
(1997) 12 DEL CK 0002
In the Delhi High Court
Case No : L.P.A.No.101 of 1997

Air Commodore I.J.S. Boparai, VM

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 19-12-1997

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1998) 44 DRJ 1(2)

Hon'ble Judges : Mahinder Narain, Acting C.J.;S.K. Mahajan, J

Bench : Division Bench

Advocate : Mr. P.N. Misra, Mr. K.C.Mittal and Mr. Ashwani Bhardwaj, for the Appellant;

Judgement

Mahinder Narain, ACJ.

1. The appellant Air Commodore I.J.S. Boparai, VM, has filed this Letters Patent Appeal, as he is aggrieved by an order dated 3.4.1997, passed in Civil Writ Petition No.4868 of 1996 by Hon"ble Single Judge of this Court (Dalveer Bhandari, J.) whereby the said writ petition filed by the appellant seeking quashing of the order of his retirement dated 23.11.1995 was dismissed.
2. The appellant before us in the said writ petition had prayed that the respondent be directed to promote him to the rank of Air Vice Marshal w.e.f. 1995 when he was first considered with notional seniority.
3. According to the appellant he had joined the Indian Air Force in the year 1962-63, and got promotion due to him in the usual course up to the level of Air Commodore in the Air Force.
4. The appellant says that certain remarks in the annual reports of the appellant are the basis of his being not promoted to the rank of Air Vice Marshal. It is the contention of the appellant that these remarks which are there in the annual report, were in existence even when he was considered for promotion from Group Captain to Air Commodore. At that time these remarks did not come in

the way of his being the said promotion. These remarks, according to the appellants, had never been communicated to him.

5. According to the appellant, the remarks which had operated against him, are adverse remarks, and according to the relevant rules, ought to have been communicated to him. The remarks, as stated before, were not communicated to him. These remarks read as under:

AIR CMDE IJS BOPARAI (7691) F(P)

(a) 26.02.82 to 30.09.82 (CO, 223 Sqn).

IO (Air Cmde RK Dhawan, ADC):

"..... He believes and at times behaves as if he alone has the answers to everything and volunteers to advice/comment irrespective of context, time or place. His boundless enthusiasm for things concerning him or otherwise has to be constantly kept under check."

(b) 01.10.82 to 30.09.83 (CO, 223 Sqn)

AIO (Air Cmde RK Dhawan, ADC, 8 Wg):

"....He is a good operational material and wants others to acknowledge it.... Can be authoritative and bossy especially with those not connected with him."

(c) 01.10.83 to 30.09.84 (CO, 223 Sqn)

AIO (Air Cmde Janak Kumar, ADC, 8 Wg):

"....He is continuously thinking of improving operational effectiveness and does put up worthwhile suggestions. However, in his enthusiasm he at times tends to overdo this bit and tries to achieve more than what circumstances warrant. Whilst he had good control over his team and trains them well, he needs to devote a little more attention to administration and other matters not directly connected with flying. An authoritarian leader, he has strong views and does not always accept any other view-point - for this reason his communication with others suffers...."

RO (Air Mshl S Raghavendran, ADC-in-C, SWAC):

"....Boparai is a knowledgeable and competent aviator. This is off-set by his unshakable adherence to his own views and constant trumpeting about his own achievements and thoughts. He also needs to spend mote thought on administration, as a commander."

(d) 01.10.84 to 30.09.85 (CO, 223 Sqn)

AIO (Air Cmde Janak Kumar, ADC, 8 Wg):

"....Constantly thinking of improving the operational environment and developing new tactics to use the Rakshak a/c to its optimum, he, however, tends to stick to

his opinions tenaciously - he should be a bit more open to ideas from others.... he needs to be more receptive and communicate more with others. An authoritarian leader...."

(e) 14.10.85 to 30.09.86 (COD, 8 Wg)

IO (Air Cmde KD Lewis, ADC, 8 Wg):

"....While officiating in Command of the station he sometimes does a little more than what is expected of him to the chagrin of the other two Branch Heads.... His style of leadership tends to be overwhelming and favours the authoritarian as compared to the democratic.... A very ambitious officer who has set his sights high. Has strong personal interests which play an important role in his life. Goes out of his way, beyond the purview of his own job, to place demands laterally on Admin and Maint Wings to produce results.... once he embarks on a certain course of action he does so in a head - strong manner and unswervingly does his best to see it through"

(f) 01.10.86 to 05.07.87 (COO 8 Wg)

IO (Air Cmde KD Lewis, ADC, 8 Wg):

"....While officiating as the Stn. Cdr tends to overdo things and requires to apply a little restraint on himself..... Has an authoritarian style of leadership and places high demands on all personnel in the Ops Wing as well as laterally on the Maint and Admin Wings.... In this, tends to be overwhelming in his efforts with the other Branch Heads, whose place of work does not suit his requirements..... He is an officer of strong ambition whose personal interests play a powerful role in his dealings and general outlook to life....."

RO (AVM EL Allen, SASO, HQ WAC):

"The IO has aptly described the personal characteristics of the appraisee, and summarised the aggressive and vigorous manner by which he accomplishes his and the organisations objectives."

SRO (Air Mshl MM Singh, ADC-in-C, WAC):

"....I agree with the IO's remarks on his personal qualities. However, I would like to add that the officer tends to self pointed and is normally unwilling to accept the views of others regardless of logic. I would thus put him as inflexible. His other ratings in that at times, he puts self and family before service. When officiating for the ADC asking for leave to drive his wife to Chandigarh during Ops alert."

(g) 06.12.87 to 30.09.88 (C Ad O, HQ SWAC)

IO (Air Mshl SK Kaul, SASO, HQ SWAC):

"....Has a tendency to force his views on others at times...."

(h) 01.10.88 to 30.09.89 (C Ad O, HQ SWAC)

IO (Air Mshl SK Kaul, SASO, HQ SWAC):

"....He, however, could afford to be more receptive to other's view points...."

(j) 26.12.90 to 30.09.91 (ADC, 8 Wg)

IO (Air Mshl P Singh, ADC-in-C, WAC):

" ...Although keenly aware of the maintenance activities of his station, some inadequacies in control and coordination of maintenance and flying activities have been apparent. The officer tends to magnify problems to attract more attention. Routine administration has received less than the desired attention with an occasional tendency to overlook the discipline aspects....."

(k) 01.10.91 to 30.04.92 (ADC, 8 Wg)

IO (Air Mshl P Singh, ADC-in-C, WAC)

"....A capable; knowledgeable and overconfident commander.... His style of man management is, however, firm and authoritarian. He is a hard task master and pushes his subordinates very hard.... He has a fertile mind and is full of ideas, some of which are not always practical.... He is visibly ambitious and has strong personal interests which tend to influence his actions.

He also tends to magnify problems to attract more attention..."

(l) 01.05.92 to 30.09.92 (ADC, 8 Wg)

IO (Air Mshl SK Kaul, ADC-in-C, WAC)

"....He has, however, not flown during this period of report.... He has a active mind with innovative ideas but at times tends to become somewhat impractical in suggesting solutions... Has a streak of authoritarianism in him and holds strong views on certain professional matters... A strong personality who has the streak of being somewhat self opiniated....."

(m) 29.12.92 to 30.09.93 (ADC, Adv HQ SW AC)

IO (Air Mshl BD Jayal, ADC-in-C, SWAC)

".....In his enthusiasm he sometimes tends to be carried away not appreciating that he is an extension of this HQ...It is sometimes difficult to get him to change his views once he has made up his mind. A medium built officer who has a good bearing and is ambitious. To my mind somewhat overconcerned.

Case (ACM SK Kaul):

"....He has a tendency, however, to a bit rigid in his views at times."

6. A reading of the aforesaid remarks draws a pen picture of a person who is enthusiastic about his job, desirous to constantly keep on performing better and

expects others to keep on performing better, and with that object, gives the impression to those reporting upon him that he tends to overdo things despite the fact he has control over his team. The remark of RO Air Marshal S. Raghavendran is telling when he says that the appellant is a knowledgeable and competent aviator. From the other remarks regarding professional capabilities of himself, and those under him, it is apparent that the appellant in the view of his senior officers, desires to improve upon the "operational environment and developing new tactics", his style of leadership tends to be overwhelming, a very ambitious, and needs to apply restraint on himself, has an authoritarian style of leadership, is an ambitious aggressive, and vigorously seeks to accomplish his own and the organisational objectives. The remarks by Air Marshal B.D.Jayal tell that the appellant in his enthusiasm, sometimes tends to be carried away, and it is difficult for him to change his views.

7. None of these remarks appear to be innocuous remarks. Therefore, the judgment of the Supreme Court reported as Union of India (UOI) Vs. M.E. Reddy and Another, cannot apply to this case.

8. Anybody reading the said remarks, would come to the conclusion that the appellant is, what the psychologist call, of type "A" personality, with ambitions, has a high degree of professional skill and gets things done his own way as a leader needs to, and he knows how to get them done by his team. To us it appears that the pen pictures establish his professional competence, and gives us a sneaking suspicion that his superiors feel slightly threatened by the capacity of the appellant to achieve the necessary objectives set up.

9. The pen pictures also reveal that there is sufficient maturity in these remarks which should be construed as adverse remarks and, Therefore, needed to be communicated to the appellant. We find it difficult to fault a man for having achieved a high level of professional competence. A high level of professional competence is exactly what seems to necessary for a person whose professional activity is concentrated upon flying state-of-the-art sophisticated air-crafts, like MIG 23 and MIG 29.

10. We have no doubt that the ability to effectively fly these two air-crafts and to fly each sortie successfully, without causing accident, which the appellant seems to have done, requires a very high degree of professional competence. We have not forgotten that the appellant was involved in two incidents/accidents in the early part of his professional career, which did not come in the way of his subsequent career as Air Commodore. Indeed some of the Initiating Officers and Reviewing Officers seem to have accepted it, and so stated it their reports.

11. A rapid/cursory reading of the said reports certainly will make any person reading them very apprehensive about the ability of any person to work as a part of the team. More so when rapidly read it, is not kept in mind that the appellant has been the head of team, its captain, while performing duties in connection with his post in the Air Force, and its organisation. To that extent these

observations appear to be adverse to the appellant.

12. In this context the appellant invites our attention to para 203 of the Air Force Regulations, which require communication of these adverse remarks to him. Rule 203 reads as under:-

203. Adverse Remarks

(a) In cases of "below average" assessments or where adverse remarks are made in paras 12 to 19 of the report, the reporting officer is to inform the officer reported upon in writing of the particular aspect of his failings and endorse a certificate to that effect in para 18 of the report. A copy of the communication addressed to the officer reported upon, duly signed by him, is to be attached to the report.

(b) As far as possible, the failings of an officer are to be brought to his notice in writing well before the report is due in order to give him a chance to improve himself. The warnings so given are not required to be intimated to Air Headquarters. If at the time of rendition of the report it is felt that the warnings have been of no avail, this fact is to be specifically mentioned and is to be treated as an adverse comment.

13. Para 203 of the Regulations of the Air Force refers to the adverse remarks in appraisal report. Para 12 of the appraisal report requires a pen picture of the person reported upon, job performance, human relations, personal characteristics, adverse comments, matters arising out of adverse comments, employability for command assignment, staff assignment, field assignment and any other assignment; training and development needs, remarks of the Specialist Officer, remarks of Senior Reviewing Officer, remarks of the Air Officer Commanding-in-Chief/PSO.

14. It is also clear that para 203 of the Air Force Regulations requires that the officer reported upon has to be informed in writing of the aspects of his failure and signatures of the officer is required to evidence receipt of adverse report by him. It is also clear that the said paragraph requires the reports to be given to the officer concerned well in time, so as to give a chance to that officer to improve himself. None of this, admittedly, has been done, as the remarks which we have reproduced above, were given to the officer only five days before he was to retire as a Air Commodore, instead of being promoted as Air Vice Marshal.

15. The appellant points out that the remarks of the Chief of the Air Staff are also to be found in his report. The Chief of Air Staff, according to the appellant, has since retired, but the remarks which were made by him, were made in connection with the conflict in perspectives of the appellant with regard to an accident which had happened, when the appellant was operating out of Leh Air Station. The appellant says that in order to show the activities of the Air Force from one of the highest altitude airports, a demonstration was organized. For that purpose the appellant had suggested that the demonstrating pilots should

be those who were based at the Air Station at Udhampur as they were used to flying in the Leh sector; not pilots from the Air Force station at Pathankot who had no experience of flying landing and "overshooting" a Leh Airport. This was, in the first instance agreed to, but unknown to the appellant this decision was reversed by his superior officers, inter alia, Mr. S.K. Kaul (who later became Chief of a Air Staff). As a result of changed decision the demonstration flight was performed by pilots based at Pathankot Air Station who did not have sufficient experience to fly through the valleys of Leh, land at, or "over-shoot" the air strip etc. According to the appellant, as an accident was caused at this demonstration in which a young pilot lost his life, and the Air Force an expensive air-craft, the said officer held it against the appellant, as he mentioned his objections to Pathankot based pilots flying in for the demonstration to him. This incident, according to the appellant, established a bias against him in the mind of the said Shri S.K. Kaul, which was inter alias responsible for the appellant not being considered for promotion. It resulted in remarks by Shri S.K. Kaul, then Chief of Air Staff against him, despite the fact that the appellant had not worked under Shri S.K. Kaul for the requisite period. This led to the breach of Instruction No.42 of A.F.0.2/90.

16. The courts have to appreciate the fact that flying a plane, a jet plane, which is a heavier than Air machine, is not quite the same thing as a car driver driving the car. The automobile is always in contact with the earth, whereas a jet plane has to be made to lose contact with the earth become air borne and then land again. This a jet plane is able to do because of the thrust from the jet engine provides a forward motion - all forces have equal and opposite reaction: Newton's third law of motion; the forward motion at a critical speed of about 160 to 200 km. per hour would provide sufficient lift from the aerofoil sections of the wings to make the aircraft lift off from the ground, and by adjusting the lift, and increasing the thrust from the engine a high speed can be maintained in the air. The lift has to counter the force of gravity and the thrust is balanced by the "drag".

17. All these forces have to be carefully controlled and adjusted constantly to ensure flying performance. Drop in speed will reduce the lift from the wings and bring the aircraft down to earth again. Proper flying of the jet plane is a matter of great skill acquired by persistent and continued flying experience, especially so when flying manoeuvres are attempted to be performed. Landing a plane or over-shooting the runway is a manoeuvre of skill.

18. In addition to what is stated above regarding straight flying of the plane when the plane is to be flown in between valleys landing with high undulated peaks, there would be wind turbulence which will necessitate controlling of the aircraft during a turn while flying, the problems will be greater when the plane fly in valleys located in high altitude where the air is thinner, and, Therefore, lift provided by the aerofoil sections of the wings is lesser, that by itself would necessitate greater speed during banking turns to avoid the mountain peaks, and

inexperienced pilot flying over unknown terrain and in unaccustomed wind turbulence is likely to be increasing its speed somewhat higher than what is optimal for ensuring proper banking turns and safety distances between the mountain peaks. Apparently, this is what it happened to the young pilot who while banking the turn was close to high mountain peak, and with the result that he went to the side of the mountain, according to the appellant, due to his being inexperienced in flying in the terrain near the landing strip at Leh. It is to avoid such a casualty, the appellant contends, that he had recommended that only pilots who had flown over the terrain, fly in the demonstration flight. It was S.K. Kaul who had over-ruled his suggestion and taken pilots who had not based in Jammu to fly. He had taken pilots to give a demonstration without having the experience of having flown over terrain before.

19. These facts appear to have been taken into consideration by S.K. Kaul against the appellant. The appellant's case may have even been mentioned to his colleagues and friends in confidence, of course, which resulted in denial of promotion by the Promotion Board, even though he had the high numerical gradings which were given to him despite the adverse comments which were made. The gradings could well be higher, had the adverse comments not existed.

20. The aforesaid incident of the crash at Leh was surely used against the appellant. It would be hard to imagine that important plane crash would not be coming in the way of the appellant.

21. From the questions which were posed to the appellant during the course of hearing, and the answers given in Court by the appellant it appears that the appellant has mastered a machine, in this case the flying machine in the shape of an air-craft, in view of the modifications which he carried out to the flying machines to make them safer for landing them at high altitude at Leh. To me there appears to be a hint of jealousy in the adverse remarks caused by the capability of the appellant in persons holding more senior rank than that of the appellant. It is this jealousy, if not jealousy, this apprehension, may have been responsible for the appellant getting the remarks which he did. But the numerical grading tells its own tale. It shows how good the appellant is at his job. That numerical grading could not be avoided, despite the fact that he won remarks in the pen picture.

22. It is not possible in this day and age that a person who is professionally competent, and has a no nonsense approach towards high skilled job, would not have his detractors, but in my opinion that cannot be the reason for his being made any kind of scapegoat by any person, or group, howsoever high or howsoever low.

23. The appellant says that for the period 1.10.1994 to 30.9.1995, the appellant was down graded by the Chief of Air Staff Shri S.K. Kaul, who had taken office only on 1.1.1996. The appellant had never worked under him, and as such he not being in the chain of command, could not down grade his A.C.R. The

appellant says that the Chief of Air Staff could only have appended his remarks in column 20 but the grading remarks could only have been given by the Initiating Officer/Reviewing Officer and Senior Reviewing Officer, and as the appellant had never worked under the Chief of Air Staff Mr. S.K. Kaul, he was not competent to give grading marks even as Reviewing Officer or Senior Reviewing Officer. Taking into account of remarks of the Chief of Air Staff for the said period by the promotion board has resulted in miscarriage of justice, particularly as the Air Head Quarter did not even inform the appellant of the down grading by the Chief of Air Staff as required by law.

24. The appellant says that the above said incident involving Mr. S.K. Kaul, who later on became Chief of Air Staff has resulted in legal malice against the appellant. He further says that this malice was carried further when despite the fact that the appellant was not required to be considered for promotion in 1995, his name was put in on the basis of artificially created requirements, and the remarks aforesaid, were used against him to deny him his promotion as Air Vice Marshal. This he attributes to the action of the Chief of the Air Staff Mr. S.K. Kaul.

25. As regards the case law in support of the proposition that adverse remarks need to be communicated to the person affected, the appellant who appears in person before us, has referred to the judgment of the Supreme Court reported as Baidyanath Mahapatra Vs. State of Orissa, 1989(4) SLR 220(S.C.). In the said judgment, it has been said that adverse entries prior to the period of promotion lose their significance and those remaining on record as part of history. Adverse entries of remote past cannot be looked into for prematurely retiring a person. It is the case of the appellant that the entries which appear to have been relied upon by the respondents for denying him promotion, existed even prior to the time when his case was being considered for promotion as Air Commodore. As such the entry had actually lost its significance in the year 1995 when he was being considered for promotion as Air Vice Marshal.

26. The appellant also referred to and relied upon the same judgment in which it was also stated that belated communication of the entries results into the denial of reasonable opportunity to improve his performance, and the belated communication of the adverse entries not proper.

27. The case of the appellant before us is that he was given the adverse entries in his annual report prior to his retirement, and as a consequence of those remarks he was denied promotion as Air Vice Marshal. According to the appellant, the aforesaid Judgment of the Supreme Court prevents the respondents from acting in such a prejudicial fashion, contrary to law against him.

28. The appellant also referred to and relied upon the judgment reported as Brij Mohan Singh Chopra Vs. State of Punjab, 1978(2) SLR 54(S.C.), wherein the Supreme Court has said that, "adverse entries if any awarded to an employee lose their significance on or after his promotion to a higher post". The appellant

contends that in as much as the same adverse entries existed on his record prior to his being promoted as Air Commodore, which were not communicated to him, and the respondent could not have taken these into account for denying him promotion as Air Vice Marshal. The appellant also contends that the promotion as Air Vice Marshal could not have been denied to him as adverse remarks in the confidential report were not conveyed to him, and no chance was given to him to represent against the adverse remarks. In this connection, the respondent has relied upon the judgment reported as Parkash Chand Sharma Vs. The Oil and Natural Gas Commission and others; 1970 SLR 116(S.C.). The appellant says that giving him the extracts from the adverse remarks Five days before his retirement, and despite the fact that he filed his response thereto overnight, virtually ensured non-consideration of his response to the adverse remarks as he was within four days, denied his promotion and was retired.

29. The appellant has further relied upon the judgment reported as Gurdial Singh Fijji Vs. State of Punjab, 1979(1) SLR 804, to say that affording an opportunity of making a representation against adverse remarks is not an empty formality. The object partially being to enable superior authorities to decide on consideration of the Explanation as to whether adverse report is justified or not.

30. In the aforesaid circumstances, the appellant says that the entry of the uncommunicated remarks, in view of virtually non-consideration by Promotion Board of the representation made by him, in view of the fact that there is no doubt about the professional skill of the appellant and the ability to make a team work, in view of the outstanding performance as an Air Commodore, and in charge of various air force stations, his record as a person concerned with investigation into air accidents, require issuance of mandamus writ, directing the respondents to promote the appellant as Air Vice Marshal w.e.f. 1995 when he was considered for promotion as Air Vice Marshal. The appellant says that he has served minimum of three years in the substantive rank as Air Commodore, but he was suitable for advancement, having been graded about 7 in all relevant numerical criteria laid down, and was medically fit for duties of his branch, he meets with the criteria of seniority and suitability for promotion from Air Commodore to the rank of Air Vice Marshal, and if the uncommunicated adverse remarks in the report which remarks were not to be taken into account for the purpose of promotion, the pen picture which emerges is one of professional competence and employability as an Air Vice Marshal.

31. It appears to us that in fighting force of this country, perhaps in every country, it is necessary for a leader to inspire his subordinate and juniors into battle and when necessary to do so, drive them harder for the purposes of ensuring that the objectives are achieved. It cannot, in our opinion, be the primary requirement that leaders of the fighting force should be so pliable, that they are incapable of voicing their points of view and adhering to them. Surely opinion expressed after a life time of professional competence are relevant. These views ought to be preferred over those expressed by persons who have

not acquired professional skill and competence in the relevant field. We do not think that the interest of the armed forces, like the air force can be served by ensuring that they are only manned by those persons who are not known for professional skill, and are willing to take all kind of dictates, reasonable or unreasonable, from less competent person.

32. Mr. K.C. Mittal who appears for the Union of India, asserts that keeping in view the provisions of the Air Force Regulations 1964, particularly regulation 115, it cannot be disputed that promotion from the rank of Air Commodore to Air Vice Marshal is by selection. Indeed regulation 115 says so, which reads as under:

115. Promotion by Selection.

Substantive promotion to the rank of wing commander and above to fill vacancies in the authorised establishment will be by selection subject to the following conditions:

(a) Squadron Leader to Wing Commander

(i) has served for a minimum period of three years in the substantive rank of squadron leader,

(ii) has been recommended as in all respects suitable for advancement by his commanding officer, and

(iii) is medically fit for duties of his branch.

(b) Wing Commander to Group Captain

(i) has served a minimum of four years in the substantive rank of wing commander,

(ii) has been recommended in all respects suitable for advancement by his commanding officer; and

(iii) is medically fit for duties of his branch.

(c) Group Captain to Air Commodore

(i) has served a minimum of three years in the substantive rank of group captain;

(ii) has been recommended as in all respects suitable for advancement by his air officer commanding-in-chief, and

(iii) is medically fit for duties of his branch.

(d) Air Commodore to Air Vice Marshal

(i) has served a minimum of three years in the substantive rank of air commodore;

(ii) has been recommended as in all respects suitable for advancement by his air officer commanding-in-chief; and

(iii) is medically fit for duties of his branch.

33. Indeed the provisions of regulation 115(d) of the Regulations for the AIR Force, specifically deals with promotion of Air Commodore to Air Vice Marshal. The essential requirement is that the officer who is considered for promotion, must have been in the substantive rank of Air Commodore for a period of three years. It is not disputed by the Union of India that the appellant meets this requirement. The next essential requirement is that the officer concerned ought to have been recommended as in all respects suitable for advancement by his air officer commanding-in-chief. The fact that the appellant was, in fact, considered for promotion by the Promotion Board constituted for that purpose in the year 1995, itself establishes that he was recommended by his air officer commanding-in-chief as suitable for his advancement. As far as the third and the last requirement that the officer is medically fit for duties of his branch, the Union of India does not dispute that the appellant was medically fit for duty of his branch. Indeed, this has to be so as the appellant was considered for promotion by the Board in 1995.

34. From what has been stated above, it is clear that the appellant met with all the requisite guidelines of seniority and suitability of promotion from Air Commodore to Air Vice Marshal, and also has requisite gradation in his A.C.Rs., which would have made him fit for promotion as Air Vice Marshal. What seems to have been used against him in not promptings him, is the remarks from the year 1982 till 1993 by various Initiating Officers and Reporting Officers.

35. The appellant has contended that these remarks ought not to have been taken into account, in as much as they are the product of malice in law, which led to his being discriminated against in the matter of his promotion as Air Vice Marshal.

36. Mr. P.N. Misra appearing for the Union of India fairly conceded before us that if he would have come to the conclusion that the remarks aforesaid suffered from malice in law, then it is obviously a discrimination, and the appellant is entitled to relief in the court.

37. The appellant before us says that the remarks which were used are malice in law, for the reasons that the said remarks are administrative in nature. He contends that the adverse remarks which are made in the A.C.Rs. are intended to be, and have to be conveyed to the person to whom they relate. For the purpose of these remarks, an opportunity is to be given to the person concerned to improve his functions in such a way that maximum benefit to the service is available to the person concerned. It is the case of appellant that there is a breach of the Air Force Order relating to making of adverse remarks and their non-communication in his case, which would tantamount to malice in law, and did gravely affect his chances of promotion. It is the case of the appellant that these adverse remarks were never, in fact, communicated to him at any relevant time, and in the manner postulated by the Air Force Orders and as the rules

regarding communication of adverse remarks had not been complied with, the said adverse remarks could not have been taken into consideration while he was being considered for promotion, and consideration of these adverse remarks has resulted in malice in law, operating against him.

38. It must be made clear that the appellant has not said that every person who made the remarks was actuated by any mala fide motive, but he does give one illustration which will be set out hereafter which indicates that there was possibly a motive involved in one of the remarks against him by one of the Reviewing Officers. In this connection it is also urged by the appellant that the remarks which have been considered to block his chance of promotion, are all stale, many years old, and being non communicated remarks, ought not to have been taken into account. In support of his proposition, he relies upon a judgment of the Supreme Court, reported as Brij Mohan Singh Chopra Vs. State of Punjab, , wherein the Supreme Court has said that adverse entries have to be communicated to the affected government servant. It is also observed that entries in a period which was more than 10 years past, should not be taken into account, as that would be an act of digging out past to get some material to make an order against the employee, and such adverse entries, if any, lose their significance on or after his promotion to a higher post.

39. The appellant contends that since 1982 he has obtained various promotions, including the promotion from Group Captain to Air Commodore, and as such these entries should not have been used against him.

40. Another case relied upon by the appellant is reported as Gurdial Singh Fijji Vs. State of Punjab and Others, , in which the Supreme Court has held that in accordance with the rules of natural justice an adverse report in the confidential roll cannot be acted upon to deny a promotional opportunity unless it is communicated to the person concerned, so that he has an opportunity to improve his work and conduct. What was held by the Supreme Court in Gurdial Singh Fijji's case regarding the effect of non communication of adverse entries was reiterated by the Supreme Court again in the case reported as Amar Kant Choudhary Vs. State of Bihar and Others, .

41. The appellant says that in para 203 of the Regulations for the Air Force, Revised Edition 1964, requires communication of adverse remarks. The said para reads as under:-

"203. Adverse Remarks

(a) In case of "below average" assessments or where adverse remarks are made in paras 12 to 19 of the report, the reporting officer is to inform the officer reported upon in writing of the particular aspect of his failings and endorse a certificate to that effect in para 18 of the report. A copy of the communication addressed to the officer reported upon, duly signed by him, to be attached to the report.

(b) As far as possible, the failings of an officer are to be brought to his notice in writing well before the report is due in order to give him a chance to improve himself. The warnings so given are not required to be intimated to Air Headquarters. If at the time of rendition of report it is felt that the warnings have been of no avail, this fact is to be specifically mentioned and is to be treated as an adverse comment.

42. The appellant, Therefore, contends that the said para 203 of the Regulations has been violated, as none of the adverse entries from 1982 to 1993 were communicated to him in writing, nor his signatures obtained with respect thereto at any relevant point of time, and the said para 203 of the Regulations having been breached in this case, the said reports ought not to have been taken into consideration.

43. The appellant also says and submits that he was granted extension in the year 1994 despite the existence of these adverse entries, so all these adverse entries had lost their significance and effect, and taking them into account was mala fide and he is entitled to be promoted as Air Vice Marshal by the Promotion Board of 1995 and 1996.

44. The appellant also contends that in his particular case, there has been a breach of Instructions No.42 to the Reviewing Officers, contained in the Air Force Order 02, which are instructions for the Reviewing Officers. The said instruction 42 to the Reviewing Officers reads as follows:-

42. The Reviewing Officer will normally be the next officer in the chain of command.

45. It is stated by the appellant that the down grading of the appellant's reports for the period 1.10.1994 to 30.9.1995 from 7.8 to 6.8 was wrongly done by the present Chief of Air Staff because the appellant asserts that the present Chief of Air Staff had become the Chief of Air Staff only on 1.1.1996, and was not in the chain of command to be the Reviewing Officer, or Senior Reviewing Officer of the appellant, and that, as stated above, the Chief of Air Staff was in breach of Instruction No.42. It is also pointed out that this down grading was not intimated to the appellant. It was asserted that the appellant had never worked under the present Chief of Air Staff, and as such he was not competent under Instruction No.42 to review the appellant's report. As such the illegally down graded report could not be considered by the Promotion Board. It appears by us that the appellant believing that the down grading of the appellant had been done by S.K. Kaul, the Chief of Air Staff, had asserted that this may have been due to the fact of an accident which had been caused at Leh in which one young pilot was killed and an expensive air craft completely destroyed, despite some suggestions given by the appellant that an experienced pilot should be flying and landing at the Airport at Leh instead of using inexperienced pilot, in landing at the Airport at Leh. The appellant stated before us that demonstrations have been organized for journalists by the Chief of Air Staff of over-shooting at the Leh Airport. According

to the appellant, who had been experienced in landing and over-shooting at Leh Airport, the approach to that Airport was tricky in as much as the landing strip was not available for a considerable time of flying in between the hills, and unless one was aware of the time taken the pilot could easily be misled into thinking that he is going into a dangerous situation. Besides lack of experience in flying at altitudes between the hills, over the valleys at speed, and not seeing the land strips, can create difficulties with pilots who had no prior experience of such flying. The appellant says that he maintained the discipline of the Air Force by not talking of this incident, and that his suggestion had been ignored, and resulted in S.K. Kaul, the Chief of Air Staff from using it against him. However, when we saw the record, it was found that it was not the Chief of Air Staff S.K. Kaul, who had made the down grading, but it was the Chief of Air Staff S.K. Sareen, who had done the down grading. This, the appellant said, had been done despite the fact that he had not worked under S.K. Sareen, and as such according to Instruction No.42 reproduced above, the down grading was against the applicable rules, and, Therefore, mala fide in law.

46. The appellant has also contended that the adverse entries which have been mentioned herein above, have been communicated to him only 5 days before he was actually to retire from the Air Force, not having been promoted as Air Vice Marshal. On these adverse entries having been communicated to him within only 5 days short of his retiring, he worked extra hard, and made a representation for redressal of his grievance to the Minister of defense - RAKSHA MANTRI. The representation made, was, however, rejected. The representation, according to the appellant, as he did not want the matters to go by default, made a representation within 5 days of his retirement, although according to rules about 30 days" time was there for making that representation. The appellant thus says that effective opportunity to make representation was denied to him.

47. Mr. Misra appearing on behalf of the Union of India, however, contended that in view of the fact that the representation which was moved by the appellant for a couple of days before his retirement, was rejected, would wipe off the non communication of adverse entries to the appellant. According to Mr. Misra, the non communication of adverse entries ceases to be fatal on account of some judgments of the Supreme Court which he relied upon, and the judgments were Jayanti Kumar Sinha (J.K. Sinha) Vs. Union of India (UOI) and Others, , and Major General I.P.S. Dewan Vs. Union of India (UOI) and Others, and Baikuntha Nath Das and another Vs. Chief District Medical Officer, Baripada and another, .

48. As far as the case of Major General I.P.S. Dewan is concerned, that case is distinguishable from the present case before us. In the case of Major General I.P.S. Dewan, there was a Court of Enquiry, and the adverse remarks which were made, were made by the Chief of Army Staff, which were based upon a Court of Enquiry. There has been no Court of Enquiry as far as the appellant before us is concerned, and the fact that the Chief of Air Staff made some remarks, which he ought not to have made as Air Force Regulations did not permit him to do so,

having not been directly in the chain of command, his remarks cannot be taken into account against the appellant. Besides this, in Major General I.P.S. Dewan's case, the representation which was made against the adverse remarks, had been considered, and the representation was rejected, and the adverse remarks were actually upheld. As regards upholding of the adverse remarks after representation is concerned, no doubt the appellant had made representation against the adverse remarks, but that representation was made only 5 days before retirement, and these representations were made to make sure that the adverse remarks do not go unanswered, although at an earlier stage of the career of the appellant, the adverse remarks had no effect in ensuring the promotion of the appellant from the rank of Group Captain to Air Commodore. The non acceptance of the representation, which was made only 5 days before his retirement, which was considered and rejected before his retirement itself, smacks of great haste, and seems to have been a produce of non application of mind to the representation made. As has been pointed out, the effect of the breach of the rules mentioned hereinabove, does not appear to have been considered at all by the Union of India while rejecting the representation. Major General I.P.S. Dewan's case, Therefore, has no application to the facts of the instant case.

49. As regards the case of Jayanti Kumar Sinha (*supra*) is concerned, that case is also of a different kind from the one of the appellant. It has not been disputed by Mr. Misra, indeed it cannot be, on the basis of the record of the appellant, that as far as the appellant is concerned he had superior numerical gradings, which entitled him to be considered for promotion from the rank of Air Commodore to Air Vice Marshal, in as much as the numerical grading of the appellant was "7" or above. Mr. Misra on the basis of the record does not dispute the professional competence of the appellant in discharge of his duties. Indeed the appellant has asserted in his Letters Patent Appeal that he has obtained numerous awards for professional competence and high achievement. As far as Jayanti Kumar Sinha's case is concerned, he was a scientist and he was a Deputy Chief Scientific Officer in the defense Electronic Research Laboratory, Hyderabad, and his case was one of premature retirement, not one of retirement on superannuation, or denial of promotion. Jayanti Kumar Sinha had unfortunately proved himself incapable in the field of research, which was needed in the organization which he was serving, and he consistently obtained poor reports from 1975 to 1984, and his was a case of retirement under F.R. 56(j). His case was one getting rid of a "dead wood". The remarks of 1980, *inter alia*, said "he is one of those whom we have to keep on as deadwood". The remarks of 1984 were "he is in my opinion at the lowest technical performance and managerial performance in DCRL Scientist "E"". In this kind of background, that Jayanti Kumar Sinha was prematurely retired, and his challenge to the premature retirement failed, this case and the observations made therein can have no application to the case of the appellant before us.

50. The case reported as Baikuntha Nath Das and another Vs. Chief District

Medical Officer, Baripada and another, , relied upon by Mr. Misra, is a case of compulsory retirement under F.R. 56(j). This case instead of helping Mr. Misra, actually helps the appellants, in as much as the observations of three Judges' Bench of the Supreme Court are that if a government servant is promoted to higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority. (paras 33 and 34).

51. In the case of the appellant before us, notwithstanding the existence of the adverse remarks, he was promoted from the rank of Group Captain to Air Commodore. As such they have lost their significance according to this judgment of the Supreme Court, yet the Union of India has thought fit to take these adverse remarks into account, while denying promotion to the appellant.

52. In the case of Baikuntha Nath Das (supra) the Supreme Court reiterated that adverse remarks ought to be communicated in the normal course, as required by the rules/orders in that behalf. These rules are to be found in para 203 of the Air Force Regulations, which as stated above, was not complied with. Therefore, these adverse remarks ought not to have been considered at all. In Baikuntha Nath Das's case in para 32 it was observed, "it is unlikely that adverse remarks over a number of years remain uncommunicated and yet they are made the primary basis of action. Such an unlikely situation, if indeed present, may be indicative of malice in law". It is this observation which is virtually clinching the case like that of the appellant. According to the record of the appellant, who is a professionally competent person, the adverse remarks were not communicated to him, and that communicated to him only 5 days before his retirement, and a promotion is denied to him. We have to see whether this is malice in law, or this is in accord with the view expressed by the Supreme Court in Baikuntha Nath Das's case. In as much as Baikuntha Nath Das's case, that was a case of compulsory retirement under F.R.56(j), which should not taken as having extended the judicial scrutiny of this Court as that of the appellate's court. In our view, the action should not have been taken by the Union of India when the instant case is against the rules which are applicable to the appellant, as is, Therefore, mala fide and arbitrary, and is liable to be struck down, which is hereby struck down.

53. It is the case of the appellant before us that he was given a very short time for the purposes of seeking redressal of his grievances. Only five days were left for his compulsory retirement from the Air Force as an Air Commodore, he was given intimation of what had been used against him for the first time. According to the appellant, he worked overnight and made assertions in his redressal of grievance letter, and particularly the incident of air crash happened at Leh as a result of which Mr. S.K. Kaul, who may have been the person to negate the suggestions of the appellant to have experienced pilots based at Jammu to fly instead of those at Pathankot who have no experience of flying at Leh, was mentioned. In our view, in view of the fact that an air accident in which a MIG-31

plane is destroyed and life of a pilot lost, it is an important incident which would be known to all in sundry in the air force, in any case, to all those who are in a position of command. Mention of such an incident would have been a red flag to anyone who is perusing the redressal of grievance letter with care and an unfortunate incident having happened persons who were to redress the grievance ought to have made sure that what the appellant was stating in the letter was carefully looked at and properly enquired into and acted upon. Instead, what seems to have been done is that the redressal of grievance letter appears to have been rejected without giving the authority concerned to look into, even beyond what was stated in the court of inquiry. No thought apparently was given to the possibility, nay, certainty, that such a flying accident had some impact on the minds of all concerned, and would have adversely affected anyone who would have had something to do with the matter of that flying demonstration and decisions taken with respect thereto.

54. One cannot lose sight of the fact that such an important incident could have some effect on the minds of persons involved especially so when the incident is repeated in a redressal of grievance letter. It is not possible that persons in force do not have friends, and when a junior officer is seen "rubbing it in" the senior officer is not affected adversely. It is unlikely that this was not the problem for the appellant when the matter came up before the Promotion Board.

55. Now the question is what is it that needs to be done in the instant case. Do we direct the Union of India to promote the appellant as Air Vice Marshal, or do we order reconsideration of the case of the appellant? We are given to understand that even if the appellant was promoted to the rank of Air Vice Marshal, he will be able to don his uniform again only for a period up to 31.12.1997. The appellant while in service, as an Air Force Officer, has obviously acquitted himself very well. He has had the requisite number of years of experience. He has a numerical grading which is higher than the requisite grading. He has been a victim of malice in law, rules having not been applied in his case. Had they been applied fairly, he would not have been denied his promotion. We would have, in the normal course, directed the promotion board to reconsider the case of the appellant for promotion, however, since the time available with the appellant, even if he is promoted, will be short, we see no useful purpose in adopting this course of action, as by the time the promotion board even assembles to reconsider his case, his right to occupy the promoted post would have lost.

56. For all the aforesaid reasons, the judgment of the Single Judge needs to be set aside, and it is hereby set aside, it has to be held that the appellant is entitled to be promoted to the rank of Air Vice Marshal as he is going to hold the rank only for a short time i.e. up to 31.12.1997. It is but appropriate that the appellant should don his uniform again and discharge duty of his office, if possible, for this short period.

I accordingly direct that in the peculiar circumstances of the case, the appellant

be promoted as Air Vice Marshal within 15 days from the date of this order. The appellant will, of course, be entitled to all consequential benefits arising from his promotion with retrospective effect from the date of his promotion in 1995.

In as much as I hold that the appellant has suffered on account of malice in law, it would be appropriate to direct that the appellant will have his costs. Ordered accordingly.