
(2001) 08 DEL CK 0091
In the Delhi High Court
Case No : C.W. No. 2556 of 2001

Air Com. K.P. Sreekant

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 24-08-2001

Acts Referred:

Citation : (2002) 61 DRJ 257

Hon'ble Judges : Dr. M.K. Sharma, J

Bench : Single Bench

Advocate : Mr. Rajiv Shakdhar and Ms. Prasanthi Prasad, for the Appellant; Mr. K.K. Sud, Addl. Solicitor General, Ms. Pinky Anand, Mr. Neeraj Jain and Ms. Rekha Palli, for the Respondent

Final Decision : Dismissed

Judgement

Dr. Mukundakam Sharma, J.—The present writ petition is filed by the petitioner seeking for quashing of the annual report generated by respondent No.4 for the period from 1.10.1999 to 31.9.2000 and also for setting aside the proceedings of the Special Review Board conducted by the respondents for the petitioner for his promotion to the post of Air Vice Marshal and also for quashing the letter dated 20.4.2001 issued by respondents to the petitioner intimating him that consequent upon drop in his performance his clearance for promotion by Promotion 1/2000 was reviewed and on this basis of the review the petitioner did not make the grade for promotion to the acting rank of Air Vice Marshal.

2. The petitioner is a serving Air Commodore in the Indian Air Force. The petitioner was commissioned in the Fighter Stream of the Indian Air Force in the year 1966 and since then the petitioner has more than 34 years of service in the Indian Air Force. While working as aforesaid the petitioner was considered for promotion from the rank of Air commodore the rank of Air Vice Marshal. The Promotion Board considered the case of the petitioner on the basis of his confidential reports and found him suitable for elevation to the acting rank of Air Vice Marshal. Accordingly, the petitioner was empanelled and was placed at serial

No.10 of the panel prepared by the Board for promotion to the rank of acting Air Vice Marshal. The petitioner was informed the said fact by a letter dated 12.6.2000 wherein it was stated that the Promotion Board for Air Vice Marshal has found the petitioner suitable for elevation to the acting rank of Air Vice Marshal subject to availability of vacancies, medical fitness and maintaining continuity of performance. After the said clearance the petitioner was placed at position No.10 in accordance with the seniority in his service.

3. At this stage it is relevant to mention that when an officer is considered for promotion by the Promotion Board the past annual reports of the officer for a period of 5 years are considered. In the case of promotion to the ranks Air Vice Marshal and above the results of the Promotion Board are to be further approved by the Ministry of defense. The aforesaid panel prepared by the Promotion Board is also valid for a period of one year. During the course of validity of the said panel nine officers placed above the petitioner in the panel by virtue of their seniority have already been promoted to the post of acting rank of Air Vice Marshal. During the currency of the aforesaid one year period a further vacancy arose on 31.3.2001. When the said vacancy had arisen the currency of the panel had not expired. But instead of granting promotion to the petitioner to the aforesaid rank the respondents conducted a Special Board on 23.3.2001 on the alleged ground to ascertain whether or not the petitioner has been able to maintain continuity of his performance. It is brought out on record that before the aforesaid date a further confidential report for the period for 11.10.1999 to 30.9.2000 was made available and Therefore, the respondents convened a Review Promotion Board to consider the position concerning continuity of performance of the petitioner.

4. It is alleged in the writ petition by the petitioner that the aforesaid practice followed by the respondents was illegal and without jurisdictional and the same was resorted to only to deny the petitioner his due promotion for which he was even empanelled. It was also contended by the counsel appearing for the petitioner that in the earlier selection he was empanelled and the said panel was admittedly valid for a period of one year and Therefore, since the vacancy had arisen during the currency of the aforesaid one year period, though unforeseen, the same should have been allowed to be filled up by promoting the petitioner who was already empanelled, without holding any review Promotion Board. In support of the aforesaid contention the learned counsel appearing for the petitioner relied upon the decision of this court in S.P. Murgai Vs. Union of India and Others, . It was also submitted by him that the petitioner believes that what was recorded in his subsequent ACR for the period from 1.10.1999 to 31.9.2000 were in the nature of adverse comments and Therefore, without communicating the same, no review Promotion Board could have been convened on the basis thereof and thereby depriving the petitioner from getting his due promotion for which he was already empanelled. He further submitted that even otherwise the impugned action of the respondent by down grading him in the ACR for the subsequent year has led to adverse civil consequences and Therefore, under the

aforesaid circumstances the respondents were mandatorily bound to communicate the comments recorded in his ACR even if it is assumed that the said comments only contained negative traits and not adverse comments. In support of the aforesaid contention the counsel appearing for the petitioner relied upon the decision of the Supreme Court in State of U.P. Vs. Yamuna Shanker Misra and another, and S. Ramachandra Raju Vs. State of Orissa, and particularly the judgment of U.P. Jal Nigam and others Vs. Prabhat Chandra Jain and others, . The counsel for the petitioner also sought to make out a case of malafide. He also drew my attention to the letter dated 12.6.2000 written by the respondents to the petitioner informing him that the Promotion Board No.1 of 2000 had found the petitioner suitable for elevation to the acting rank of Air Vice Marshal subject to availability of vacancy, medical fitness and maintaining continuity of performance. Relying on the same counsel for the petitioner submitted that if there was any fall in the performance of the petitioner it was known to the respondents by the aforesaid date of 12.6.2000 and Therefore it was necessary for the respondents to inform him about the same and instead even on 12.6.2000 the respondent informed the petitioner that his performance was good and Therefore , he has been found suitable for promotion.

5. Mr. K.K. Sud, Additional Solicitor General appearing for the respondent/Union of India and M/s. Pinki Anand as also Ms. Rekha Palli for respondent No.5 submitted that the comments recorded by the respondents in the concerned ACR of the petitioner contained only the negative traits and no adverse comments and Therefore in terms of the relevant circular issued by the Air Force Authority it was not necessary to communicate the said comments recorded in the ACR of the petitioner. It was also submitted that the said comments recorded in the fresh ACR having become available could have been relied upon for the purpose of adjudging whether or not the petitioner still continues to be suitable for promotion as it was a term of empanelment itself. The Additional Solicitor General placed before me the original records including the ACRs of the petitioner recorded by the authorities to substantiate his submission. he also submitted that the members of the defense Force have their own Service Rules and are governed by separate set of service conditions, and that they have their own peculiarity and specialities and accordingly, their service conditions cannot be equated with the civil servants and Therefore, the general law as applicable to the civil servants cannot be made applicable to the army personnel. In support of his contention the learned counsel relied upon the Division Bench decision of this court in Lt. Col. Krishan Chand Vs. Union of India & Others, 1996 (V) AD (Delhi) 199. He also submitted that since it was stipulated in his order of empanelment that the said empanelment is subject to continuity of his performance and since after the ACR written in the year 1999 a fresh ACR became available in early part of 2000 the same was required to be considered to adjudge as to whether or not the petitioner still continues to be fit for promotion and when the same was considered it was found that the petitioner had incurred negative traits in his performance and Therefore, he was down-graded in his performance for which

he became unsuitable for further promotion and accordingly, he was de-empanelled. He submitted that the same Promotion Board which considered the case of the petitioner for promotion and found him suitable for promotion considered his case after receipt of the subsequent ACR and the same Board found him unfit to be promoted and Therefore, the allegation of malafide has no basis at all.

6. In the light of the aforesaid submission I may now proceed to discuss and scrutinise the rival submissions of the counsel appearing for the parties in the light of the facts and records of the case.

7. The Promotion Board NO.1-2000 constituted for making selection and empanelment to the post of Air Vice Marshal found the petitioner suitable for elevation to the acting rank of Air Vice Marshal subject to availability of vacancy, medical fitness and maintaining continuity of performance. The said fact was intimated to the petitioner by the communication dated 12.6.2000. While considering the case of the petitioner by the aforesaid Promotion Board ACRs of previous 5 years up to August, 1999 were considered. The last ACR which was considered during the aforesaid proceedings was of 29.11.1999, where the petitioner's over all assessment was rated at 6.9. The proceedings of the Board are also on record and on the basis of the performance as reflected in the aforesaid 5 years' ACRs the petitioner was found suitable for such promotion to the acting rank of Air Vice Marshal. it is admitted position that subsequent to the aforesaid selection the petitioner was empanelled and was placed at Sl. No. 10. Nine of the officers in the said panel were elevated to the acting rank of Air Vice Marshal.

8. As luck would have it, one unforeseen vacancy occurred during the currency of the aforesaid panel which was valid for one year. In the natural course the petitioner would have been promoted to the said post by virtue of his panel position as he was the next man in the said panel. However as a further performance appraisal report in the form of ACR of the next year was available the respondent decided to call for a review Promotion Board to consider the case of the petitioner for adjudging whether or not he still continue to be suitable for further promotion. The aforesaid performance appraisal report was also placed before me. The same was initiated by the Initiating Officer and he recorded his comments. The respondents state that the said comments contained a number of negative traits of the petitioner. Petitioner, however, believes that some of the comments made therein would amount to adverse comments when properly appreciated. An overall assessment of the petitioner was made in the said ACR on 21.1.2001 wherein the petitioner was rated as 6.0. It is thus established that the petitioner was down-graded in his performance from the earlier year of assessment wherein he was rated as 6.9.

9. It was submitted by the counsel appearing for the respondents that the empanelment is always intimated to the concerned officer with usual three conditions namely - availability of vacancies, medical fitness and maintaining

continuity of performance and that no exception was made in the present case. The aforesaid position appears to be correct in view of the fact that the petitioner was also so intimated when he was informed about his empanelment and when the said fact was intimated the aforesaid three conditions were also mentioned in the said communication. Even after receipt of the said communication the petitioner did not object to inclusion of the said conditions in the empanelment. Therefore, continuity in performance was one of the conditions of his empanelment. In that view of the matter when even during the currency of the panel namely-within the period of one year a vacancy had arisen and since further ACR was available the respondents were justified in considering the same before issuing the order of promotion of the petitioner on the basis of his earlier empanelment. It is admitted position that the first two conditions as communicated on 12.6.2000 were fulfilled by the petitioner even at the later stage but according to the respondent the third condition namely, continuity in performance was not fulfilled because variation has been observed in his performance as is reflected in the ACR for the period from 1.10.1999 to 30.9.2000. It is the stand of the respondent that his performance has fallen from above average to average with negative remarks in his pen portrait. In view of the aforesaid position a review Promotion Board 2-2000 was held on 20.3.2000 which recommended de-empanelment of the petitioner due to fall in his performance depicted in his ACR of the year 1999-2000. The records disclose that the entire proceedings along with the recommendations even went up to the defense Minister, who was also of the opinion that if in case performance falters de-empanelment must follow and therefore, no interference with the recommendations of the Review Promotion Board is called for. This case, therefore, stands on a different footing from that of Col. S.P. Murgai (supra). It was held in the said decision that if the panel validly made need not be worked upon during the period of its validity in certain circumstances then the rule or instructions must specify that and also specify the circumstances. In the present case such instruction was issued that the empanelment would be subject to continuity of performance and therefore, the said decision could be distinguished from the facts and circumstances of this case.

10. New coming to the comments recorded in the subsequent confidential report for the period 1999-2000, it admittedly contains a number of negative traits about the performance of the petitioner Counsel for the parties in this connection brought to my notice various provisions of the circular concerning appraisal reports of the Indian Air Force Officers. Reference was particularly made by the counsel appearing for the parties to clause 28(a) which lays down that the Appraising Officers are not to give overall gradings on the appraisal in the report and cutting and over writing should be avoided to the maximum and if done should be initialled by the appraiser. In my considered opinion, the aforesaid provision has no application in the facts and circumstances of the present case.

11. Learned counsel appearing for the petitioner next relied upon the contents of clause 28(b) which provides that there should normally be no occasion

whatsoever to re-write the remarks after the same have once been recorded. It further provided that if the later report is relatively adverse compared to the initial one the same must be communicated to the concerned officer in writing. The records placed before me also disclose that the aforesaid clause has no application to the facts and circumstances of the present case.

12. Reliance was also placed on the provisions of Adverse reports which are contained in paragraph 33 of the aforesaid circular issued by the Indian Air Force. It is provided therein that as far as possible, failings of an officer are to be brought to his notice in writing by the appraisers in the reporting channel well before the report is due so as to give him a chance to improve himself and in case of all adverse ARs, the adverse comments given in the AR are to be communicated to the appraise in writing and copy of this communication is to be sent Along with the Annual Report. It is provided in paragraph (f) thereof that the intention of the report writing is to be factual and must convey the correct impressions. This will help the organisation to place the correct man in the correct post. It is further provided that while factual reporting is necessary, IOs must differentiate clearly between an adverse comment/remark and a negative comment/remark. What would constitute adverse comment is also enumerate when it states negative comments are conditional remarks like often, some times, usually, generally etc. while unconditional comments/remarks are adverse remarks like. He lacks initiative and drive", "he does not take decision", "he fails to comply with orders", "he misbehaves with others after consuming alcohol" etc.

13. When the annual report of the petitioner for the year 1999-2000 is read in the context of the aforesaid provisions, I am convinced that the comments were so recorded as to make them appear to be negative comments or traits instead of adverse comments. The comments recorded in the fresh ACR of the petitioner contain remarks like - "somewhat", "generally" etc. so as to make out a case of negative traits instead of adverse comments. Even the comments of the Air Chief Marshal are so worded that such comments would appear to contain only the negative traits. Such negative comments in terms of the circular issued by the Indian Air Force are not to be communicated. The only requirement is to give counselling to the concerned person so as to give him an opportunity to improve upon. In this connection reference may be made to the circular issued by the Air Headquarters dated 5.4.2000 wherein a differentiation has been made between the "adverse" and "negative" remarks in the annual reports of the officers. In paragraph 3 thereof it is stated that any adverse remark in the annual report makes it an adverse annual report and such adverse annual report has serious implications. Therefore, it was made mandatory in the circular that the adverse remarks should be communicated to the appraise in writing so as to obviate unnecessary representations from the appraise that the failings were not brought to his notice and he was not given any chance for his improvement. it was further stated that it must however, be borne in mind that an appraise should be commented upon adversely only in case the failings and shortcomings noticed in his performance persist despite counselling and warning. In paragraph 4 thereof

it is further stated that it is mandatory to communicate adverse remarks to the appraise in writing whereas negative remarks if given in the annual report, are not to be communicated to the appraise but appraise should be periodically counseled on negative aspects of his performance/behavior. It was also stated that compared to adverse remarks, the impact of negative remarks on appraise's career is milder.

14. In *U.P. Jal Nigam & Others* (supra) however, it was held by the Supreme Court that if the graded entry is of going a step down, like falling from "very good" to "good" it might not be an adverse entry since both are a positive grading but all that is required by the authority recording confidential in the situation is to record reasons for such downgrading on the personal file of the officer concerned and inform him of the change in the form of an advice and that if the variation warranted be not permissible, then the very purpose of writing annual confidential reports would be frustrated. It was further held that even a positive confidential entry in a given case could perilously be adverse be adverse and to say that adverse entry should always be qualitatively damaging may not be true. In the said case the court found that no reason for the change was mentioned in the service record of the employee and that the downgrading was reflected by comparison which could not be sustained and the same was quashed.

15. The normal course the ratio of the aforesaid decision would have squarely applied to the fact of the present case because in the present case also a case is made out by the respondents by giving a graded entry to the petitioner by bringing him a step down like falling from "very good" to "good". In the light of the aforesaid decision it was necessary for the authority to communicate the said downgrading and the change in the form of an advice for the aforesaid entry in this particular case has perilously become adverse to the petitioner, for it has amounted to his de-empanelment from the panel, and Therefore, has affected him adversely. However, learned Additional Solicitor General appearing for the respondents brought to my notice the decision of the Division Bench of this Court in *Lt. Col. Krishnakant Vs. Union of India and others* (supra). In the said decision reference was also made to the case of *U.P. Jal Nigam* (supra) and the said case was also considered by the Division Bench of this court Along with the case of *State of Haryana Vs. P.C. Wadhwa*, AIR 1987 SC 120. The Division Bench however, held that on the selection system also or on the provisions contained in the Special Army Order No. 3-S/89 as regards communication of the ACRs there was no specific challenge made in the writ petition by the appellant. It goes on to hold thus-

"Legality and validity of the Special Army order No. 3-S/89 or of the selection system is not specifically under challenge. Without specifically making any challenge thereto and that also on admissible grounds, it will nt be permissible for us, while hearing the appeal, to consider the submission made by the appellant or to make and observations thereon, in as much as such points were not urged or agitated in the writ petition. Otherwise also in view of the decision

in Lt. Col. K.D Gupta's case, it will not be proper to apply the ratio of the two decisions relied upon by the appellant that defense services have their own specialities and peculiarities. Selection is based on an overall profile of an officer with special stress on the performance in criteria Command appointment."

16. Thus, according to the said decision the ratio of the decision in U.P. Jal Nigam is not applicable to a case of defense Forces the defense Services have their own specialities and peculiarities. I am bound by the ratio of the aforesaid Division Bench decision of this court. It is also to be noted that while laying down the aforesaid law the Supreme Court relied upon the decision of Col. K.D. Gupta Vs. Union of India, AIR 1989 SC 1393. In the said decision it was observed by the Supreme Court that the defense Services have their own peculiarities and special requirements and that the considerations which apply to other Government servants in the matter of promotion cannot, as a matter of course, be applied to the defense Personnel of the category and rank of the petitioner in the said case. It was further held that requisite experience, consequent exposure and appropriate review are indispensable for according promotion, and Therefore, the petitioner would not be given promotion as claimed by him on the basis that his batch mates had earned such promotion. It was further held that the 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.

17. The said observations were made in the peculiar facts and circumstances of the said case because the petitioner sought for his promotion on the ground that his batch mates had been promoted and Therefore, since his batch mates had been promoted he should also be promoted irrespective of his experience and performance. Since however, the Division Bench of this court has held that the ratio laid down in U.P. Jal Nigam's case (supra) would not be applicable to the case of a member of the defense Service, the ratio of the said decision in U.P. Jal Nigam (supra) cannot be made applicable to the facts and circumstances of the present case.

18. So far the allegation of malafide is concerned I find no merit in the same. There is no reliable material on record to hold that the action of the respondents was in any manner malafide. Besides, drop in performance due to which the petitioner was de-empanelled is a matter relating to records. The said records were also considered by the same Promotion Board which earlier recommended for his empanelment. Therefore, the allegations has no substance.

19. In view of the aforesaid position, I have no other option but to hold that since the performance of the petitioner was downgraded after recording negative comments in his annual report there was a fall in his performance. Since in the order of empanelment it was stated that his empanelment would be subject to continuity of performance which however, had fallen in the subsequent period, no grievance could be made by the petitioner either for downgrading him or for de-empanelling him from the panel.

20. In the result, this writ petition has no merit and is dismissed accordingly. Pending application also stands disposed of accordingly. However, there will be no order as to costs. dusty.