

(1999) 11 GAU CK 0021

Gauhati High Court (Kohima Bench)

Case No: Civil Rule No. 15 (K) of 1998

V.K.Bedi

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision: Nov. 5, 1999**Citation:** (1999) 3 GLJ 609**Hon'ble Judges:** H.K.Sema, J**Bench:** Single Bench**Advocate:** B.N.Sharma, K.Meruno, Apok Pongener , Advocates appearing for Parties

Judgement

1. Petitioner was commissioned on 14.6.69 as a Short Service Commission Officer and inducted into the Punjab Regiment. He was granted permanent commission on merit and his seniority was fixed on 12.8.70. Petitioner by now has completed about 28 years of commission service. He is holding the rank of Colonel.

2. In 1991 92 petitioner was posted as Colonel at 28th Battalion of Punjab Regiment while he was communicated with the adverse remark in his ACR for the period from 1st Sept. 91 to 31st August 1992 by a confidential letter dated 29th Sept. 1992. Material portion of adverse remarks runs.

◆A smart and impressive officer with a forceful personality who makes a powerful initial impact. A bit of a gogetter who goes hammer and tongs to achieve results. His initial performance during Op Bajrang and Rhino was impressive but has since leveled out. The shocking incident in his battalion dealing with the murder of Maj Gayakwad has dampened his enthusiasm. Greater tenacity was expected of him to bring the battalion into shape after this traumatic event in the battalion. The SOP and adm. as well as command techniques still have considerable scope for improvement in his Unit.◆ (emphasis supplied)

3. In September, 1996 No. 2 Selection Board considered the batch of 1970 officers for promotion to the rank of Brigadier. But his case was not approved for promotion on account of adverse remark recorded against him for the year 1991/92 by the then

Major General HM Khanna (now Lt General) respondent No. 3 while he was commanding 2 Mountain Division. His nonstatutory complaint has been rejected by the Military Secretary dated 21st March 1994 as it lacks substance. His statutory complaint filed before the competent authority on 20.3.97 has also been rejected by letter dated 2nd July" 97 issued by the Under Secretary a to the Govt of India, Ministry of Defence. Hence the present petition praying inter alia for quashing the order dated 21st March 1994 rejecting the nonstatutory complaint filed by the petitioner and another impugned order dated 22nd July 1997 rejecting the statutory complaint of the petitioner.

4.1 have heard Mr. BN Sarma, teamed counsel for the petitioner as well as Mr. K. Meruno, learned Senior Central Govt. Standing Counsel for the respondents at length.

5. Inter alia following contentions have been raised by Mr. BN Sarma:

(a) The ACR of the petitioner for the period 199091 carried a box grading of out of maximum 9 points and the petitioner earned exemplary performance both on account of the Battalion as well as command capabilities.

(b) The adverse remarks in the ACR for the period 199192 was the result of the refusal on the part of the petitioner to submit to the coercive pressure of the then Major General HM Khanna, the Reviewing Officer, to punish a noncommissioned officer of the Battalion on the allegation of which the petitioner was not convinced. This allegation specifically averred in paragraph 3 of the petition.

(c) That the Battalion of the petitioner was inspected by Brigadier CS Brar Commander 181 Mountain Brigade for the year 199091 and the Unit was declared fit for war. The annual inspection was also signed by the Major General HM Khanna, the then General Officer Commanding, 2 Mountain Division and graded the petitioner's Battalion as fit for war and recorded the satisfactory administration of the Unit by its inspection report signed on 12.9.92.

(d) That adverse remarks recorded by 23 Brigadier CS Brar, Commander 181 Mountain Brigade and Major HM Khanna the then General Officer Commanding 2 Mountain Division as Reviewing Officer is belied by the box grading of 8 which means above average.

(e) The adverse remark is not substantiated by Annual Inspection Report and by figurative assessment.

6. These are sums and substances of the contentions raised by the petitioner which I am of the view may not be necessary to consider all these contentions at this stage for the reason that I shall be peeling presently herein below.

7. Petitioner has made a specific, allegation in paragraph 8 of the petition that the adverse remarks for the period 199192 were the result of the refusal on the part of

the petitioner to submit to the coercive pressure made by the then Major General HM Khanna, the Reviewing Officer to punish a noncommissioned officer of the Battalion the allegation of which the petitioner was not convinced.

8. Specific allegation has also been made in paragraph 18 of the writ petition that in a statutory complaint dated 20th March 97 the petitioner has alleged that nonstatutory complaint before the competent authority for setting aside the Annual Confidential Report of the petitioner for the year 1991,92 containing adverse remarks which was referred to Complaints Advisory Board of the Army Headquarter (CAB) has been rejected by the same Board because of the presence of Major General HM Khanna who was then holding the post of Additional Military Secretary (A) Military Branch at Army Headquarter which was part of the function of; the CAB. It is specifically stated that it is because of the presence of Major General HM Khanna (who was a Reviewing Officer in the adverse remarks of the petitioner for the period 199192), in the Military Secretary Branch at Army HQ exerted influence on the CAB when the nonstatutory complaint against the adverse remarks of 199192 was considered.

This is an allegation of bias.

9. Major General HM Khanna (now Lt General) has been impleaded as respondent No. 3 in this writ petition. He has filed counter. The specific allegation made against him in paragraph 8 of the writ petition as referred to above has been answered in paragraph 6 of his counter. Respondent No. 3 denied allegation made against him in the writ petition as false and baseless. However, this allegation has far reaching consequences in disposal of nonstatutory complaint made by the petitioner.

10. The allegation made in paragraph 18 of the petition that a nonstatutory complaint was considered and rejected by the CAB of the Army HQ because of the presence of Major General HM Khanna in the Military Secretary Branch at Army HQ and exerted influence on the CAB when the nonstatutory complaint against the adverse remarks for the period 199192 was considered) has been answered in para 14 of the counter.

11. Paragraph 14 of the counter is brief and it is extracted :

That with regards to the statement as contained in para 18 of the writ petition, the deponent denies the same and states that the petitioner's contention is distorted and incorrect. The deponent further begs to state that the Complaints Advisory Board (CAB) is a separate body functioning directly under the Chief of Army Staff (CO AS). As Additional Military, Secretary (A), the deponent had no connection with or control over the functioning of the CAB. Therefore, no influence, whatsoever, was exerted by the deponent upon the CAB as alleged by the petitioner.◆ (emphasis supplied).

12. A bare perusal of the statement made in paragraph 14 of the counter it clearly appears that the respondent No. 3 admitted that he was holding the post of Additional Military Secretary (A) at the relevant time when nonstatutory complaint filed by the petitioner has been rejected by a Military Secretary's order dated 21st March 1994. In fact from the body of the order itself speaks that the letter dated 21st March 1994 has been issued by the Military Branch. Therefore, respondent No. 3 cannot plea ignorance of his participation as Additional Military Secretary of the Army Headquarter in the consideration and rejection of the nonstatutory complaint filed by the petitioner. In fact, the very presence of the respondent No. 3 as Additional Military Secretary of the Army Headquarter has itself created a likelihood of bias. There is no denying the fact that the nonstatutory complaint filed by the petitioner which was referred to CAB was considered and rejected while the 3rd respondent was holding the post of Additional Military Secretary of the Army Headquarter. The order dated 21st March 1994 rejecting the nonstatutory complaint has been issued by Army Headquarter Military Secretary Branch. Therefore, the 3rd respondent being Additional Military Secretary of the Army HQ is presumed to have participated in the consideration and the rejection of the nonstatutory complaint filed by the petitioner, in the face of the serious allegation against the respondent No. 3 in paragraph 8 of the petition that the adverse remarks relating to 1991/92 in the ACR of the petitioner were the result of the refusal on the part of the petitioner to submit for the coercive pressure of the then Major General HM Khanna, the Reviewing Officer, it was not fair on the part of the 3rd respondent to have participated and rejected the nonstatutory complaint filed by the petitioner when he was holding the post of Additional Military Secretary of the Army Headquarter. This has created a likelihood of bias.

13. In *Ashok Kurnar Yadav & others vs. State of Haryana & others*, AIR 1987 SC 454 it has been held by the Apex Court as under:

◆ It is one of the fundamental principles of our jurisprudence that no man can be a judge in his own cause and that if there is a reasonable likelihood of bias it is in accordance with natural justice and common sense that the justice likely to be so biased should be incapacitated from sitting". The question is not whether the judge is actually biased or in fact decides partially, but whether there is a real likelihood of bias. What is objectionable in such a case is not that the decision is actually tainted with bias but that the circumstances are such as to create a reasonable apprehension in the mind of others that there is a likelihood of bias affecting the decision. The basic principle underlying this rule is that justice must not only be done but must also appear to be done, It is also important to note that this rule is confined to cases where judicial power strict sense is exercised, it is appropriately extended to all cases where an independent mind has to be applied to arrive at a fair and just decision between the rival claims of parties. Justice is not the function of the Courts alone; it is also the duty of all those who are expected to decide fairly between contending parties. The strict standards applied to authorities exercising

judicial power are being increasingly applied to administrative bodies, for it is vital to the maintenance of the rule of law in a welfare State where the jurisdiction of administrative bodies is increasing at a rapid pace that the instrumentalities of the State should discharge their function in a fair and just manner. ♦

14. In the nonstatutory complaint dated 21st Nov. 1992 in paragraph 9 (b) of the complaint it is alleged as under:

♦(b) Report by the RO in 199192: The RO Maj Gen HM Khanna, similarly gave me no performance counseling, whatsoever, though he has incorrectly endorsed this action in my ACR. From the ACR, it will be seen that he has initially written "No" in my ACR against verbal counseling, but changed this to "Yes" later. ♦

This would clearly show that even if in nonstatutory complaint allegation has been made against the respondent No. 3 then it was unfair for him to participate in the consideration and rejection of the nonstatutory complaint which contained allegation against him.

15. That the rejection of his own statutory complaint was biased has been pleaded by the petitioner in paragraph 3 of its statutory complaint dated 20th March 1997. This is what the petitioner has stated in paragraph 3 of its statutory complaint:

♦3. My Non Statutory Complaint against that ACR (copy attached) was rejected by the MS Branch on the plea that it lacked substance. In my belief the reason for not getting due justice could also be that the person who was responsible for the aberration of my record of service (viz. the then RO, Maj Gen HM Khanna) was actually the Chairman CAB when the Non Statutory Complaint reached the Army Headquarters. Hence I have all reasons to believe that CAB could have been biased by the Chairman against whose ACR endorsement the complaint was made. Hence I request, plead and pray for equitable justice. ♦

16. One of the cardinal principle of the rule of natural justice is that no man shall be judge of his own cause. There is no doubt in my mind that in view of the allegation made in paragraph 3 of the statutory complaint as referred to above that the respondent No. 3 being Additional Military Secretary of the Army Headquarter participated in considering and rejecting non statutory complaint filed by the petitioner, despite of serious allegation made against him in paragraph 8 of the writ petition, thereby he has become a judge of his own cause rendering the principle of the rule of natural justice nugatory.

17. It is unfortunate that this pitiable prayer has been overlooked by the authority while considering and rejecting the statutory complaint. From the order dated 22nd July 1997 rejecting the statutory complaint filed by the petitioner it clearly appears that the order is cryptic and without the application of mind. It must be taken to be the law that when appeal is presented the appellate authority has coextensive power with the disciplinary authority to reappreciate the materials and the

evidences on record and come to a conclusion of its own irrespective of the findings of the order appealed against. In the instant case, in the face of the statement made in paragraph 3 of the statutory complaint it was open to the respondent No. 1 to have formed its independent opinion and to have passed an appropriate order which is fair and reasonable and not tainted with mala fide or bias. Unfortunately the respondent No. 1 has not discharged its statutory duty justly and reasonably.

18. In view of what has been stated above, the impugned order dated 21st March 1994 rejecting the nonstatutory complaint and the order dated 22nd July '97 rejecting the statutory complaint under the signature of the Under Secretary to the Govt of India, Ministry of Defence are hereby quashed and set aside as being biased and violative of the rule of natural justice. The 2nd respondent, Chief of the Army Staff shall now take the nonstatutory complaint dated 21st November, 1992 filed by the petitioner Col. V.K. Bedi (1C 29399L) to its file and dispose the nonstatutory complaint afresh uninfluenced by any observation made in the impugned order dated 21st March 1994 rejecting the nonstatutory complaint filed by the petitioner. It is made clear that respondent No. 3 Lt General HM Khanna shall not in any way either directly or indirectly interfere with the consideration and the disposal of the nonstatutory complaint filed by the petitioner. Considering the fact that the petitioner's case has been rejected by No. 2 Selection Board in 1996, the respondent No. 2, Chief of Army Staff shall impose of the nonstatutory complaint within a period of 1 (one) month from the date of receipt of this order.

This writ petition is allowed. However without costs.