

(2004) 11 DEL CK 0041

In the Delhi High Court

Case No : Writ Petition (C) No. 879 of 2004

Air Vice Marshal T.S. Chhatwal

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 08-11-2004

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2005) 3 ESC 1924

Hon'ble Judges : V.K. Jain, J;H.R. Malhotra, J

Bench : Division Bench

Advocate : Keshav Kaushik, for the Appellant; P.P. Malhotra, A.S.G., Pinky Anand and Rituparna De, for the Respondent

Final Decision : Allowed

Judgement

Vijender Jain, J.—Rule D.B.

2. The detailed reasons have been given by us in quashing the policy of promotion pertaining to the promotion of AVM Harish Masand in WP (C) No. 1035/2004 filed by AVM Masand. As the question raised in both the petitions were almost similar, the reasonings rendered in AVM Masand's case holds good in this case as well. However, some other facts and distinguishing features which are not mentioned in the said judgment are deliberated in this judgment. This petition has been filed by the petitioner. Petitioner passed out from National defense Academy Khadakvasla with rare distinction of bagging two medals including one for being the best All-Round Air Force Cadet in 1965 and was commissioned as Pilot Officer in the Indian Air Force on 31.12.1967. He was promoted as Flying Officer on 31.12.1968 and during the Liberation War of Bangladesh, the petitioner flew maximum number of sorties beyond the enemy lines in the most hostile environment, the same has been well documented in the records of 1971 War. He was promoted as Flight Lieutenant and selected to undergo Qualified Flying Instructor's course during the year 1973-74 and during 1976-77 petitioner recorded highest number of sorties amongst his other

colleagues of the Flying Instructors School. He was selected for deputation to the Government of Iraq from October, 1977 to October, 1979 to impart Jet-flying training to their pilots. He was promoted as Squadron Leader in 1978 and was awarded Vay Sena Medal for flying excellence and gallantry in January, 1984. He was promoted to the rank of Wing Commander on 8.10.1984 in the very first Promotion Board. He was awarded President award of Shaurya Chakra for demonstrating exceptional gallantry and for creating the world record in July, 1984 by flying 42 combat missions in a single day in the face of the enemy in the most arduous and inhospitable terrain of Searching Glacier. He airlifted 23 tons of essential load and ammunition single handedly in one day. According to the petitioner this finds mention in the Limca Book of Records and was duly acknowledged by the Guinness Book of World Records. He was promoted in 1989 as Group Captain. In 1993 Presidential Award of "Ati Vishisht Seva Medal" a Group Captain on the Helicopter Stream was awarded. Thereafter he was promoted as Air Commodore and was posted as Deputy Director General, defense Planning Staff and thereafter posted in the Ministry of defense as Secretary, Kendriya Sainik Board's next promotion to the rank of Air Vice Marshal was made on 1.10.2001. He was posted as Additional Director General, National Cadet Corps. The ground taken by the petitioner with regard to the promotion policy from Air Vice Marshal to Air Marshal was brought into force by respondents 1 and 2 on 15.3.2002 is the same as taken by Air Vice Marshal Harish Masand in his writ petition [WP (C) No. 1035/2004]. The same is not repeated here. This Court has dealt in detail the promotion policy and its effect as well as the nothings of the Ministry of defense as to how on account of disproportionate marks given by the Promotion Board petitioner has suffered. In the case of the petitioner another important factor which has to be borne in mind was that in spite of such an outstanding record of service the petitioner was not granted extension of one year as Air Vice Marshal. He filed a Civil Writ petition No. 7595/2003 in which the following order was passed by this Court on 18.12.2003 :-

"This petition was filed by the petitioner against refusal of the respondent to grant him extension in service by one year. During the pendency of the petition, the representation of the petitioner was disposed of by an order dated 11th December, 2003. The grounds for not granting extension of the term are contained in para No. 2 of the said letter which reads as under:- "2. The statutory complaint of the officer was considered by the Government. The laid down criteria governing extension of service prescribe that the officer should be medically fit and should have had a high level of performance. His retention should not block the promotion of juniors and during the preceding 5 years of service his annual confidential reports should have at least 3 grades of 7 and none below 6. In addition to the grades the pen portrait given by the reporting officers also should be good. When his case for extension of service was considered by the Ministry of defense it was observed that the officer did not meet the laid down criteria in respect of AR grades. It was found that during the

assessment year 1.11.01 to 30.9.02 the officer received a grade of only 5.5 and his performance was graded as average. Hence, the officer was not granted extension."

In the said order, it has been mentioned that the laid down criteria governing extension of service was that the officer should be medically fit and should have had a high level of performance. His retention should not block promotion of juniors and during preceding five years" of service, his annual reports should at least have three grades of 7 and none below 6. In addition to the said grading, the pen portrait given by the reporting officer also should be good.

Pursuant to that order passed by the respondent we have directed the learned Additional Solicitor General to produce the A.Rs. of the petitioner which have been produced. The grievance of the petitioner is that he was getting outstanding A.Rs. for the preceding five years prior to A.R. for the period 1st October, 2001 to 30th September, 2002 which is borne out from the record. It is also an admitted case of the parties that on the basis of the A.Rs. of the petitioner upto the year 2001, he was promoted as Air Vice Marshall on 1st October, 2001. After his promotion as Air Vice Marshall, the petitioner was posted as Additional Director General, NCC. The problem of the petitioner started after he claimed extension in terms of the policy of the respondent for a period of one year. The remarks given by the Director General, NCC, Lt. General B.K. Bopanna on 9th September, 2003 is to the following effect:-

1. Professionally a very competent Officer, AVM TS Chhatwal, AVSM, SC, VM, has carried out his duties and responsibilities as Addl.D.G.(A) at my HQ effectively.

2. I did assign him a lot of additional responsibilities, particularly in the absence of my second Addl.D.G., during critical period of intense activity in the NCC such as Republic Day Camp and other major events. In all these, by sheer hard work and dedication, he ensured proper team work by his subordinates and effective coordination of all aspects concerning training activities and logistics management.

3. I strongly recommend that his request for extension of service by one year in his present rank may please be considered based on his overall profile."

3. We have perused the A.Rs. of the petitioner for the period 1st October, 2001 to 30th September, 2002 as it is on the basis of this A.R. that the respondent has not agreed to grant extension to the petitioner on the ground that he did not fulfill the laid down/requisite criteria as he received the grading of 5.5 (below 6) in this year. A bare perusal of the grades/report as recorded by the Initiating Officer (I.O.), Reviewing Officer (R.O.) and Senior Reviewing Officer (S.R.O.) make them immediately suspect about the authenticity and credibility of the grounds recorded by the R.O. and the S.R.O. as we have prima facie noticed certain fudging and manipulation of the remarks recorded by the R.O. initially which appears to have been altered subsequently.

4. It appears that in his original remarks, the R.O. had fully agreed with the remarks of the I.O. whose rating of the petitioner was outstanding and within a grade of around `8". For reasons which are not easy to understand, the R.O. it appears has altered the various gradings given in numericals against various clauses of column 7 and 8 by giving the grade as `6" against most of the other entries except 7(a) of Professional Competence where he has given the grade `7". We could observe that the previous gradings at some of the places were higher which has been erased by putting white ink so as to make them disappear and other gradings lowering down the grade has been substituted. It is also apparent that the pen portrait/hand written remarks recorded by the R.O. were replaced by means of a typed remarks on a slip pasted over the hand written remarks thereby making his remarks luke-warm/average. Why this was done needs to be inquired after the respondent are afforded an opportunity to explain the circumstances under which it has happened. It may be open for an R.O. to downgrade his grading but the same has to be done in pursuance to the well known principle of lowering the grading which has been initially given. Even if the remarks of the R.O. as they are shown to exist now, are taken on its face value, by no stretch it can be said that the grading of the petitioner even for this year would be below `6".

5. The remarks of the S.R.O. (Chief of Air Staff) which took out the petitioner from meeting the criteria for extension, raises an eye-brow because the petitioner was not working under any Command or any formation in the Air Force and in any case not directly under him and so he could not judge his performance as objectively as was done by the I.O. As late as in September, 2003, the I.O. has strongly recommended the case of the petitioner for extension of his service by one year based on his performance in the post of Air Vice Marshall. The S.R.O. without recording his disagreement to the remarks recorded either by the I.O. or R.O. has, it appears, on certain imaginary and untenable grounds put the petitioner in grade 5.5 and it is no wonder that it was one with the sole object of keeping the petitioner out of the criteria.

6. In view of the observations made above, we had asked the learned Additional Solicitor General appearing for the respondent to seek instructions from the respondent if they would like to reconsider the matter at their own end as it pertains to Armed Forces of the Country. May be the advice of learned Addl. Solicitor General has not been heeded to by the respondent.

7. The petitioner if not given extension for one year, will retire on 31st December, 2003. We know that the grant of extension is not a right but non-grant of extension on the basis of irrationality, arbitrariness or without observing the principle of natural justice, does not go with the established principle of judicial review. The Court while exercising the power under Article 226 of the Constitution of India has to protect the fundamental and legal rights of the citizens and to prevent the miscarriage of justice. How and in what circumstances and at whose instance the A. Rs. have been fudged and pasted,

have to be seen after getting the affidavits from the respondent. Normally, this Court had been reluctant in granting an extension to the petitioner till the next date of hearing, however, keeping in view the extraordinary circumstances appearing in this case, if we do not grant any relief to the petitioner, the petition will become infructuous and non-grant of extension would result in miscarriage of justice. Therefore, we are of the opinion that the order passed by the respondent not granting the extension of one year to the petitioner, prima facie, seems to be based on irrationality and arbitrariness, so the order dated 23rd July, 2003 shall not given effect to till the next date of hearing. The petitioner shall continue in service in his present rank as per the requirements of the respondent. We are making this order keeping in view the records which have been produced before us. We would like the record to be preserved so as to pass appropriate orders after affidavits have been filed by the respondent. Same be filed within four weeks. Rejoinder be filed within four weeks thereafter."

8. We have reproduced this order in view of the fact that after the said order was passed, Union of India did not challenge that order by way of filing a SLP but conceded to the prayer in the writ petition and allowed the petitioner to continue for one more year as Air Vice Marshal for complete two years. Petitioner is still in service. Although, petitioner has been retained in service as Air Vice Marshal but as per the averment made in the writ petition no work has been assigned to the petitioner by the respondent except designating him to a post and making him to sit in his office from 10.00 a.m. to 5.00 p.m. What a way to abide by the orders of the Court. In spite of such orders having been passed as has been reproduced above, the course open to the Government was to initiate inquiry against the erring former defense Secretary by taking appropriate civil and criminal action but instead of punishing him, it is the petitioner who has succeeded in his earlier writ petition, but de to high handedness of the respondents, no effective work is taken from him as Air Vice Marshal. We observe this in the context that what kind of consideration has gone into the minds of the members of the Selection Board who had awarded 20% of the Board Marks to the petitioner and how the course of consideration has been influenced by an invisible hand. No records of the Board proceedings have been maintained. Therefore, the least we can say is that respondent No. 2 cannot exonerate his self from the obligation to be fair and impartial as head of the Air Force. Although, the stand taken in the counter affidavit as well as in the argument is that the offending and fudging report for the year 1.10.2001 to 30.9.2002, which is also subject matter of WP (C) 7595/2003, has not been taken into consideration. According to the respondents, the petitioner's Board Marks were not disproportionate. We are afraid that on the line of reasonings in AVM Masand's petition, the arguments of the respondents are devoid of any merit, more so in this case as for the last three years prior to Promotion Board meeting the petitioner had not worked either under the Chief of Air Staff or under any of the Air Marshals who were members of the said Board as he was working with the Ministry of defense. We have perused the reports prior to the manipulated and fudged report, of the then defense Secretary from

1.3.1998 to 30.9.1998 granted by Air Marshal V.K. Bhatia who has graded the petitioner at 7.3, the then Chief of Air Staff, Air Marshal S.K. Sari in has concurred with the said assessment of the petitioner. Thereafter from 1.10.1998 to 30.9.1999, the initiating officer who was Air Marshal V.K. Bhatia had granted 7.2 and the same has been endorsed by the then Chief of Air Staff, Air Marshal Tipnis grading the petitioner as 7.3. From 2.2.2000 to 30.9.2000, he petitioner was in Kendriya Sainik Board where Major General N. Chatterjee and Additional Secretary, Ministry of defense have granted 7.4 and the then Chief of Air Staff Tipnis has endorsed the grant of 7.4 grade to the petitioner. For the period 1.10.2000 to 3.9.2001, the petitioner was in Kendriya Sainik Board and Lt. General who was in-charge of the said Board as I.O. And reviewing officer Shri Samir Tandon, who was the then additional Secretary has granted 7.3 which has been maintained by the than Chief of Air Staff Air Marshal Tipnis. In view of these reports and the later report which has been dealt with in the order dated 18.12.2003 in WP (C) 7595/2003, there has to be someone who never wanted petitioner to be promoted. Therefore, assigning the Board Marks to the petitioner which was only 37 out of 120 on the basis of 20% marks was totally disproportionate to his AR gradings and irrational, arbitrary and without any basis. It was a mala fide exercise of power by respondents 1 and 2. An officer who was rated throughout in the grade of 7.3 to 7.4 i.e. getting 395 marks which comes to about more than 82.29% is given about 30.8% as Board Marks, nothing can be more arbitrary than this exercise of grant of the Board Marks, more so in view of the fact that none of the members of the Board had the opportunity to assess the petitioner as the petitioner has not worked with them in the last three years. As a matter of fact the respondent ought to be more cautious as the respondent had not contested the writ petition No. 7595/2003 in spite of such serious observations raised by the Court against the then defense Secretary. Needle of suspicion is writ large on the respondents 1 and 2 who made sure that the petitioner is ousted from the consideration for promotion by giving such low marks. It is indeed intriguing that AVM A.D. Joshi who got 395 marks on the basis of 80% aggregate weightage of AR was given 101 Board marks, i.e. almost 82% and he was on the top of the recommendation of the Select on Board. We have perused his ARs also. It was recorded that he was obese. This aspect of the indiscriminatory, arbitrary, irrational assigning of marks has been dealt with in AVM Masand's petition and the same are not repeated in this judgment as both the judgments are pronounced together. In AVM Masand's case there was no prayer with regard to quashing of the promotion policy of 2002. In view of the notes of the Ministry of defense as reproduced in AVM Masand's case the policy attributing such percentage of marks have demonstratively affected the career prospects of the petitioner. The relevant note of the Ministry of defense in AVM Masand's case are reproduced below :

Paragraph 10 "Further it would be observed from the statement at Flag Y that 9 out of 15 officers have slipped down by 20 or more points due to their under assessment by the Board. While such sharp variation can be acceptable at the

initial stage of recruitment where candidates from the market are assessed through written examination and interview, any service assessment particularly in the Services it would be proved to be counter productive in the sense that the officer secured appreciation in the multi-tier assessment. There is system (10/RO/CS), crystalised in the shape of numerical gradings of ARs would suddenly put themselves in poor light after assessment by the Board and missing the next higher rank. It will generate an atmosphere of despair and demotivation. It is, Therefore, felt that the variation upward or downward in the assessment of the Board as compared to the mark awarded on the basis of AR grading should be of a limited extent may be up to 10 to 15 points."

9. After discussing the note with the Joint Secretary, Shri A.P. Pandit, Deputy Secretary on 28.3.2003 recorded vide note No. 50 which is as follows :-

"I have examined AR dossiers of these air officers. A comparison of pen portrait of AVM A.D. Joshi as I have been able to discern shows that both the officers are of comparable merit but the former has an edge over the latter. When AVM Masand has secured 84.6% marks on the basis of 80% weightage of AR gradings there is no real justification for awarding 52.5% marks by the Board on 20% weightage. This variation which is by 32 points depicts that there is no co-relation between the weight or grading and assessment of the Board. It is further observed that there were some adverse remarks for the year 1997-98 and 1998-99. These remarks were recorded by the present Case (the then Air Marshal) in the capacity of I.O. But the same were expunged by he Case in the capacity of R.O. It appears that the non formation at the stage of recording AR carried on at the back of main of Board members when the air officer was being assessed in the promotion board."

10. This Court would not interfere in judicial review of gradings as received by incumbents but it is on the basis of the grading by the respondents themselves of weighted average of AR which is of the highest order, the grant of Board Marks has no co-relation in its appropriateness as has been discussed in AVM Masand's case, no record has been kept, assessment of the petitioner by the Board members could not have been made in such a disproportionate manner as the petitioner has not worked with the members of the Board. The least that can be said is that the discretion exercised by the respondents was based on totally irrational and extraneous consideration and in an arbitrary manner. A policy which gives such sweeping power cannot stand the scrutiny of law and is vocative of Article 14 of the Constitution of India. Another important distinguishing fact of the case is that no argument was advanced from the respondents that petitioner has been granted any censure or any adverse report which was given to the petitioner in his entire career. In para 18 of the Ministry of defense note it was observed:-

Para 18 " The case of AVM A.K. Singh is another one which is quite illustrative. In the case of A.K. Singh, his position as per the Air marks was at No. 10, whereas after the Board marks this discretionary power he shot up to No. 4 position and

made to the rank of Air Marshal. This is despite the fact that there has been some unfitting remarks in his ACR. Some of them written by the present Case himself. May kindly refer to para 8 (x) of Note 51 ante. Despite such unfitting remarks, the officer has been able to make the grade solely on the ground of generosity shown to him by the Promotion Board. While the Board has been quite liberal in its attitude towards A.K. Singh it has been quite harsh to many others. All these aspects point to enormous differential and decisive powers at present held by the Promotion Board which is able to undermine the entire lifetime record of an officer with one stroke."

11. When Ministry of defense itself has seen that these aspects point to enormous differential and decisive powers held by the promotion Board which is able to undermine the entire lifetime record of an officer with one stroke. Can such kind of policy with stand the test of Article 14 of the Constitution of India? The answer is in negative. Therefore, we have no hesitation in quashing the promotion policy as circulated by the respondent on 15.3.2002. The Government of India have decided to lower down the Board Marks from 20 to 5 marks on 27.2.2003 and the same was communicated on 1.9.2003. As Government of India itself has decided that 5% marks should be attributed to the Board Marks, there is no reason why the petitioner should suffer from that sid test of disproportionate assessment at the hands of respondent. The low percentage of Board Marks as stated above has resulted in arbitrariness. It is very difficult to maintain high profile of aggregate of over 82% at the grading of 9 for four years. The petitioner has maintained very high grading in all the previous four years. As a matter of fact during the course of the argument a chart was submitted by learned counsel for the respondent to demonstrate that even if what has been written under the fudged report by the defense Secretary which was the subject matter of WP (C) No. 7595/2003, the grading of the petitioner would come to 7.8. If that is so, how and on what basis the Board has evaluated the petitioner by only awarding 30% marks which comes to 37 out of 120. In view of the fact that the irrelevant consideration has gone with the Board, the recommendation of the Board for the year under consideration needs to be quashed. No material was placed before us to show that any adverse report or any other factor which has been taken into consideration which has resulted in such a disproportionate assessment of the petitioner by the Board. A meritorious officer like the petitioner has not been selected on the basis of grant of 20% Board Makes which are so disproportionate to his career profile that not only the conscience of this Court is shocked but that shows the unfettered discretion of the Board which has exercised such discretion in an arbitrary and irrelevant consideration. Grant of such discretion under the policy has resulted into policy being incapable of withstanding tests of reasonableness and fair play. Therefore, the same is quashed. As we have quashed the promotion policy of 2002, the promotion made pursuant to the Promotion Board of 2003 are also quashed. The petition is allowed. Same relief is granted to the petitioner in terms thereof as has been granted in AVM Masand's case. Rule is made absolute.

12. Writ petition is allowed with costs.