

Transfer Application No. 1199 of 2010

Tuesday this the 8th day of February , 2011

“Hon’ble Mr. Justice Janardan Sahai, Member (J)
Hon’ble Lt. Gen. P.R. Gangadharan, Member (A)”

640848-K Sergeant S.K.S.Chauhan (AD SO)
Aged about 41 years Son of Sri Dwarika Singh
Resident of Village and P.O. Office Bihar
District Farrukhabad, presently S.M. Q. 20/4
Air Force Station Memaura P.O. Banthara
Lucknow- Pin- 227101

.....Applicant

By Legal Practitioner Shri V.P.Pandey, Advocate.

Versus

- 1- Union of India, Through Secretary Ministry of
Defence, New Delhi
- 2- Chief of Air Staff, Vayu Bhavan
New Delhi- 110011
- 3- Air Officer Commanding
Air Force Record Office, Subrato Park
New Delhi - 110010

..... Respondents

By Legal Practitioner Sri K.D.Nag, Sr Standing
Counsel for the respondents

“Hon’ble Mr. Justice Janardan Sahai”

The applicant was enrolled in the Indian Air Force on 19-8-1985 and he was promoted to the rank of Corporal on 09-9-2000 and was further promoted to the rank of Sergeant on 01-7-2003. He was not considered for promotion to the rank of Junior Warrant Officer for the year 2004-05 on the ground that he had not completed the required one year length of service as sergeant on 30-6-2004.

2. It is common ground between the learned Counsel for the parties that this was the only ground upon which the applicant was not considered. The applicant had filed representation dated 19-9-2005 (Annexure- CA2) to the respondent no.3 which was rejected and the decision was communicated to the applicant by Annexure-R/3 to the counter affidavit, which is dated 03-1-2006. In the order it is stated that SNCO was not considered for promotion during the panel year 2004-2005 as he was not completing one year in sergeant rank i.e. 30-6-2004. The applicant filed Writ Petition No.5629 of 2006 in the Lucknow Bench of Allahabad High Court. A counter affidavit was filed in the writ petition. The papers of the petition were thereafter transmitted to the Tribunal. A rejoinder affidavit has been filed in the Tribunal.

3. We have heard Sri V.P.Pandey learned counsel for the applicant and Sri R.N.Singh, Senior Standing Counsel, for the respondents

4. The policy for promotion has been annexed with the counter affidavit as Annexure- R/2 to the counter affidavit. Para-4 of the Promotion policy which is relevant is quoted below:

4- Minimum service in present rank would be governed as per AF1 12/S/48. The minimum service of one year in present rank is required to be completed as on 30th June of the year preceding the promotion panel for the next promotion. For example, an airman who gets to the rank of JWO on 1st August 2002 and is meeting the criteria for promotion to WO rank, would not be considered for promotion for the panel year starting from 01st July 2003 since the subject JWO would not have held the present rank of JWO for complete one year as on 30th June 2003.”

5- Learned counsel for the applicant has relied upon the decision of the Apex Court in the case of Prabhu Dayal Sesma Vs. State of Rajasthan and another (1986) 4SCC page 459. In that case it was held that in absence of any express provision, while calculating a person's age, the day of his birth must be counted as a whole day and any specified age in law is to be computed as having been attained on the day preceding the anniversary of his birthday. It was also held that a legal day commences at 12. O' clock midnight and continues until the same hour the following night. Reliance has also been placed upon a decision of Eerati Laxman Vs. State of Andhra Pradesh (2009) 3SCC 337.

6. On the other hand Sri R.N.Singh, learned Senior Standing Counsel for the respondents submits that a single Judge of the Rajasthan High Court has dealt with this specific issue in Writ Petition No.3768 of 2005 along with other connected cases decided on 21-7-2006. The issue in the case before Rajasthan High Court was regarding determination of date of completion of 17 years length of service. The Rajasthan High Court has held that where the criteria was completing 17 years length of service persons appointed on 1-7-1988, completed 17 years of service at zero hours in intervening night of 30th June and 1st July 2005 and such persons cannot be treated having completed 17 years prior to zero hours on 1st July 2005

7- The following passage from Section- 5 Fractions of a day has been extracted from Halsbury's Laws of England 3rd Edition page-100:

"178- The general rule: In computing a period of time, at any rate when counted in years or months, no regard is, as a general rule, paid to fractions of a day, in the sense that the period is regarded as complete although it is short to the extent of a fraction of a day. In cases in which the day of the date of an instrument of lease is included in the term it is immaterial that the tenant's enjoyment cannot begin with the beginning of that day. Similarly, in calculating a person's age the day of his birth counts as a whole day; and he attains a specified age on the day next before the anniversary of his birthday

In contracts where payment has to be made at a certain rate per diem a part of a day counts as a whole day, unless it appears from the context that the contrary was intended. Where it is stipulated that money shall be paid at a given hour, the whole period between that hour and the next hour is intended; the hour is considered as the twenty fourth aliquot part of the day."

8- The applicant was promoted as sergeant on 1-7-2003. That day would be deemed to begin at zero hours in the mid night of the night intervening 30th June and 1st July 2003. However, in view of the passage above quoted from Halsbury which has been relied upon by the Supreme Court and thus approved in Prabhu Daval Sesma (supra) the 1st of July would be treated as a whole day even though the applicant was not appointed at zero hours mid night of the night intervening 30th June and 1st July 2003, #1st July 2003 would therefore be taken into account as the first day of service of the applicant. The year 2004 was a leap year. The applicant had thus completed one year length of service in fact 366 days at zero hour in the night intervening 30th June 2004/ 1st July 2004. Thus the applicant had completed one year length of service as sergeant at the end of 30th June 2004 viz at zero hours in the night intervening 30th June 2004 and 1st July 2004.

para - 4 of the policy, which has been quoted above. The said example is to the effect that if length of service commences from 1st August in a particular year, the person would not be completing one year of service on 30th June next year. The policy framers have not said that if length of service commences 1st July he would not be completing one year on 30th June next year. In case the intention of the policy framers had been to treat the persons whose service commences on 1st July of a particular year not having completed one year of service as on 30th June in the next year they would have given that date in the example. The decision of the Rajasthan High Court is based on a different paragraph of the policy relating to completion of 17 years service. Para- 5 of the promotion policy letter deals with the cases of completion of 17 years length of service.

10- The Rajasthan High Court has distinguished Prabhu Dayal Sesma's case (supra) on the ground that it dealt with determination of age and not with computation of complete length of service. No doubt that is true but the Apex Court relied upon the General Rule in Halsbury's quoted by us, above. The full passage quoted by us indicates that the Rule in Halsbury's does not deal with determination of age alone but in computing a period of time particularly when counted in years or months.

11- The Apex Court in Eerati Laxman (supra) has held in para 14 as follows:

“ The appellant therefore having been born on 10-5-1978 the said day was to be counted as a whole day and thus, he had not attained the age of 16 years before 12 0'clock in the midnight of the previous day i.e. 9-5-1978 (sic 9-5-1994). This aspect of the matter has recently been considered in Acchaibar Maurya vs. State of U.P. wherein it was held (SCC page 642, para- 14)

“14-It is interesting to note however that the common law rule stated in Shurey, Re, Savory in respect of anniversaries has been abrogated by virtue of the Family

expressed in years is the commencement of relevant anniversary of the date of his birth (See Halsbury's Laws of England, 4th Edn, Reissue P- 209) We do not have such statute. We have therefore to determine the cases on the touchstone of statute operating in the field and in absence thereof by common law principle.”

12- In our opinion the view taken by the respondents that the applicant had not completed one year length of service on 30-6-2004 from the date he was appointed as sergeant is erroneous. We therefore, quash the letter dated 03-1-2006 (Annexure-CA3) and direct the respondents to consider the applicant's case for promotion pertaining to the year 2004 -05, in accordance with law. It appears that subsequently the applicant was indeed promoted to the rank of Junior Warrant Officer in the year 2009. In case the Departmental Promotion Committee finds the applicant to be fit for promotion pertaining to 2004-2005, the applicant will be given notional promotion with consequential benefits with effect from the date his batch mates were given promotion.

(Lt. Gen. P.R. Gangadharan)
Member (A)

(Justice Janardan Sahai)
Member (J)

IA/-