

(1994) 07 MP CK 0016

Madhya Pradesh High Court (Indore Bench)

Case No: Miscellaneous Petition No. 2157 of 1993

Major General R.S. Taragi, Dy.
Commandant, College of
Combat

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision: July 8, 1994

Acts Referred:

- Constitution of India, 1950 - Article 14, 16

Citation: (1994) 39 MPLJ 986 : (1994) MPLJ 986

Hon'ble Judges: A.R. Tiwari, J

Bench: Single Bench

Advocate: S.N. Saxena, L.N. Kapoor, J.P. Singh and Lalsingh, for the Appellant; B.G. Neema, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

A.R. Tiwari, J.

Considering himself aggrieved by non-selection to the rank of Lieutenant General, the petitioner, a Major General liable to be superannuated on 31-7-1994 has sought expunction of certain portions in his ACRs and reconsideration of his case for promotion by issuance of appropriate writs in this petition presented under Article 226 of the Constitution of India.

Facts are jejune. Commissioned in the Rajput Regiment of the Indian Army on 15th December, 1957, the petitioner by exhibition of special qualities of excellence and efficiency, rose to the rank of Major General in February, 1987. He successfully and satisfactorily handled various appointments as Chief of Staff, General Officer Commanding 26 Infantry Division, Addl. Director General and Joint Director. He passed M.Sc. (Defence Studies) from Madras University in January 1990 in First

Division. He has to his credit distinction of holding important and sensitive appointments. During the period between April, 1988 and March, 1990, he was in command of 26 Infantry Division. His ACR for the period of four months from 29th April 1988 to 30th August 1988 was initiated by Lieutenant General Vijaya Singh, the then General Officer Commanding 16 Corps (since retired) in September, 1988 and was reviewed by Lieutenant General B. C. Nanda, Officer Commanding in Chief, Northern Command (since retired) and by General V. N. Sharma, Chief of Army Staff (CO-AS-since retired). The assessment recorded in paras 15(b) and 18 in this ACR became major destroyer of future prospects. The ACR dated 9-4-1990 (Annexure P/I) caused further deterioration in career graph in that on aspect of "Ability to Inspire Command". The initiating Officer, in cruel conflict with observations contained in para 16, marked 5/9, albeit inflated to 7/9 by the reviewing officer. Non-statutory complaint (Annexure P/6) against ACR of April, '88 to August '88 was partly allowed in that comments noted in para 15(b) were dislodged but seemingly interlinked observations contained in para 18 were left undisturbed on 6-4-1991 (Annexure P/7). Further factual matrix, needing to be noted herein is that instructions for rendering confidential reports are contained in Special Army Order (SAO)10/S/83 (Annexure P/3) and SAO 3/S/89 (Annexure P/4). Acting rank of higher post was denied (Annexure P/5). Procedure for A.C.R. is indicated by annexures P/8 to P/12. The other documents, relied upon, are Annexures P/13 to P/23. The petitioner had three chances to secure promotion through Selection Board. The first chance occurred on 22-7-1990. Adverse position in this was however, anaesthetized as a result of partial success on non-statutory complaint on 6-4-1991. He, therefore, got three chances more on 12-4-1991. Lady luck however, did not smile and on all these occasions, the petitioner heard monosyllabic "no". In this petition, the petitioner hopes to see light at the end of tunnel which provided only tenebrosity.

The Respondents have filed return with Annexure R/I and affidavit of officer-in-charge of the case in oppugnation. The petitioner submitted rejoinder with appendix A/1 to A/7. The respondents then presented para wise comments on 25-4-1994.

I have heard M/s. S. N. Saxena, L. N. Kapoor, J. P. Singh and K. P. Singh learned counsel for the petitioner and permitted. On request petitioner also to put his point of view. In opposition, I have heard Shri B. G. Neema, learned Standing Counsel for the Respondents ably assisted by Col. A. K. Joshi, M. S. Branch New Delhi.

Before going into finer aspect, it is necessary to note that after hearing counsel for the respondents, the petitioner limited this petition only to impugment of ACR of April 1988 to August 1988 and ACR dated 9-4-1990 and gave up the challenge to other uncommunicated ACRs.

It is stated that rating is regulated on nine-points. The initiating officer recorded in ACR of 9-4-1990 5/9 on the topic "Ability to inspire Command" whereas reviewing

officer deemed it fit to opine 7/9 instead. It is said that both authorities had the right to pen their independent assessment. It is also submitted that ACRs of May 1990 to September, 1990, December, 1990 to March, 1991, May 1991 to July, 1991 and July 1991 to July, 1992 contained grading as 9/9, 7/9, 7/9 and 7/9 respectively.

The counsel for the petitioner, becoming cognizance of unharmful grading in four ACRs, noted above, urged that the decision of non-selection suffered vitiation due to

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a) Consideration of para 18 in ACR of April, 1988 to August 1988, and

b) Taking into account rating of 5/9 by initiating officer in ACR of 9-4-1990 and prayed that exclusion of these adverse positions alone can undo the wrong and make "decision making process" of Selection Board free from vice of arbitrariness. It is thus, contended that this part merits to be mortalised.

The counsel for the Respondents on the other hand, dubbed the contention as non-meritorious and detailed that process suffered no dent or vitiation because in ACR of 1990 reviewing officer himself graded 7/9 and in ACR of 1988 Para 18 lost its potency at least to some extent on deletion of Para 15(b). It is further contended that promotion of defence personnel did not depend on "ACRs alone but demanded possession of individual capacity and special qualities." The counsel thus, with admirable vehemence, defended non-selection. Reliance is placed by him on [Shri Parvez Qadir Vs. Union of India \(UOI\)](#), Shri Neema contended that Paras 15(b) and 18 are independent of each other.

The short question as posed before me is thus whether discretion has been properly exercised and whether aforesaid low grading and retention of para 18 are improper and can be said to have vitiated the verdict of non-selection to the rank of Lt. General? The core issue is whether there was "fair" consideration on the fulcrum of "proper" material.

Lord Mansfield in John Wilke's case, (1770)4 Burr 2528 has stated in classic terms that discretion meant sound one governed by law and guided by rules, not by humour. Article 16 of the Constitution of India has mandated "equality of opportunity in matter of public employment" and Apex Court has ruled in [The Manager, Government Branch Press and Another Vs. D.B. Belliappa](#), that this expression did not mean only initial employment but comprehended all matters including promotion as well.

It appears that petitioner is puzzled to no end and finds himself unable to comprehend as to what really went wrong. His emotions on non-promotion are bruised and he maintains that if initiating officer would have correctly accorded 7/9 as was done by reviewing officer, and non-statutory complaint would have been accepted in toto as it ought to have been with direction to obliterate para 18 (Report by superior Reporting officer SRO) as well, he had better chance to secure the rank.

He therefore, prays that this damage ex facie unmerited, needed to be undone. Incidentally, he also felt that ACRs, having potential to perish prospects of selection, ought to be treated as "adverse" and should not be acted upon without opportunity of representation against the same.

Law is luculent. In AIR 1989 SC 1993, Lt. Colonel K. D. Gupta v. Union of India and Ors., it is succinctly laid down that-

"The defence services have their own peculiarities and special requirements. The considerations which apply to other Government Servants in the matter of promotion cannot as a matter of course be applied to defence personnel of the petitioner's category and rank. Requisite experience, consequent exposure and appropriate review are indispensable for according promotion and the petitioner, therefore cannot be given promotions as claimed by him on the basis that his batchmates have earned such promotions. Individual capacity and special qualities on the basis of assessment have to be found but in the case of the petitioner these are not available."

I now proceed to examine the worth of the grievance as presented and projected before me.

It is apt to notice that preamble to the Constitution of India itself promises "equality of opportunity" and "dignity of the individual". It is time to bear in mind that soldier, a great sacrificer for the country, should never be consigned to the state of feeling that he was not fairly treated and that he suffered not because of bad work but because of bad system. The case on hand seems to contain an echo of what Shakespeare's Othello had held -

"But he that filches from me my good name

Robs me of that which not

Enriches him

And makes me poor indeed"

(Othello, Act III, Scene 3).

The petitioner holds that non-selection tarnished his "good name", and feels that he falls on thorns of life and "bleeds". The exercise then is to tell the petitioner that either he is not wronged or, if found wronged to right the matter in an effort to do justice to the individual and assure all defence personnel that Courts are ever watchful, operating on maxim, "ubilius ibi remedium". After all, law is not to stay petrified and must keep its promise to justice. It is wisely said that law and Justice are not distant neighbours.

It is undisputed position that the petitioner was not heard on ACRs, which are alleged to have marred the prospects of selection. The Respondents cosily slip

under the umbrella, deeming it protective, of non-communication on the linchpin that the same were not considered to be adverse. The question that stares in the face is that if average or high average grading like 5/9 is considered inadequate for clearance to high rank like Lt. General, then how can it be construed as less than adverse and in that view how principles of natural justice assurer of fair play in action can be sent on holiday? This question is incidentally posed before me. The importance of ACR is well understood.

In AIR 1969 SC 2218, Baidyanath Mahapatra v. Uate of Orissa and Anr., it is laid down that-

"The purpose of communicating adverse entries to the Government Servant is to inform him regarding his deficiency in work and conduct and to afford him an opportunity to make amend and improvement in his work and further if the entries are not justified the communication affords him an opportunity to make representation."

It is an undisputed fact that ACRs played very significant role before Selection Board. They may mirror individual capacity and portray presence or absence of special qualities needed for promotion.

Testing the facts on the basis of aforesaid position of law and logic, it is found that para 15(b) in ACR of 1988 recommended non-promotion on the obvious basis of assessment recorded in its para 18. The competent authority on non-statutory complaint, permissible under the law, found it fit to expunge para 15(b). Once that was so, it becomes inexplicable as to how and why its foundation, as contained in para 18, was permitted to be retained? In my view, para 18 was closely interlinked with para 15(b). Both can coexist or suffer simultaneous mortality. It was a case of procedural correction. It seems little illogical to kill para 15(b) and still will para 18. Frank Furter J., very fittingly spoke that "He that takes the procedural sword shall perish with the sword."

In my pursuit to justice to the parties, I desired to know from the respondents as to how para 18 was retained when para 15(b) was deemed fit to be demolished and whether such a course did not negate rule of law ? The order (Annexure P/7) threw no light as to why partial relief was considered to be just and adequate. In [Mahabir Prasad Santosh Kumar Vs. State of Uttar Pradesh and Others](#), it was held -

"The practice of the executive authority dismissing statutory appeal against orders which prima facie seriously prejudice the rights of the aggrieved party without giving reasons is a negation of the rule of law."

Before me, all that is submitted is the lone statement that retention of para 18 is sustainable. But how? There is no solution to the conundrum. This does not tear up the tenebrosity. What is the efficacy in permitting consideration for promotion with grading sure to make the consideration illusory, inutile and inefficacious? On my

perusal and assessment, I find that paras 15(b) and 18 could have either co-existed or ceased to exist and it is improper to view such paras in isolation. Para 15(b) seemingly appeared to-be born of para 18. Annexure P/7 is thus, not totally fault free. I leave it to the authorities to consider whether preparation of blue-print of reform within the framework of law is need of the hour.

As regards 5/9 in ACR of 9-4-1990, I find it fit to reproduce para 16 (Annexure P/I) :

"An even tempered and sedate personality, has a quick and perceptive mind. Is resourceful and innovative. Maintains good working relation with higher echelons of civil administration.

Has clear understanding of battle at corps level and clearer grasp over set piece and deliberate (deliberate) operations. Has the perspective and breath of vision to accept higher and greater responsibilities in service.

He commanded his division very well and succeeded in improving standards around."

-X- -X- -X-

Luculently enough, 5/9 is in direct conflict with assessment noted in para 16 and rating of reviewing officer. It clearly suffers from the vice of arbitrariness. Admittedly the petitioner was not heard with regard to this as well.

23-24. In [State of Uttar Pradesh and Others Vs. Maharaja Dharmander Prasad Singh and Others](#), it is held that -

"Judicial review under Article 226 cannot be converted into an appeal. Judicial review is directed not against the decision but is confined to the examination of the decision making process. When the issues raised in judicial review is whether a decision is vitiated by taking into account irrelevant or neglecting to take into account of relevant factors or is so manifestly unreasonable that no reasonable authority, entrusted with the power in question could reasonably have made such a decision, the judicial review of the decision making process includes examinations as a matter of law of the relevance of the factors."

-X- -X- -X-

I am thus, satisfied that the Selection Board was required to consider the case of the petitioner for promotion to the rank of Lt. General by excluding the grading of 5/9 in ACR of 1990 and observations contained in para 18 of ACR of 1988. The act of non-exclusion has thus introduced vitiation.

ACR of July, 1991, to July 1992, graded as 7/9 was not available at the time of selection process held on 25-4-1992. Position of later ACRs is not placed on record.

It may be stated that private interest and public good both have to be kept in focus and served justly but in case of clash, public good has to reign supreme. In Wade's Administrative Law, 6th Ed. it has been succinctly stated -

"The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in" order that it may use them for the public good."

- X - - X - - X -

It needs to be stated that the respondents have not produced any material whatsoever apart from ACRs as noted above in this petition to show that the petitioner lacked individual capacity, or special qualities or particular standard of efficiency. In absence of such a material, it is as discussed above, reasonably believed that the decision of Selection Board held on 25-4-1990 has been prejudicially influenced by excludable material like low grading of 5/9 of the initiating officer in ACR of 1990 and observation in para 18 of ACR of 1988 in the face of expunction para 15(b). This requires reconsideration for the sake of justness and fairness as already noted above.

The Court has to see the justness and reasonableness. Lord Wright pulled the blinkers off our eyes when he once elegantly observed that -

"The truth is that the Court decided the question in accordance with what seems to be just or reasonable in its eyes. The judge finds in himself the criterion of what is reasonable."

- X - - X - - X -

There is no clash as noted above. Vitiating is visible. Once this is so, the Selection Board, a responsible and reasonable body, should consider the question *sine ira et studio*, as directed below so as to incinerate the impression of injustice and to relieve the petitioner, claiming to be wronged from *Taedium Vitae*. The Board should take into account relevant material only and render its independent decision. It may even on exclusion of irrelevant material as pointed out above find it fit to say that petitioner is unfit for the higher rank. But such a view should rest on consideration of relevant and proper material and overall objective assessment. The petitioner ought to know that promotion is not a right but fair and just consideration is of course a valuable right. Writ never runs beyond this right.

Ex consequenti, I hold that decision of Selection Board finding the petitioner unfit for promotion to the rank of Lt. General, on 25-4-1992 deserves to be and is accordingly set aside. This then means that the petitioner acquires one more but last chance for consideration, I therefore, placing reliance on Division Bench order of this Court passed in M. P. No. 1301/93, *Bri. K. K. Sood v. Union of India*, on 13-12-1993 direct the respondents to constitute immediately special Selection Board

to consider and decide the case of the petitioner for promotion well before 31-7-1994 the date for retirement by omitting grading of 5/9 in ACR 1990 in view of opinion of the reviewing officer and by excluding para 18 of ACR of 1988 in view of expunction of para 15(b) by the Competent Authority. To that extent order passed on non-statutory complaint (Annexure P/7) and ACRs of 1988 and 1990 shall be treated as modified.

As the answer became possible on grounds of inconsistency produced by expunction of para 15(b) but retention of para 18, and illogicality pointed by grading of 5/9 being in conflict with para 16 and different grading of 7/9 by the reviewing officer, I have chosen to express no opinion on broader questions as to whether such ACRs should be treated as adverse and whether concerning officer is to be heard in conformity with SAO/Rule/Regulation/ Principles of natural justice. These twin points are thus left open as this petition, fraught with peculiarity of facts permitted its disposal on short point of arbitrariness only;

For the aforesaid reasons, this petition is allowed in part in terms indicated above, particularly para 31, with no orders as to costs.

Security cost shall be refunded to the petitioner after due verification.

Issue WRITS accordingly.