

**IN THE ARMED FORCES TRIBUNAL,
PRINCIPAL BENCH
NEW DELHI.**

TA No.385/2009
WP (C)7811/2009)

Group Captain Atul Shukla ...Petitioner (1)

Versus

Union of India & others ...Respondents

AND

TA No.386 of 2009
WP (C)9772/2009)

Group Captain VJ Naraian ...Petitioner(2)

Versus

Union of India & others ...Respondents

OA No.99/2009

Group Capt. Virendar Gigoo ...Petitioner(3)

Versus

Union of India & others ...Respondents

For the Petitioner : Mr. S.S.Pandey, Advocate
For the Respondents: Mr. R.Balasubramanian, ASG

C O R A M:

HON'BLE MR. JUSTICE A.K.MATHUR, CHAIRPERSON

HON'BLE LT.GEN.M.L. NAIDU, ADMINISTRATIVE MEMBER

JUDGMENT
(02.05.2013)

BY CHAIRPERSON:

1. All the above three petitions involve similar question of law, therefore, they are disposed of by a common order.

2. For convenient disposal of all these petitions, the facts given in the case of Gp. Capt. Atul Shukla [TA No.385/2009 (WP No.7811/2009)] are taken into consideration.
3. This writ petition was transferred by the Hon'ble Delhi High Court to this tribunal on its formation.
4. Petitioner by this petition has prayed by appropriate directions the letter dated 16.06.2008 and policy dated 12.01.2009 may be quashed whereby respondent have fixed the age of superannuation in respect of the petitioner Gp Captain at 54 years. He has also prayed that respondent may be directed to allow the petitioner to continue to serve till the completion of 57 years with all consequential benefits.
5. The petitioner was commissioned in the Indian Air Force on 13.6.1974 in the logistic branch. He became Group Captain (Time Scale) on 16.12.2004. His date of retirement in existing position as per the age of superannuation i.e. 54 years is 30.6.2009. Whereas according to petitioner, he is entitled to continue till the

age of 57 years and he should be retired on 30.06.2012

6. It is alleged that petitioner was considered for the promotion to the rank of Group Captain for the first time and thereafter second and third time in review but he could not be empanelled even though he was fit in all respects. It is alleged that during these years the retirement age of Central Government Employees was increased from 58 years to 60 years by the Govt. then in power. Thereafter, this was again reduced to 58 years. Normally three courses, one of each year are considered for promotion together i.e. in 2000 the courses considered will be 1999, 2000 and 2001 & so on. However, during this period the age of retirement being increased and then subsequently decreased resulted in bunching up of as many as seven courses at a time for the limited amount of vacancies.
7. That on 16.12.2004, the Respondent No.1 implemented the AV Singh Committee recommendation regarding improvement of the career prospect of the

officers of the Armed Forces by introducing, for the first time, the Rank of Group Captain (Time Scale) after completion of 26 years of service for those officers who could not be promoted in the select rank of Group Captain due to competitive merit or lack of vacancy.

8. It is alleged that on the basis of the recommendation of AV Singh Committee to abolish the rank of Wg Cdr (Time Scale) which was granted to those officers prior to promulgation of AV Singh Committee recommendations, who could not be promoted to the rank of Wing Commander on completion of 21 years of service with same retirement of age as that of select grade Wing Commander based on the said Committee. However, every officer who had completed 13 years of service was made eligible for promotion to the rank of substantive Wing Commander after implementation of the AV Singh Committee report.
9. The Air Headquarter Human Resource issued a policy dated 12.01.2009 on the recommendations of the AV Singh Committee report. As per the report, a detailed

policy was laid down for consideration for promotion and laid down reckonable period of commission service for each post like Flight Lt.- 2 years, Sqn Leader- 6 years, Wing Commander – 13 years and Group Captain – 26 years. They laid criteria for promotion of Wing Commander to Group Captain (Time Scale) for which they were required to consider 3 years report and age of superannuation was mentioned – “The age of superannuation for Gp Capt (TS) would be same as it is for the rank of Wg Cdr in respective branches. Therefore, there is no change in the retirement age of a Wg Cdr on being promoted to the rank of Gp Capt (TS)” i.e.54 years.

10. However, petitioner could not be promoted in selection to the post of Gp. Capt and he was informed by communication dated 16.06.2008 that he will be retiring from service on completion of 54 years of age whereas normal age in respect of Gp Captain is 57 years.

11. Petitioner was made substantive Gp Capt (TS) on 10.01.2006 published in the Gazette dated on 05.08.2006. It was pointed out that Gp Capt (TS) are identical to Gp Capt (Select) the financial powers given to Gp Capt (Select) are also vested with Gp Capt (TS). The duty discharged by both Gp Capt (Select) and Gp Capt (TS) are identical. The Pay Scale & Grade Pay of both i.e. Gp Capt (Select) & Gp Capt (TS) is same after 6th Pay Commission.
12. It is pointed out that in the Air Force, the Fighting Branch is Flying Branch, the remaining branches have similar nature of duties. Therefore, it is submitted that the incumbent by rank Gp Capt (TS) discharges all administrative functions as Gp Capt (select) except flying functions. He is getting same pay scale, grade pay & wears same rank but he has been discriminated in matter of age of superannuation. Gp Capt (TS) has to retire at the age of 54 years and Gp Capt (Select) has to retire at the age of 57 this is discriminatory, it is

violative of Article 14 & 16 of the Constitution & deserved to be struck down.

13. Therefore, this policy is sought to be challenged by the petitioner by this petition. He submitted that the Gp Capt (TS) & Gp Capt (Select) stand on same footing and to discriminate them further on the basis of Time Scale and on the basis of Selection is discriminatory and violative of Article 14 & 16 of the Constitution. It is pointed out that it has no nexus which is sought to be achieved by this kind of classification. There is no rationale that has been pointed out as to why two separate age of superannuation has been prescribed for same rank. Therefore, petitioner has challenged the order dated 06.06.2008 whereby he was informed that his date of superannuation will be 30.06.2008 at the age of 54 years may be quashed and likewise policy laid down by HQ 12.01.2009 whereby this two ages of retirement has been prescribed be also struck down being violative of article 14 and 16 of the constitution.

14. A reply was filed by the Respondent and Respondent in their reply has pointed out that petitioner was given three chances from Wg Commander to Gp. Captain but he could not be selected. It is pointed out that with the introduction of time based promotion upto the rank of Wg Commander the previous to AV Singh Committee Report, the Wg Cdr (TS) rank became redundant and in line of the AV Singh Committee proposal for Army and Air Force, the Gp Captain (TS) rank was granted to Air Force Officers on completion of 26 years of service. This rank was granted to officers who were superseded in the first select grade rank three times and who met the minimum performance criteria and it was also made clear that this category of officers would be junior to all select grade Gp Cpts. It is also pointed that Air Cmde and above ranks are all select grade appointments and there are no time scale promotion for these ranks. It is pointed out that a new category of officers was created – that of Gp Capt (TS). As per GOI letter – MoD letter No.2(2)/US(L)/D(Air-III)/04

dated 12 March 2005, which created this rank, the retirement age of GP Capt (TS) would be the same as the age at which the Wing Commander retires in that branch. Therefore, if a flying branch Wing Commander retires at 52, so would the Gp Capt (TS) and likewise for ground duty branches at the age of 54. It is pointed out that the objective behind the institution of GP Capt (TS) rank was to make every young officer stay motivated, even though he may not have made it to GP Capt (select) rank. It was felt that the rank of GP Capt has a great relevance and importance in the social fabric of society. It is alleged that prior to AVSC-1 time scale promotion to the rank of Wg Cdr were employed in appointments of Sqn Ldrs. Likewise, post AVSC-1 implementation, GP Capt (TS) officers are also employed in the appointments of Wg Cdrs and these officers are held against the establishment of a Wg Cdr rank. The age of superannuation of GP Capt (TS) is clarified vide para 5 (d) of Govt. letter that there would be no change to the

retirement age of a Wg Cdr on being promoted to the rank of GP Capt (TS). The same was further reflected by communication dated 05.07.2005 & 12.01.2009. Therefore, it was pointed out that retirement age for corresponding age in Army for the Arms and Services – Colonel (TS) is 54 years. It is also admitted that Lt. Col (Select) and Col (TS) all retire at the age of 54.

15. So no rationale has been pointed out in the reply filed by the respondent that what is the rationale for prescribing two dates of retirement for officers of the same rank.
16. Learned Counsel for the petitioner has submitted that when the petitioner is appointed as a Gp Capt by time scale, he gets same salary & same grade pay of Gp Captain, as provided by the 6th Pay Commission and he discharge all duties as is being discharged by the Gp Capt (select) except in flying branch. Therefore, it was contended by learned counsel that when pay scale, grade pay, nature of duties performed are same & lastly wear same rank then to discriminate in matter of

age of superannuation in serious violation of article 14 & 16 of the Constitution. In this connection learned counsel has invited our attention to the decision of Supreme Court in the case of ***Miss Raj Soni Vs. Air Officer Incharge (1990 AIR SC 1305)*** and ***M.G.Phadke & Ors. Vs. Municipal Corporation (AIR 1993 SC 142)***. He also invited our attention to the decisions given by the Hon'ble Supreme Court in the case of ***E.P. Royappa Vs. State of Tamil Nadu & Anr. [(1974) 4 SCC 3]*** and in the case of ***Union of India & Ors. Vs. Nitdip Textile Processors pvt. Ltd. & Anr [(2012) 1 SCC 226]***.

17. As against this learned counsel for the respondent Mr. Balasubramaniam strenuously urged before us that infact the time scale is nothing but upgradation of Wg Cdr who has put in 26 years of service and they continue to be Wg Cdrs, therefore, their age of retirement also continues to be 54 years. They are posted against the post manned by Wg Cdrs and only in order to motivate these persons they are made Gp

Capt (TS), but they are basically Wg Cdrs and the age of Wg Cdrs is 54 years. Learned counsel for the respondent in support of his contention invited our attention to the decision given by Hon'ble Supreme Court in the case of ***Lt.Gen. R.K. Anand Vs. Union aof India & Anr. (AIR 1992 SC 763)***.

18. We have bestowed our best of the consideration on rival submissions of the parties and perused the record.
19. We quite appreciate the laudable purpose of the respondent of creating a time scale post of Gp Capt. on completion of 26 years of service. This was done on the basis of the AV Singh Committee report which was appointed to rationalise the service conditions. It is true that earlier there was a time scale for Wg Cdr. also and they used to retire at the age of 54. The learned counsel for the respondent tried to justify this distinction on the basis that Gp Captain (TS) belong to original cadre of Wg Cdr and therefore, they have to retire at the of 54 meant for Wg Cdr and they are also posted in the station which is manned by Wing Cdr.

This is no justification. The very fact that Gp. Capt(TS) wears the same rank, gets the same salary, gets the same grade pay and posting or adjusting these Gp Capt (TS) against Wg Cdr post is all administrative matter of the respondent. But what is the rationale on the basis of which these different age of retirement has been prescribed? The only difference between the two is that a person who is meritorious becomes eligible for consideration for the post of the Gp Capt with the lesser period of service than the person who is selected against a time scale i.e. after completion of 26 years. Gp Capt for the timescale is eligible for promotion in case he completes 26 years of service for consideration of Gp Captain(TS). A person who is meritorious will become earlier on completion of minimum service for consideration for promotion to the post of Gp Captain whereby a person in time scale he need to have minimum 26 years of service. Once incumbent puts 26 years of service he is given benefit of timescale being found suitable on criteria laid down for that. A person

who is meritorious become selected earlier and gets a march over a person who is selected in time scale. Therefore, his future prospects grow further, whereas a person in time scale has to wait for 26 years in service when he is not found suitable on the basis of selection. Therefore, a person who gets the rank in the time scale no doubt is not meritorious, because he could not make in merit but he is serving in Indian Air Force for more than 26 years of service and as laudable purpose of respondent in their reply is, that in order to avoid the stagnation and to give proper incentive to the young officers their avenue for promotion has been opened up.

20. On the one hand they have granted them a benefit for serving Indian Air Force for more than 26 years and on the other hand they want to deprive them by retiring them at the age of 54 years. Their appears to be no rational basis in this. When both the persons wear the same rank, draw the same salary and they get the same grade pay and then to say that one Gp Capt (TS)

will retire at the age of 54 years and the other Gp Capt (Select) at the age of 57 years. This distinction which is sought to be made has no rational basis whatsoever. It is true that Government can have mini and micro classification but there has to be some rational basis for certain object which is sought to be achieved. In this case all rationale which has been given is this only that since the Gp. Captain (TS) are posted against the post of Wg Cdr and age of retirement of Wg Cdr is 54 years, therefore, they should be retired at 54 years is no rationale. Once a person who has been promoted from Wg Cdr to Gp Captain, he wears his uniform as Gp Captain and he draws same salary of Gp. Capt he gets same Grade Pay of Gp. Capt., he performs same duties of Gp Capt as others Gp Capt performs except the flying branch, then to make a distinction that he should retire at the of 54years because the post against which he has been appointed is that of a Wg Cdr, therefore, he will still be treated as Wg Cdr for the purpose of superannuation is no rationale.

21. We have been informed that earlier as Lt.Col. (TS) is concerned, they used to retire at age of 53 and Lt.Col. (select) used to retire at 54. That distinction has been now done away subsequent on recommendation of the AV Singh Committee.
22. In this connection our attention was invited to decision of the Supreme Court in the case of ***E.P. Royappa Vs. State of Tamil Nadu & Anr. (Supra)***. In that their Lordships in para 85 observed that which reads :

Article 16 embodies the fundamental guarantee that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Though enacted as a distinct and independent fundamental right because of its great importance as a principle ensuring equality of opportunity in public employment which is so vital to the building up of the new classless egalitarian society envisaged in the Constitution, Article 16 is only an instance of the application of the concept of equality enshrined in Article 14. In other words, Article 14 is the genus while Article 16 is a species. Article 16 gives effect to the doctrine of equality in all matters relating to public employment. The basic principle which, therefore, informs both Article 14 & 16 is equality and inhibition against discrimination."

23. Similarly, in the decision given by ***the Hon'ble Supreme Court of India in the case of Ajay Hasia & Ors. Vs. Khalid Mujib Sehravardi & Ors [(1981) 1 SCC 722]***, it was pointed out that the classification should be founded on an intelligible differentia and

that differentia has a rational relation to the object sought to be achieved by the impugned legislative or executive action. It was also observed that Article 14 has highly activist magnitude and it embodies a guarantee against arbitrariness.

24. Similarly, our attention was invited in the case of ***Union of India & Ors. Vs. Nitdip Textile Processors pvt. Ltd. & Anr [Supra]***. In para 49 it was observed that *"The tests adopted to determine whether a classification is reasonable or not are, that the classification must be founded on an intelligible differentia which distinguishes person or things that are grouped together from others left out of the groups and that the differentia must have a rational relation to the object sought to be achieved by Statute in question"*
25. In this connection our attention was also invited to a decision of Supreme Court in the case of ***Central Inland Water Transport Corpn Ltd. Vs. Vs. Brojo Nath***

Ganguly & Anr. (AIR 1986 SC 1571). There also the similar principle was reiterated.

26. Our attention was also invited to decision of Hon'ble Supreme Court in the case of **Miss Raj Soni Vs. Air Officer Incharge (Supra)**. In this case normal age of retirement of an employee of an aided school prescribed under s. 208 of the Delhi Education Code, 1965 was 60 years and it further prohibited the administrator from varying the conditions of service of an employee of an existing school at the commencement of that Act to his disadvantage. While fixing the retirement age of employees of recognised private schools at 58 years sub-rule (1) of rule 110 of the Delhi Education Rules, 1973 protected the entitlement of existing employees to higher age of retirement. Petitioner who had joined service before the coming into force of the Act, assailed her retirement on attaining the age of 58 years on the ground that under s. 8 of the Act read with rule 110 of the Rules

she had a statutory right to continue upto the age of 60 years in terms of s. 208 of the Code and that the management had acted arbitrarily and discriminately in depriving her of two years of service and consequential benefits and their lordships held that she is entitled to continue till the age of 60 years.

27. Our attention was also invited to the decision of the Hon'ble Supreme Court in the case of ***M.G.Pandke and Ors Vs. Municipal Council, Hinganghat (AIR 1993 SC 142)***. In this case also question was that teachers working in Municipal School of Vidharba division of Maharashtra should retire at the age of 60 or 58 years and their Lordships after considering the matter came to the conclusion that all these schools which are working under the various municipal council in Vidharbha division are identically placed, their service conditions is governed by the Code as amended from time to time and the age of superannuation has been reduced from 60 to 58 years by some Municipal Councils by framing the bye-laws and it was held that in municipal council where there are no

such bye-Laws the age of superannuation continues to be 60 years, hence in this case the incumbent was allowed to continue upto 60 years.

28. As against this learned counsel for the respondent Mr. Balasubramaniam has invited our attention to the decision given by the Hon'ble Supreme Court of India in the case of ***Lt.Gen R.K.Anand Vs. Union of India (Supra)***. Here the question was petitioner was Lt.Gen and sought to be retired on attaining the age of 57 years. He challenged this by filing a petition in the High Court that by instructions contained in the letter 9th May, 1985 he could not be retired before he attained the age of 58 years. The High Court took the view that the letter of 9th May, 1985 did not hold the field and subsequent letter of 9th September, 1986 was the one which governed the retirement of the appellant. In that a writ petition was dismissed. Aggrieved against that, the matter was taken up in the Hon'ble Supreme Court by the petitioner. It was pointed out that a letter of 9th May, 1985 prescribes the ages of retirement for officers belonging to Armoured

Corps, Infantry, Artillery, Engineers and Signal Corps. The age of retirement for the Lt. General is mentioned as 58 years. Since the appellant belongs to the Infantry he was entitled to continue in service upto 58 years under the instructions contained in this letter. This letter was issued with the concurrence of the Ministry of Defence (Finance) and was to come into force from the date of issue. This letter further directed that the Army Rule 16A should be revised in due course, but factually the Army Rule 16A never underwent a revision as envisaged by this letter. By this letter of 9th September, 1986, a distinction was made that an officer on promotion to the post of Major General and Lt. Gen. to be bifurcated in 'Command and Staff Stream and 'Staff only'. It is contemplated that those who are appointed Lt.Gen. in the 'Staff only' stream are expected to superannuate one year earlier than officer in the 'Command and Staff Stream'. That is the person who has been selected in 'Command and Staff Stream' will retire at the age of 58 years and those who have selected against 'Staff only' stream only will retire at 57 years.

Their lordships affirmed the two age and dismissed the petition and petitioner retired at the age of 57 years. It is true that this judgement made a distinction on the basis of a 'Command and Staff stream' and 'Staff stream' only and different dates of retirement was prescribed. With great respect, this issue does not survive now. There is no distinction now in the age of superannuation for persons who have become Lt.Gen. on the basis of the 'Command and Staff Stream' and 'Staff Stream only'. This distinction has been obliterated and now both the Lt.Gen. retire at the age of 60 years irrespective of the fact that they have been selected through different streams. Society is advancing and such kind of artificial distinction are now slowly and slowly are going in disuse. This is only peculiar in the case of Air Force that two age of retirement have been prescribed for the post of Group Captain. Whereas in Army also there is no such distinction.

29. We asked learned counsel for the respondent repeatedly to tell us that what is the rationale for making this

distinction when both the officers, one selected by 'select' and other by 'time scale' they wear same uniform, they wear same rank, they get same salary and they get same grade pay and discharge identical duties (except flying branch) then why this distinction is sought to be made from their earlier birth mark. There is no rationale which has been brought up either in reply or by the learned counsel for the respondent. The only argument was that these are basically Wg Cdr and they continue to be wing commanders. Once they have been promoted as a Gp. Captain (TS) they cease to be Wg Cdr, it is there administrative arrangement that out of these Wg Cdrs, some posts are upgraded in order to provide salary to these persons of Gp. Cap. Once they are drawing a salary of Gp. Capt and automatically post of Wg Cdr stand upgraded otherwise no salary of the Gp Capt will be given unless post of the Wg Cdr to which he is posted is upgraded.

30. Therefore, we are of the considerate view that this distinction which is sought to be made has no legs to

stand. Consequently, we allow this petition and set aside the notification dated 12.06.2009 to the extent which lays down the ages of retirement for the Gp Capt(TS) at the age of 54 years and direct that all the persons who are in the rank of Gp Capt(TS) will be entitled to continue upto the age of 57 years. The order of the petitioner by which he has been sought to be retired at the age of 54 years dated 5.12.2008 is quashed and petitioner is entitled to all benefits upto the age of 57 years. His pension and other emoluments should be worked out and he should be also entitled to arrears of the salary till he attains the age of 57 years.

31. All other petitions are allowed for reasons mention above.

No order as to costs.

[Justice A.K. Mathur]
Chairperson

[Lt. Genl. ML Naidu]
Member (A)

New Delhi
2nd May, 2013