A

COL. AVTAR SINGH SEKHON

v.

UNION OF INDIA

July 31, 1980.

B

[V. R. KRISHNA IYER AND O. CHINNAPPA REDDY, JJ.]

Review—When the Court would review its earlier judgment.

Apprehending that the Government was considering a change of policy framed in 1964 for choosing an officer to become brigadier in charge of military farms the petitioner moved the High Court for the issue of a writ. C On directions from the High Court to the Defence Department to select the best man for the post the Department reported that the petitioner and respondent were equal in merit, but since the respondent in the review petition was senior as colonel, he be chosen for the post. After considering the legal import of the 1964 policy the High Court allowed the petitioner to become a brigadier. The respondent's petition for special leave was granted by this Court. D The Central Government was given one month's time to evolve its policy, if necessary. That not having been done the respondent moved this Court again as to the non-compliance and for consequential orders. On May 9, 1980 the Court passed orders that the respondent be appointed as brigadier. The petitioner sought review of that order.

HELD: A review is not a routine procedure. An earlier order cannot E be reviewed unless the Court is satisfied that material error manifest on the face of the order undermines its soundness or results in miscarriage of justice. A review of a judgment is a serious step and resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. In the instant case the relief of review is not justified. [173G-H]

F *Chandra Kanta* v. *Sheikh Habib* [1975] 3 SCR 933 at 933-34, followed.

From the affidavits filed by the Government in the Court on May 9, 1980 it is obvious that the Government had decided on abandoning the 1964 policy and was actually pursuing steps to fashion a new policy. Therefore, no rights on the old basis, if any, can enure to the benefit of the petitioner especially because he relied on his third rank in a selection for one vacancy made in 1971. That apart, a selection of 1979 turned out in favour of the G respondent. The petitioner is postponed but by a few months and the respondent has been far senior as colonel and will retire in August, 1980. The conspectus of circumstances hardly persuades the Court that there is injustice in the order of May 7th or May 9th. [173D-E]

CIVIL APPELLATE JURISDICTION: Review Petition No. 104 of 1980.

H Review Petition against the Judgment and Order of this Hon'ble Court dated 7-5-1980 and 9-5-1980 in CMP. No. 1219/80.

Kapil Sibal and *R. S. Sodhi* for the Petitioner.

R.K. Garg and *P.C. Bhartari* for Respondent No. 3. A

The Order of the Court was delivered by

KRISHNA IYER, J.—A simple petition to review an earlier judgment of this bench has, because of the intervening summer vacation, passed through vicissitudes, gathered episodes and been blown up into an exciting chronicle of unsavoury events, injecting more B passion than reason, more heat than light, into the forensic proceedings. We kept completely clear of the unhappy imputations and confined counsel to the merits of the review proceeding before us. 'Justice discards party, friendship, and kindred and is therefore represented as blind'. This objectivity generated clarity and brevity, thanks, of course, to cooperation by counsel on both sides. C

The facts are few although the fight is furious and the parties are army officers. It is a pity that careerism makes camaraderie a casualty in a profession where self-sacrifice for a higher cause is the dedication. Without moralising, we will state the grievance of the petitioner and examine whether our earlier order deserves reconsideration or reversal. D Judges have a vested interest not in their judgments but in the justice of the cause and where the former is in error must unhesitatingly suffer surgery so that no curial wrong is done and right, to the best of our lights, is done.

Two colonels in the army have one post of brigadier to which E either may aspire and become Director of Military Farms. In this musical chair scenario the (review) petitioner apprehending that the Central Government was considering a change of policy departing from the 1964 policy, in choosing the officer to become brigadier in charge of the military farms, moved the High Court for a writ to issue to Government against any such new policy. The High Court, before F it finally disposed of the case, had directed the Defence Department to select the best colonel to be promoted as brigadier and Farm Director. The selection so made was to be without prejudice to the result of the writ petition but it is significant that the report made was that both the contesting colonels were equal in merit (to run cattle farms?) but the respondent (in the review petition) being senior as G colonel may be chosen for the post. Merit being equal, seniority tilts the scales—fair enough. Eventually, the High Court considered the legal import of the 1964 policy and allowed the writ petition which meant that the (review) petitioner would become the brigadier. The respondent colonel rushed to this court for special leave to appeal which was granted, and, after hearing both sides and the learned H Attorney General for the Central Government, this court passed a final order. We see no reason, whatever to depart from that judgment

A and no basic flaw therein has been pointed out either. It was plainly laid down that no finality nor infallibility attached to the '1964 policy' and the Central Government was free to revise or reverse that policy 'provided it acts justly and fairly'. A month's time to evolve a new policy, if felt necessary, was granted to Government and the learned Attorney General agreed to abide by this direction.

B

Three factors need more than passing notice. The Defence Ministry — the file had been shown to us at the hearing of the appeal and there is material in the pleading also — has been considering revision of the 1964 policy and the court has upheld its full freedom to do so. Secondly, the post of brigadier fell vacant in 1979 and, on C the direction of the High Court, an evaluation of the claims of both was made by the Selection Panel on an updated basis. In this process, both were adjudged equal and the senior (the respondent in the review petition) was recommended for appointment. Thus, it is obvious that had the Defence Ministry been permitted to choose, the respondent would have enjoyed the post. There is nothing outrageous in picking D the senior when both are otherwise equal. There is a human side to it also. The senior was to retire in a few months and the other hopefully would have his innings.

The third circumstance which should not be overlooked is that this court did give the go-by to the High Court's finding :

E

> "We make it further clear that the Central Government will be free to act subject to the directions we have given above and untrammelled by the reasoning or the direction given by the High Court."

Indeed, we had, in the judgment, emphatically upheld the Central Government's plenary power to formulate or modify military policy. F Wars are won or lost not through writs of courts but by the best strategy. But even amidst the clash of arms the laws shall not be silent, so much so, the constitutional mandate not to act arbitrarily was binding on the Defence Ministry.

The selection on which the review petitioner stakes his claim is G of 1971 vintage and the vacancy to be filled was of the year 1979. The respondent, therefore, contested the petitioner's 1971 credentials as obsolete and even obscurantist. We need not re-open that issue except to state that in the final order, passed after hearing both sides, the inviolability of the 1964 policy had been nailed. A closer reading of the 1964 policy statement reveals under it seniority for an earlier H promotee is conferred in the substantive rank provided he has been earlier included in the approved list. Such a situation has not arisen here at all. Be that as it may, the final direction of the court appeal

did permit the Central Government to evolve its policy within one month. This not having been done, the respondent drew the attention of the court to the non-compliance and for consequential orders. At the hearing of that petition (the so-called contempt petition) the respondent through Shri R. K. Garg and the Central Government through the learned Attorney General were heard. Shri Kapil for the petitioner (review) intervened and was heard. But we must fairly state that his client had not been given formal notice and perhaps he had a grievance of not having been heard adequately. We cannot fault him for filing a review petition but hasten to clarify that we wholly desist from making any observations on the happenings set out in the respondent's papers put into court. Nor did we permit Shri Garg to refer to those matters since they were, in our view, extraneous to the merits of the review petition and related to another proceeding pending before another bench. We must record that Shri Kapil has with youthful vigour and clarity of advocacy presented his case fairly. The gravamen of his grievance is merely that he should have been heard if a direction to his prejudice was to be made. We are mindful of the force in this plea and cannot dismiss it merely because the sands of time are running out against the respondent whose approaching retirement will make his legal success, if any, a phyrrhic victory and, worse a tragic irony. Of course, that, by the way, is the life-style of most litigative triumphs.

Shri Garg, in his fighting submissions, complained how his client had been baulked of the fruits of success by dubious proceedings, but, while we are unconcerned about those anecdotes, we do consider that there is justice in his plea that he has been chosen by the panel in 1979, that a bare selection (not actual promotion) of 1971 on which the petitioner relies, is too stale to be relevant, that the Central Government itself had filed an affidavit in this court stating that they had appointed his client and that neither law nor justice supported any interference with this court's direction of 7-5-1980 to promote the respondent as Brigadier.

Let us notice the substance of this Court's orders dated 7th and 9th May, 1980 which are now sought to be reviewed. On May 7, 1980, the following direction was given following on the non-compliance by the Central Government with the earlier judgment:

> "This Court had given a direction that the policy of the Defence Ministry may be finalised within one month from the date of the order. That period has expired on 26th April 1980. Nevertheless, no policy decision has yet been taken nor even has an application been made for extension of time from this Court. We consider that this conduct is far from satisfactory.

A However, there are two courses open, out of which one must be adopted in the course of couple of days. The Respondent may appoint the petitioner, Director, Military Farm (Brigadier) until he retires, which event, we are told, happens within about four months. Alternatively, the Union of India in the Defence Ministry will take its policy decision within two days and report B to this Court about it so that further directions may be issued on 9-5-1980 regarding further implementation of the policy consistent with the rights of the petitioner. Post on 9-5-1980."

This order of 7th May, in sequence and consequence, flows out of the judgment of March 26, 1980 made after *all* parties were fully C heard. Two notable circumstances in that order, as earlier highlighted, are these. Firstly, Government had freedom to formulate a new policy, but it had to be done within one month as accepted by the Attorney General. Secondly, Government was freed from the High Court's insistence on the 1964 statement. If this bondage was not broken, this court could not have directed the Defence Ministry to D make any new policy it thought fit. A third fact, undisputed, also emerged from the case, viz., that in 1979 on the High Court's direction fresh evaluation of promotional merit gave the respondent (review) an edge over the petitioner on the score of seniority — not, surely, an extraneous factor. Necessarily, therefore, this Court in its May 7th order gave effect to the earlier judgment virtually with the consent of E the Central Government. This is made more manifest in para 5 of the Government's affidavit put in on May 9, 1980. Paragraphs 4 and 5 of that affidivit merit excerption :

"I state that the Government have taken steps for and are in the process of finalising a policy applicable to the officer cadre F in the Army in all the Arms (Infantry, Artillery, Armoured Corps) and Services (Army Supply Corps, Army Ordnance Service etc. including the Department of Military farms). The chief of the Army Staff has already appointed a High Power study Team comprising of Senior Army Officers and headed by an Army Commander to study all aspects of selection and other career G management procedures now in vogue in the Army including promotion procedures. The Study Team has already made considerable progress in their deliberations. After the Study Team submits its Report, the matter will have to be considered by the Army Commanders and later examined by the Army Headquarters and the Government. The above process is likely H to take some more time. It will not be appropriate to evolve a separate policy for a small Directorate like the Directorate of Military Farms alone. The entire Officer Cadre of the Army in

the Army like Infantry, Artillery, Armoured Corps and Services like Army Supply Corps, Army Ordnance Service etc. will have to be covered by one uniform policy as is existing at present. A

In the circumstances and in compliance with this Hon'ble Court's directions/orders dated 26-3-1980 and 7-5-1980, the Government are willing to abide by this Hon'ble Court's directions given on 7-5-1980. Government, however, prays that this Hon'ble Court may be pleased to direct that the promotion of the petitioner to the rank of Brigadier will be without prejudice to the policy which may ultimately be decided by the Government and subject further to the condition that if under the policy which may be evolved, the petitioner is not eligible for promotion to the rank of Brigadier, he would have no right to continue in the said rank." B C

It is obvious from this affidavit that Government had decided on abandoning the 1964 policy and was actively pursuing steps to fashion a new policy. So no rights on the old basis, if any, (though we see none) can enure to the benefit of the petitioner especially because he relies on his 3rd rank in a selection for one vacancy made in 1971. That apart, a selection of 1979 turned out in favour of the respondent. And, to come to think of it all, the petitioner is postponed but by a few months and the respondent has been far senior as colonel and will retire in August, 1980. The conspectus of circumstances hardly persuades us that there is injustice in the order of May 7th or May 9th. D E

We have sedulously followed the lucid submissions of Shri Kapil for review of the earlier direction and are clear in our conscience that neither law nor justice has suffered on account of the impugned orders. F

A review is not a routine procedure. Here we resolved to hear Shri Kapil at length to remove any feeling that the party has been hurt without being heard. But we cannot review our earlier order unless satisfied that material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice. In *Sow Chandra Kanta and Anr.* v. *Sheik Habib*(1) this Court observed: G

"A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility.....The present stage is not a virgin ground but review of an earlier order which has the normal feature of finality." H

(1) [1975] 3 S.C.R. 933 at 933-34.

A By this test and even after re-reading the 1964 policy statement for *prima facie* satisfying ourselves about vesting of valuable rights we are not satisfied that the relief of review is justified. The basics of this case are the choice of a brigadier is out of two colonels, the petitioner and the respondent. They are of equal merit as assessed in 1979. The latter is far ahead in seniority and the Central B Government has agreed to appoint him as brigadier. He has a period of a month or so to go for retirement when the vacancy will be filled in, probably by the petitioner. The claim of the petitioner is based largely on the 1964 policy statement which the Central Government has decided to give up. Moreover, the claim itself is based upon an ancient selection made a decade ago when the vacancy C was only one and the petitioner was 3rd in rank. Moreover, whether the 1964 policy statement confers a right merely by inclusion in the approved list where no appointment has taken place as brigadier and the question of substantive rank has not arisen, is, to say the least, moot.

D

These are sufficient for us to repel the relief of review. Of course, the petitioner has effectively postponed the appointment of the respondent by getting a stay order. We make no comments whatever on the chain of events but permit ourselves the observation that the implementation of the final order which has been passed by this Court E has been further delayed by the stay thereof by a learned single judge of this Court during the vacation; and so, we mention this only to justify our imperative direction that no more delay shall take place and the Central Government shall put the respondent in his position as Brigadier in charge of the Military Farms by tomorrow. Law is highly allergic to procrastination. We refuse the review, but in the F circumstances without costs and hope that the chapter of unfortunate events referred to in the affidavits will be treated as closed in a spirit of mutual goodwill. It has been brought to our notice that there is a direction by the vacation judge that the extra salary that the respondent may be entitled to in the event of success should be deposited into court by the Central Government and that has been G done. The respondent will draw that sum from court. But there will be no direction that the petitioner should refund the extra salary, if any, drawn by him because, after all, he must have functioned pending orders of this Court, as Director of Military Farms and so we do not think it just to make any order for refund against the H petitioner.

P.B.R. *Review petition dismissed.*