

RESERVED

**ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW
E-Court**

Original Application No. 410 of 2018

Thursday, this the 18th day of February, 2021

Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)
Hon'ble Vice Admiral Abhay Raghunath Karve, Member (A)

Sub Prasant Kumar Sahoo, presently posted at Command Military Dental Centre, Eastern Command, Kolkata.

..... Applicant

Learned Counsel for the Applicant : **Shri Virat Anand Singh**, Advocate

Versus

1. Union of India, through the Secretary, Ministry of Defence, DHQ, PO, New Delhi-110011.
2. The Chief of Army staff, Integrated HQ of Ministry of Defence (Army), DHQ, PO-New Delhi-110011.
3. Director General Armed Forces Medical Services, Ministry of Defence, 'M' Block, New Delhi-110001.
4. The Commandant, Army Medical Corps Centre, Lucknow.
5. The Officer-in-Charge, Army Medical Corps Records, Lucknow.

..... Respondents

Learned counsel for the : **Ms Appoli Srivastava, Advocate**
Respondents Central Govt Counsel.

ORDER

Per Hon'ble Vice Admiral Abhay Raghunath Karve, Member (A)

1. The instant Original Application has been filed on behalf of the applicant under Section 14 of the Armed Forces Tribunal Act, 2007, whereby the applicant has sought following reliefs:-

- (i) *To quash the decision of COAS dated 26 Feb 2018 received vide DGMS letter dated 08.03.2018 as being non speaking and call for the records based on which the Respondents have determined the merit position of Permanent Commission candidates based on the marks obtained by the candidates in SSB only and thereafter quash the said merit prepared by the respondents holding the same unconstitutional.*
- (ii) *Direct the respondents to redraw the final merit of all successful permanent commission candidates for AMC (NT) 2011 quota based on the marks obtained by them in service records + written exam marks + SSB marks and grant them permanent commission with further direction to grant such commission to the applicant if based on his position in the final merit list so prepared, he is above any of the candidates who have been given PC as the case may be.*
- (iii) *In alternative direct respondents to consider the request of the applicant for grant of permanent commission by releasing additional vacancies and grant him permanent commission to him with all consequential benefits against the quota of 2009 vacancy when only one vacancy was released.*
- (iv) *Direct the respondents to draw the combined merit based on SSB Interview marks of all remaining candidates of permanent commission along with recommended SSC candidates for AMC (NT) 2011 when it was followed after taking advice of ministry of Law and Justice and grant them short service commission as per the revised final merit so prepared with further direction to grant such commission to the applicant if based his position in the final merit list so prepared, he is above any of the candidates who have been given SSC as the case may be.*
- (v) *Pass any other order/orders as deemed appropriate by this Hon'ble Tribunal in the facts and circumstances of the present case.*

2. Facts giving rise to Original Application in brief are that applicant was enrolled in Army Medical Corps (AMC) on 30.12.1991 and was promoted to the rank of Sub w.e.f. 01.02.2017. In the year 2011, the applicant applied for permanent commission in AMC [(PC)(NT)]. Prior to

forwarding application for commission, he was screened by a Board of Officers (BOO) and his name was recommended for written test. Based on aforesaid written test, he was selected for SSB-22, result of which was declared on 08.01.2012 and he was declared qualified. However, he could not be granted permanent commission being low in merit. Being aggrieved, applicant submitted non statutory complaint dated 05.10.2012 which was rejected by General Officer Commanding-in-Chief (GOC-in-C) (Central Command) by order dated 05.03.2013. Against rejection order dated 05.03.2013, applicant filed O.A. No. 154 of 2013 to this Tribunal. The O.A. was disposed off vide order dated 13.04.2017 with directions to applicant to represent his case to the appropriate authority. A direction was also issued to respondents to decide representation of applicant within six weeks. The applicant submitted statutory complaint dated 19.05.2017 which was rejected by Chief of the Army Staff (COAS) vide order dated 26.02.2018. It is in this perspective that this O.A. has been filed.

3. Learned counsel for the applicant submitted that applicant was declared qualified by Service Selection Board (SSB). According to the applicant there were a total of 68 vacancies of both; permanent commission (PC) and short service commission (SSC), in the year 2011. After grant of commission to 06 PC and 16 SSC qualified officers, there still existed a deficiency of 46 officers as on 04.07.2012. Thus, by releasing one additional vacancy out of these 46, the applicant could have been selected and the total would also not have crossed the authorized limit of establishment. Further submission of learned counsel for the applicant is that after selecting candidates from the PC merit list, the left over candidates should have been automatically selected for SSC in terms of

para 6 (h) of Army Instruction 10/2001. His further contention is that respondents ought to have prepared the merit list for Permanent Commission based on the marks awarded in service records plus written exam marks plus SSB interview marks and that a combined merit list of all PC and SSC candidates should have been prepared. He further submitted that the respondents have determined the final merit list based on the SSB marks only which is contrary to the established norms of selection being followed by all Government departments as also para 6 (h) of Army Instruction 10/2001. His further submission is that in the year 2010, Hav Harmesh Yadav was granted Permanent Commission by releasing one additional vacancy, subject to the condition that authorized establishment of AMC is not exceeded. He pleaded that an additional vacancy be released in his case also and that he be either granted Permanent Commission with retrospective date or Short Service Commission in terms of Army Instruction 40/73. His contention is that the respondents have acted differently with the applicant, thus making out a clear case of discrimination. Reliance has been placed by learned counsel for the applicant on the Hon'ble Apex Court judgment decided in the case of ***Tridip Kumar Dingal & Ors vs State of West Bengal & Ors***, reported in AIR 2008 Legal Eagle (SC) 1451 based on which he has contended that in view of this pronouncement, the applicant deserves to be granted relief.

4. Per contra, learned counsel for the respondents submitted that in accordance with criteria outlined in Army Instruction 10/2001 (for PC) and Army Instruction 40/73 (for SCC), candidates are tested in SSB and final list is prepared by DGAFMS in consultation with the Recruiting Directorate. It is further submitted by learned counsel for the respondents that

vacancies of PC and SSC are distributed in the ratio of 40:60. He further submitted that marks of the screening test are not added to the SSB and only marks of the SSB are taken into account for preparing the final merit list prepared by DGAFMS. The applicant had applied for PC and accordingly, he was considered for PC only on the basis of rules framed in Army Instruction 10/2001. Further, in accordance with Army Instruction 10/2001 (for PC) and Army Instruction 40/73 (for SSC), applicants are tested in SSB and final list is prepared by DGAFMS in close coordination with the Recruiting Directorate. His further submission is that in the instant case, marks of the screening test were not added to the final marks given by SSB and only marks of SSB were taken into account for preparing the final merit list. The applicant was tested and final list was prepared by DGAFMS as per availability of vacancies in each category i.e. PC and SSC in strict adherence to provisions contained in para 6 (h) of Army Instruction 10/2001, vide which he was placed at serial number 09 of final merit list of PC candidates. The applicant could not qualify for PC as there were only 06 vacancies and he being placed at serial No 09 of the SSB merit list. The learned counsel further submitted that applicant could also not be selected for SSC in accordance with the aforesaid Army Instruction being placed at serial number 08 of the combined merit list of left over candidates for PC and SSC, as 15 candidates (including one candidate who qualified for both PC and SSC) were already selected for SSC and thus only one vacancy for SSC was thereafter available which was filled from the combined merit list. Nk/SKT Shaji KP being a left over candidate of PC merit list placed at serial number 06 of combined merit list was thus considered for SSC being higher in merit than the applicant. He concluded

that since applicant could not be considered for PC on the basis of merit list of PC and having not applied for SSC cadre, his case was not considered for SSC as applicant's name figured at serial number 08 of the combined merit list and only one person was required to be taken from that list, which was Nk/SKT Shaji KP (serial No. 06) who has been finally selected. He pleaded the O.A. to be dismissed.

5. Having heard submissions of learned counsel of both the sides and perusal of records, we find that applicant was placed in final merit list of PC at serial number 09 and since only 06 vacancies were released that year only 06 candidates were selected for PC. Therefore, the applicant could not be selected being placed lower in merit. As per para 6 (h) of Army Instruction 10/2001, after granting permanent commission to the candidates as per vacancy, the remaining candidates will be granted SSC in terms of Army Instruction 40/73 depending upon vacancies as decided by the DGAFMS. The applicant was also not selected for SSC in terms of para 6 (h) of Army Instruction 10/2001 which stipulates that *'after granting permanent commission to the candidates as per vacancy, the remaining candidate will be granted SSC in terms of Army Instructions 40/73 depending upon vacancies as decided by the DGAFMS'*. The applicant assumed that the left over candidates, who have not been selected for PC ought to automatically be selected for SSC irrespective of vacancies even if he had not applied for SSC in his application. In this regard para 8 of AI 40/73 stipulates that SSB will grade candidates according to their suitability and forward the completed application forms including their recommendations and grading to DGAFMS for final selection. Since there is no separate SSB for PC and SSC candidates, the DGAFMS prepares a

combined merit list of the remaining left over of PC and SSC candidates for grant of SSC.

6. The applicant contends that Nk/SKT (now Capt) Shaji KP, who had applied only for PC and had not applied for SSC, was granted Short Service Commission which, per se, is illegal. There is no provision in Army Order 10/2001 and Army Instruction 40/73 that a candidate who applied only for PC will also be considered for SSC simultaneously. Even so we are of the opinion that even if a candidate is considered for SSC then he should be a left over candidate from the PC merit list. Nk/SKT (now Capt) Shaji KP was a left over candidate of PC placed at serial number 06 of the combined merit list of left over candidates of PC, whereas the applicant stood at serial number 08 in the same list. Therefore, Nk/SKT (now Capt) Shaji KP being higher in merit was rightly selected for SSC.

7. On the point of releasing additional vacancy to accommodate him as well as others in waiting, a case has been quoted by the applicant, in which, in the year 2009, an additional vacancy was released for Hav (now Captain) Harmesh Yadav for grant of SSC. After examining the documents we find that 06 PC and 16 SSC vacancies were sanctioned for the year 2009. The qualified candidates for PC list at serial number 06 (Hav (now Captain) Harmesh Yadav) and at serial number 07 (Hav (now Captain) Shaju EK), in the merit list had secured the same marks. However, Shaju EK who was senior in the present rank was inadvertently granted PC although Harmesh Yadav was in the zone of merit and he was meeting all the eligibility criteria. As per the prevailing policy he was offered SSC as there was no vacancy in PC and a vacancy was readily available in SSC. However, he was not meeting the age criteria of SSC i.e. 40 years of age,

hence to solve the peculiar situation, an additional PC vacancy was released as Harmesh Yadav who was older, was required to be placed higher in the merit list having obtained same marks as that of Shaju EK. In this case Hav Harmesh Yadav being senior on the basis of the age should have been granted PC in place of Shaju EK with all consequential benefits, hence to retrieve the situation, a vacancy in PC (NT) was granted by Ministry of Defence in respect of Harmesh Yadav, being a rare/unprecedented situation. This case was thus not similar to the case of the applicant and it cannot be made the basis for releasing an additional vacancy for him. We agree with the averment that the number of vacancies to be released for a post in a particular year is an executive function of the Government and is decided on long term HR perspective plans. No one has a legal right to complain against such a decision of the Government unless it is shown that the decision suffers from the vice of malafide.

8. One of the important aspects, as pointed out by learned counsel for the applicant, is that respondents have failed to make a combined final list of PC and SSC on the basis of legal advice given by Legal Adviser (Defence/MoD) vide his note dated 08.04.2013. On this issue we find that the legal advice pertains to the year 2013 and the case in hand is of the year 2011. However, on scrutiny it emerged that the following procedure was adopted for selection of PC and SSC solely in terms of Army Instruction 10/2001 and 40/73 to avoid any ambiguity in selection procedure:-

- (i) Filling up of PC vacancy from PC merit list.

(ii) Those left over in PC list, were selected for the SSC in terms of para 6 (h) of Army Instruction 10/2001 in order of relative merit of marks awarded by SSB.

9. The DGAFMS, as mandated by the Army Instructions on the subject, granted commission as per choice exercised by the candidates and merit position in the respective merit list of PC and SSC. Some qualified candidates of PC were left over on account of limited number of vacancies in PC (i.e. 06 vacancies in this case). This presented a situation wherein SSC vacancies could not be filled (i.e. only 14 out of 16 were filled by SSC candidates in 2011) due to inadequate number of qualified candidates in SSC, whereas there were candidates who had qualified for PC but could not be granted PC due to paucity of allotted vacancies. These left over vacancies for SSC were to be offered to the PC candidates as per para 6 (h) of Army Instruction 10/2001. There were 16 SSC vacancies for the year 2011 whereas number of qualified candidates was 14 only. Remaining two vacancies of SSC were to be filled from candidates who qualified for PC and could not be granted PC due to limited number of vacancies (i.e 06). To fill 02 SSC vacancies, 01 was filled from a candidate who qualified both for SSC and PC, whereas the second was filled from the candidate being at 07th position of the PC merit list i.e. left over candidate of PC. The applicant was low in merit list (i.e. at 09th place) of PC merit list, hence he could not be granted SSC as per the rules.

10. Further, the applicant had secured 9th position amongst 22 candidates qualified for PC. However, Ministry of Defence had sanctioned only 06 vacancies for PC and 16 vacancies for SSC for the year 2011. 06 candidates were granted permanent commission from PC list in order of

their merit strictly in adherence to Army Instruction 10/2001. The SSC merit list was received from the Recruiting Directorate comprising 14 selected candidates. However, vacancies of SSC were 16, therefore to fill up two vacancies, Hav Satish Kumar who had opted for and also qualified for both PC and SSC, placed at serial number 12 of PC list, was granted SSC. Thereafter, Shaji KP, who was in PC merit list number 07 in the year 2011 and could not be granted PC owing to paucity of vacancies, was granted SSC as a left over qualified candidate of PC in strict compliance of para 6 (h) of Army Instruction 10/2001, and the applicant being lower in merit than Shaji KP was not considered either in PC or in SSC.

11. Learned counsel for the applicant contended that respondents cannot change policy on year-to-year basis in case of promotions. On this point, citing the Hon'ble Supreme Court judgment in the case of **Hardev Singh vs Union of India & Another**, reported in (2011) 10 SCC 121, learned counsel for the respondents submitted that according to aforesaid judgment, no employee has a right to get promotion, but only a right to be **considered** for promotion and the employer is entitled to change the policy for benefit of the organization. Operative portion of aforesaid judgment is as under:-

*“it cannot be disputed that no employee has a right to get promotion, so the appellant had no right to get promotion to the rank of Lieutenant General but he had a right to be **considered** for promotion to the rank of Lieutenant General and if as per the prevailing policy, he was eligible to be promoted to the said rank, he ought to have been considered. In the instant case, there is no dispute to the fact that the appellant's case was duly considered by the SSB for his promotion to the rank of Lieutenant General.*

The necessary exercise for collecting the data and putting it in a proper form was done in 2008 but, in fact, the said data was considered by the SSB only when it

convened its meeting in January 2009 i.e. after the new policy had come into force. The cases of the appellant and others were never considered by the SSB in 2008 or prior to 01.01.2009. It means that the cases were considered as per the new policy and, therefore, all submissions made on behalf of the appellant that the policy was changed after the process of selection had been started are not a correct and, therefore, they are to be discarded.”

12. In view of the above, we are of the considered opinion that respondents have not erred while making merit list and granting PC and SSC to qualified candidates. The merit list for PC was made as per procedure laid down in Army Instruction 10/2001 and Army Instruction 40/73 and no injustice seems to have been done to applicant keeping in view of aforesaid discussion.
13. The O.A. is devoid of merit and deserves to be dismissed. It is accordingly **dismissed**.
14. No order as to costs.
15. Pending applications, if any, are disposed off.

(Vice Admiral Abhay Raghunath Karve) (Justice Umesh Chandra Srivastava)
Member (A) Member (J)

Dated : February, 2021