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**(2001) 12 DEL CK 0145**

**Delhi High Court**

**Case No:** C.W. No. 4147 of 1996

K.C. Prasad

APPELLANT

Vs

Union of India and Others

RESPONDENT

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**Date of Decision:** Dec. 20, 2001

**Citation:** (2002) 3 AD 1029

**Hon'ble Judges:** Dalveer Bhandari, J

**Bench:** Single Bench

**Advocate:** G.K. Sharma, for the Appellant; Geeta Luthra, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

Dalveer Bhandari, J.

The petitioner has approached this court with the prayer of fixing his seniority as Naib Subedar with effect from 1st March, 1990 vis-a-vis other JCOs of his batch instead of 1st March, 1992 as it exists at present. It is further prayed that the petitioner be promoted to the rank of Subedar with effect from 1st June, 1993. It is also incorporated in the prayer clause to reinstate the petitioner in service with effect from 31st July, 1996 with all consequential benefits of pay and allowances, seniority, perks and chances of promotion vis-a-vis his batch mates.

2. The petitioner was enrolled in the Army Ordinance Corps on 9th July, 1970. He was promoted as Naik on 1st February, 1981, Havildar on 1st April 1983 and Company Quarter Master Havildar on 30th June, 1988. According to the petitioner, as per his original seniority he was due to be promoted as the Naib Subedar on 1st March, 1990 and Subedar on 1st June, 1993.

3. There has been delay in promotion of the petitioner as Naib Subedar until 1st June, 1994. He was promoted with effect from 1st March, 1992 and lost his seniority by two years. It is also mentioned that the petitioner was admitted to pay and allowances of Naib Subedar only with effect from 12th February, 1994, thereby depriving him of pay and allowances of the rank of Naib Subedar by 3 years, one

month and 12 days. The petitioner filed a statutory complaint on 27.10.1995 which was rejected on 5th August, 1996.

4. The petitioner has approached this court on rejection of his statutory complaint by way of filing this writ petition.

5. The petitioner mentioned that from 1981 to 1993 4 marks (above average) have been awarded out of 4 to the petitioner in the rank of Havaldar except during 1982 by the initiating officer who had the opportunity to observe the performance of the petitioner directly. However, the reviewing officers on four occasions awarded 3 marks out of 4 marks (high average). Since the down-grading of ACR by the reviewing officer is the main grievance of the petitioner, Therefore, I deem it appropriate to reproduce the ACRs from 1981 to 1996 as submitted by the petitioner in the petition.

Year	Initiating Officer		Reviewing Officer	Rank
1981	4	4	Naik	
1982	3	4	-do-	
1983	4	4	Havildar	
1984	4	4	-do-	
1985	4	3	-do-	
1986	4	3	-do-	
1987	4	4	-do-	
1988	4	3	-do-	
1989	4	4	-do-	
1990	2	2	set aside	
1991	4	4	-do-	
1992	4	4	-do-	
1993	4	4	-do-	
1994	7	7	Naib Sub.	
1995	7	7	-do-	
1996	7	7	-do-	

6. The petitioner has leveled allegations against the Reviewing Officers but has chosen not to implead them in this petition. It is the settled position of law that in case the officials against whom allegations have been leveled, if they are not impleaded in the petition, then it would not be proper for the Court to probe against those allegations. In consonance with the principles of natural justice the officials against whom the allegations are leveled, have to be given an opportunity of defending themselves, otherwise the entire exercise would be contrary to the basic principles of natural justice.

7. In [State of Bihar and Another Vs. P.P. Sharma, IAS and Another](#), Their Lordships of the Supreme Court observed:

"It is a settled law that the person against whom mala fides or bias was imputed should be impleaded as a party respondent to the proceedings and given an opportunity to meet those allegations. In his/her absence no enquiry into those allegations would be made. Otherwise it itself is violative of the principles of natural justice as it amounts to condemning a person without an opportunity."

8. Therefore, now the only surviving grievance of the petitioner is regarding his ACR of 1988 where he was given 3 marks out of 4 by the reviewing officer which is considered as high average. It is submitted by the petitioner that he had lost his first chance to get the promotion cadre on account of low grading of 3 marks awarded by Lt. Col. K.C. Aneja who is not a party to this petition. The other grievance of the petitioner has been removed when the representation regarding grading of ACR of 1990 was accepted by the Chief of Army Staff on his statutory complaint filed on 18.8.1992. The respondent on 29.1.1994 set aside the ACR for the year 1990 but the grading in his ACR by the reviewing officer for the year 1988 was not changed.

9. In pursuance to the show cause notice issued by this court, a reply has been filed by the respondents. In the reply it is mentioned that the petitioner initially came up for derailment on promotion grade Havaldar to Naib Subedar commenced with effect from 3rd July 1989 to 26th August, 1989 but he could not be promoted due to ACR criteria laid down in Army Headquarters letter dated 18.12.1985. According to the respondents, the petitioner was lacking three (above average) ACR gradings out of last five reports. The petitioner's case was again reviewed during 1990 but found lacking in ACR criteria. His case was again reviewed and he was provisionally detailed to attend promotion cadre course with effect from 18th February, 1991 to 13th April, 1991 subject to earning appropriate grading in 1990.

10. It is also mentioned in the reply that the petitioner has filed a statutory complaint on 18.8.1992 against his supersession for promotion to the rank of Naib Subedar due to wrong and inappropriate grading in ACRs for the years 1988 and 1990. ACR of 1990 was set aside but ACR of 1988 was kept intact by the order dated 3.1.1994. The petitioner was promoted to the rank of Naib Subedar with effect from 1st January, 1994 in his own turn. The petitioner was granted ante-dates seniority with effect from 1st March, 1992, the date he could have qualified promotion cadre course with effect from 6th January, 1992 to 29th February, 1992 after setting aside the ACR for the year 1990 and taking into account the ACR grading for the year 1991. The petitioner again submitted another statutory complaint on 27th October, 1995 for setting aside the ACR for the year 1988 and consequentially grant of ante-dates seniority to the rank of Naib Subedar with effect from 1st March, 1990 along with his original batch mates after a lapse of six months from his promotion to the rank of Naib Subedar. His statutory complaint was rejected by the order dated 5th August, 1996. Meanwhile, the petitioner retired from service with effect from 1st August, 1996.

11. An additional affidavit has been filed by the respondents. In the affidavit, the facts mentioned in the reply have been reiterated. It is mentioned that the comments of Initiating Officer and Reviewing Officer (for short I.O. & R.O.) were called. The then it, Col. K.C. Aneja, R.O. of 1988 ACR, has stated that the NCO has been graded high average by him on his demonstrated performance. The R.O. has further stated that the allegations leveled by the petitioner are false and baseless. The performance of NCO as COMH was found to be unsatisfactory and necessitating his change on arrival of Hav. SKT GS&C Md. Hasmat Ali. The respondent has examined the petitioner's statutory complaint pertaining to the ACRs for the years 1988 and 1990. It is mentioned in the affidavit that on careful scrutiny of the ACRs of last several years of ACRs it is revealed that no malafides or bias can justifiably be levelled by the petitioner. As his ACR for 1990 was not confirming of his overall ACR profile, Therefore, the same was set aside. The contention of the petitioner that his complaint regarding ACR of 1988 was not considered is incorrect though, inadvertently it is not indicated in the order. The petitioner cannot be permitted to take advantage of this inadvertent lapse of the respondents. On careful scrutiny of the original records it becomes abundantly clear that the petitioner's grievance regarding 1988 ACR was considered by the respondents and thereafter it was rejected. The Reviewing Officer can legitimately differ in his assessment or evaluation with the Initiating Officer otherwise there would not be any necessity of the Presiding Officer. It may be pertinent to mention that on earlier occasions also the petitioner had received similar grading from the Reviewing Officers. Even otherwise also, the scope of the jurisdiction being very limited. I cannot go into the settled position of law as has been reiterated in the case of Amrik Singh v. Union of India and Ors. delivered on November 16, 2000 by their Lordships of the Supreme Court.

12. The learned counsel for the petitioner leveled allegations against the Reviewing Officer without impleading him as party in this petition. According to the settled law, the court cannot probe into the allegations against a person who is not party to the petition according to the settled principles of natural justice.

13. Learned counsel for the petitioner submitted that any entry which may be "above average" or "high average" but if it has the potentiality of prejudicing an officer's prospects, then it must be communicated to the office to make improvement in subsequent years so that when not found if it, as a first case, he may be in a position to make improvements for the second review and final review.

14. Learned counsel for the petitioner heavily relied upon [State of Haryana and others Vs. D.L. Uppal](#), . Their Lordships of the Supreme Court in the said judgment have mentioned that if the graded entry is of going a step down, like following "very good" to "good" it may not ordinarily be an adverse entry since both are a positive grading. All that is required by the authority recording confidential in the situation is to record reasons for such down grading on the personal file of the officer concerned, and inform him of the change in the form of an advice. This is a

salutary proposition. Application of this principle may not make any difference in the facts and circumstances of this case. The petitioner on a number of earlier occasions received similar marks from the Reviewing Officers in his annual confidential reports. In a paramedical structure, officers are promoted on the basis of comparative merit.

15. The learned counsel for the respondents has placed reliance upon a decision of the Supreme Court in *Lt. Col. K.D. Gupta v. Union of India*, AIR 1989 SC 1393 and contended that the defense Services have their own peculiarities and special requirements. The considerations which apply to other Government servants in the matter of recording of ACRs or in the matter of promotion cannot, as a matter of course, be applied to defense Personnel. Requisite experience, consequent exposure and proper review are indispensable for carrying out promotion."

16. The Division Bench of this court in *Lt. Col. Krishan Chand v. Union of India* reported as 1996 V AD (Delhi) 199 observed:

"Selection is based on an overall profile of an officer with special stress on the performance in criteria Command appointment. The aim of the Selection Board is:

(a) To assess all eligible officers of a batch who reckon seniority during on calendar year, and their equivalent seniority in other Arm/Services for promotion to the next rank.

(b) To screen officers of earlier batches who have been placed on Review for promotion to the next rank.

(c) To assess the suitability of officers, who have been approved earlier to the next higher rank whilst in low medical classification, for their physical promotion and recommend restrictions, if any, on their employment in that rank.

(d) To ensure selection through objectivity, impartiality and in the best interest to the service, in accordance with the guidelines laid down by the COAS."

17. I do not find any infirmity in the selection process. This petition being devoid of any merit is accordingly dismissed.