recorded by respondent No.2 though not fully supporting him and in spite of which his case was considered and he was approved for

D empanelment. In that view of the matter, to disturb the proceedings in which four other officers had been approved would cause great prejudice and hardship to them especially when respondent No.1 himself has now been approved for new promotion.

E In that background, the learned Single Judge did not consider it fit to disturb the ACRs recorded. Against that part of the order, a separate SLP has been filed by respondent No.1 in SLP(C) No.20345/96, on which notice has been issued and tagged on to the present appeal. In view of the fact the notings made in ACRs have not affected him and as rightly noticed by the High Court, he having been held to be fit for promotion to the rank of Major

F General, we do not think it is necessary to open up the old wounds to examine as to how they occurred as the same would also cause disturbance to many other events that have taken place. In that view of the matter, we decline to exercise our jurisdiction under Article 136 of the Constitution and refuse to grant leave to appeal and reject this SLP.

G So far as the second aspect of the matter is concerned, the High Court rightly noticed that the promotion of respondent No.1 as Major General would depend on the availability of the vacancies before December 31, 1995 when he was to retire on superannuation in the rank of Brigadier. If respondent No.1 was promoted as Major General before December 31, 1995 his service

H tenure would have been extended by two more years. Therefore, the entire

case turns upon the question whether any vacancy was available as on the date he retired as Brigadier. The High Court, on this aspect of the matter, embarked upon an investigation as to the number of vacancies of Major Generals that were available in the various branches of the Army. After examining the various statements and records that had been produced before the High Court took the view that there was some misunderstanding on the part of the officers in the interpretation of the communication dated August 25, 1992 read with the Government of India, Ministry of Defence's resolution dated 27.3.1991. According to the learned Single Judge the two matters adverted in the two communications pertain to different areas and both were independent of each other, mixing up of the membership of SSDC and linking it with the unspecified vacancy as created by the communication dated 25.8.1992 was an act which unnecessarily deprived the AOC of one vacancy and created confusion regarding the actual number of vacancies available in the AOC. It is because of this misunderstanding respondent No.1 became a victim. Respondent No.1 averred that on March 27, 1991, SSDC was created by the Government of India and only a Major General from Army Ordinance Corp had remained its member. If it has been an unspecified vacancy this appointment would have been shared by a Major General by any other Corp Arms particularly ASC, who has to share in unspecified vacancy was with AOC upto October/November, 1993. That is with effect from December 1, 1994, this vacancy had to be released in favour of the AOC but till date the same has not been done with the object of depriving him of that chance. They have pointed out that the AOC remained without unspecified vacancy when its turn came on 31.12.1994 and such appointment had been held by a Major General of Engineers without any right or claim on the same. This stand has been stoutly denied by the appellants before us. It has been pointed that the Union of India had produced the position as available in August 1992 and as on the date when the matter was dealt with by the High Court which are as under:

August 1992	As on Date
1. Prem Sagar, ADG Org. Army HQ. [UNSPECIFIED]	1. Maj. Genl. B.N. Rao ADG OS (CN&A), Army HQ [SPECIFIED]
2. Maj. Genl. S.K. Bhatnagar ADG OS (CN&A), Army HQ [SPECIFIED]	2. Maj. Genl. T.J.S.Gill ADG OS (CV), Army HQ [SPECIFIED]

A 3. Maj. Genl. Mohinder Singh ADG OS (CV), Army HQ [SPECIFIED]	3. Maj. Genl. Y.S. Teja ADG OS (TS) [SPECIFIED] Army HQ
B 4. Maj. Genl. S.K.Chopra ADG OS (TS) [SPECIFIED] Army HQ	4. Maj. Genl. MS Bhinder MG AOC, Southern Command [SPECIFIED]
5. Maj. Genl. S. Verma MG AOC, Southern Command [SPECIFIED]	5. Maj. Genl. DD Ghoshal MG AOC, Eastern Command [SPECIFIED]
C 6. Maj. Genl. G. Mitra MG AOC, Eastern Command [SPECIFIED]	6. Maj. Genl. R. Mehta MG AOC, Western Command [SPECIFIED]
D 7. Maj. Genl. S. Talwar MG AOC, Western Command [SPECIFIED]	7. Maj. Genl. V.K. Sareen MG AOC, Central Command [SPECIFIED]
	8. Maj. Genl. V.L. Vohra, MG AOC, Northern Command [SPECIFIED]
E	9. Maj. Genl. Vijay Lall, Member, SSDC [UNSPECIFIED]
	10. Maj. Gen. AC Sharma, Dy. Comdt. & CI, CMM [SPECIFIED]

The vacancies in the rank of Major General among various Arms/ Services is approved by the Chief of the Army Staff like cadre strength of each arms/service, combat and service requirements or conditions. Deputational appointments/ex-cadre appointments are, therefore, calculated against the authorisation made for each service in order that rational allocation of vacancies are made. In addition, the Army Officers while on ex-cadre post or on deputation continue to hold alternative appointment in the Army Cadre, which is directly related to their age of retirement and they have to be absorbed in Army appointment immediately on reversion. As per the allocation of vacancies authorised by the Army Headquarter letter dated August 25, 1992, one unspecified appointment rotates alternatively between ASO and AOC and because of organisational interest and suitability, one specified appointment of Major General, namely, members of SSDC was elected in July 1991. This

organisation has been created temporarily for specific purpose and would A  
cease to be effective on 31.3.1996. Thus, the vacancy of the Member at SSC  
was held by Major General Vijay Lall, which was unspecified vacancy  
authorised for AOC and no other unspecified vacancy was due for AOC and,  
therefore, in terms of para 7(a) of the Army HQ letter dated 25.8.1992 which  
specifically provided the first year with effect from the date of issue of this B  
letter will be treated as organisation period to cater for adopting the changes  
envisaged due to implementation of new allotments. Thereafter, the additional  
unspecified vacancy held as on 25.8.1992 by Major General Prem Sagar  
ceased to exist on 26.11.1993. The said organisation period itself ended on  
26.11.1993. Thereafter AOC continued to hold one unspecified vacancy, that C  
is, Member, SSDC, as authorised in Army HQ letter dated 25.8.1992. Thus  
the High Court in the matter of calculation added a vacancy which was not  
available and, therefore, gave a direction to the appellants to promote  
respondent No.1 to the rank of Major General against any available vacancy  
in the Army notwithstanding the fact that he belongs to AOC or to create a  
vacancy if none exists and to keep in service until he is promoted as Major D  
General and actually picks up the rank.

All these directions could have been given only if vacancy position had  
been correctly understood by the High Court. That having not understood  
correctly as explained by us, we find the order made by the High Court  
cannot be sustained. The same shall stand set aside to the extent indicated E  
above. In other aspects in so far as the denial of the claim made by respondent  
No.1 is concerned, the order made by the High Court is maintained. Thus  
respondent No.1 having failed on the two claims made by him his writ  
petition in the High Court shall stand dismissed.

This appeal is allowed accordingly. No costs. F

B.S.

Appeal allowed and  
Petition dismissed.