
(2000) 04 DEL CK 0021

In the Delhi High Court

Case No : CWP. No. 2651 and CM No.11785/98, CWP No. 5654 of 1998

A.S. Saharan (Brig.)

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 07-04-2000

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 21, 51A

Citation : (2000) 4 AD 597 : (2000) 53 DRJ 614

Hon'ble Judges : A.K. Sikri, J

Bench : Single Bench

Advocate : Mr. Maninder Singh Adv, for the Appellant;

Judgement

A.K. Sikri, J.—Both these writ petitions are filed by the petitioner which were heard together.

CW No. 2651/98 was filed by the petitioner on 25.5.1998 in which he has claimed the following reliefs:

(A) Quashing impugned annual confidential report for the year 1984-85 and reports endorsed by the reviewing officers(ROs) and senior reviewing officers(SROs) in reports rendered during the period 01 June 1985 to 21 September, 1987.

(B) Upgrading the report rendered by the initiating officer from "Above average" to "Outstanding" in annual confidential report 1994-95.

(C) Modifying petitioner's records attached to the proceedings of promotion board held on 27 March, 1998 for objective assessment since partial relief has been granted by respondent No.1 vide order No. A/45501/45/98/SC/MS(x)/205/SC/D(MS) dated 08 May 1998.

(D) Restoring original seniority (27 June, 1965) to the petitioner for promotion.

2. The petitioner in this writ petition also filed CM No.6409/98 in which he,

interalia, claimed the relief restraining the respondents from promoting any other Brigadier of Army Ordnance Corps to the rank of Major General till the decision of the writ petitions on the grounds that petitioner was seniormost eligible Brigadier in the Army Ordnance Corps and also sought directions that respondents held special fresh selection board for promotion to Major General in case of petitioner. In this CM, which came up for hearing on 29.5.1998 orders were passed from time to time. Without going into details of these orders, it would be sufficient to state that the respondents on the basis of orders passed by this Court, held special selection board which considered the petitioner for promotion to the rank of Major General but rejected the case of the petitioner. In these circumstances on 14.9.1998, petitioner had submitted that he reserved his right to challenge the finding of the selection board. This led to filing of CW No. 5654/98 in which petitioner has made the following prayers :

"(A) Reviewing the subjective recommendations of Selection Board No.1 held on orders of Hon"ble Delhi High Court on 25th August 1998 and approval of its proceedings by Union of India of "Rejecting" the petitioner for promotion to the rank of Major General.

(B) Issuance of orders/directions to the respondents to promote the petitioner to the rank of Major General with effect from date not later than 14th September, 1998 with full benefits of the rank and place the petitioner forthwith in an appointment tenable by a Major General.

CW: 2651-98

3. The facts narrated by the petitioner in his writ petition on the basis of which he claims the relief in CW No. 2651/98 may now be stated which are as under.

The petitioner was Commanding Officer 6 FOD, Jodhpur from 27 June 1984 to 21 September, 1987. Major General (Maj Gen) M.L.Yadav MG, AOC, Southern Command, Pune was his immediate Superior Officer and also the initiating officer (IO) for CR for the period of 01 June 1984 to 31st May 1985. Lt. General Deepinder singh, COS, Southern Command, Pune a batch mate and a friend of Major General M.L. Yadav, was his Reviewing Officer (RO) for CR 1984-85 and thereafter Senior Reviewing Officer (SRO) for two CRs in 1986-87 on becoming GOC-in-C, Southern Command, Pune.

4. Lt. General R.S. Dayal, GOC-in-C, Southern Command, Pune, a school mate of Major General M.L.Yadav from King George School, Jalandhar, was the SRO for CR 1984-85 and CR 1985-86. Major General (later Lt.General) M.L.Yadav was thoroughly corrupt and to achieve his aim of making money illegally, he pressurised him in every possible manner including threats of ruining his career. However, he did not succumb to his pressures. Factual details are contained at page 50 to 54, page 65 to 79 and at page 5 (from para 3) to page 15 (upto para 22) of CW 2651/98. The ever increasing atrocities by Major General M.L. Yadav left him with no choice but to initiate a letter dated 13.4.1984 (page 65 to 74 of CWP 2651/98) to the Head of Department, Lt. General Robinder Sarin, who in

turn wrote a letter dated 25.4.1985 (page 80-81 of CWP 2651/98) to Lt. General R.S.Dayal GOC-in-C, southern command. The gist of the letter was to get local purchase irregularities in Southern Command investigated by a Staff Court of Inquiry and to safeguard his interest since he was innocent. Major General M.L.Yadav wielded so much influence with Lt.General Deepinder Singh and Lt. General R.S. Dayal that instead of action being taken against him, he got him removed from command of 6 FOD and got a Staff Court of Inquiry instituted against him. He was attached to a local unit on 25.5.1985 on disciplinary grounds without any prima facie case. The Court found the allegations to be baseless and his performance to be laudable. The disciplinary case against him thus was dropped on 28.6.1985 and he resumed command of 6 FOD the same day he was also asked to drop the case against Lt.General M.L.Yadav by the staff officers of RO and SRO to which he did not agree.

5. Based on his letter dated 13.4.1985 (page 65-74 of CWP 2651/98) the Ministry of defense ordered a detailed investigation in June/July 1985. Lt. General M.L.Yadav then posted at CMM, Jabalpur, was attached to Southern Command Pune during a special audit followed by a Court of Inquiry. He was finally arrested on 30/31 August 1986 for trial by General Court Martial. The GCM proceedings commenced in First/second week of February 1987. Lt. Gen. M.L. Yadav (who was retired on 31.8.1986) absconded from custody on 13.2.1987 and returned on 1.3.1987. His trial by GCM could not continue because of legal problems till the Hon"ble Supreme Court of India gave a ruling in July 1996 for trying him by GCM. The GCM thereafter reassembled in August 1996 and Lt. General M.L. Yadav (Retd) was found guilty and awarded the punishment, "Cashiering and two years imprisonment" in 1997.

6. CR (27.6.1984 to 31.5.1985) : He submitted the CR form duly signed by him on 30.7.1985 to the RO as the disciplinary case against him was dropped on 28.6.1985. Major General M.L.Yadav, his immediate superior, was debarred from initiating the CR because of the disciplinary case against him. In terms of para 47 of SAO 10/S/83 (Annexure "H" page 108) Lt. General Deepinder Singh, the RO, was required to initiate the report after obtaining sanction of Lt.General R.S.Dayal, SRO at the earliest. The CR is prayed to be quashed on the following grounds:

(a) The CR due for initiation in August 1985 was initiated by the RO, Lt. General Deepinder Singh on 21.9.1987 (as stated by defendants). The CR was thus deliberately withheld from timely initiation with the motive of keeping him under threat of an adverse CR since he was the "Prime Witness" in the GCM trial of Lt. General M.L. Yadav (a batch mate and friend of the RO) which had commenced in February 1987. Such delay is illegal in terms of Para 35(b) of SAO 10/S/83 (perused by Your Lordship during arguments) and Para 116 of Instructions for Rendition of CR (Annexure "J" Page 109 of CWp 2651/98). The said CR in terms of para 35(b) of SAO 10/S/83 should have reached Respondent No. 3 by 15.10.1985.

(b) Sanction of SRO for initiation of CR by RO is mandatory in terms of para 47 of SAO 10/S/83 but was not obtained by the RO Lt. General Deepinder Singh. Lt. General R.S. Dayal, the SRO, retired on 30.11.1986 (after 16 months of submission of the CR form). The RO thus had sufficient time for obtaining necessary sanction but deliberately chose not to do so. As per defendants permission has been granted on 10.8.1987. such permission itself is illegal since the SRO had retired on 30.11.1986.

(c) The CR is a "One man" report and blatantly violates the spirit of para 28 of SAO 10/S/83 which stipulates that two more Superior Officers should normally have endorsed the report. The defendants have no Explanation for these deliberate omissions except the retirement of the SRO after 16 months on 30.11.1986 which is a vacuous plea.

(d) Lt. General Deepinder Singh did not visit 6 FOD or him even once during his 3 years and 3 months tenure in Command of 6 FOD in violation of the provisions of Rules 117 and 118 of "Instructions for Rendition of CRs" (Annexure `J" pages 109 & 110 of CWP 2651/98) in order to render an objective assessment in terms of para 3 of SAO 10/S/83. Page 97 to 100 of CWP 2561/98 may be perused since they are "records of Visits" traditionally maintained by all units of the Army.

(e) The CR ought to be construed as a "Down grading" entry reflecting an adverse element, hence compulsorily communicable. However, he has not been informed of this change till date by the relevant authority. In this regard your Lordship's attention is requested to Supreme Court ruling in UP Jal Nigam & Ors. Vs. P.C. Jain & Ors. at Annexure "K"(page 111 & 112 of CWP 2651/98).

7. CRs. for the period from 1.6.1985 to 21.9.1987: Endorsement by ROs & SROs: Against 18 to 30 months of the usual tenure in Command as per Army HQ Policy he was retained in Command of 6 FOD for 39 months. His services had become indispensable because of Exercise "Brass Tacks" in 1986 when Pakistan and India were at the brink of war. Only after repeated requests after the exercise, he was posted out on 21.9.1987. If his performance was truly as rated by the ROs/SROs he should have been moved out by December, 1985/February, 1986 itself. Endorsement of "Luke warm" reports in CRs for this period is in line with the age old cliché "Use able professionals in the hour of need and then check their growth for the sake of the system". Hence, CRs endorsed by the ROs and SROs for the said period are prayed for being quashed on the following grounds :

(a) None of the ROs and SROs had adequate knowledge and made no efforts to visit him/his unit even once during their tenure to obtain such knowledge. Para 117 of Instructions for Rendition of confidential Report (Annexure "J" page 109 of CWP 2651/98) lays down "The reporting officers must resist the tendency of rendering reports based on inadequate knowledge of the subject officer". Also, para 118 of the same instructions requires the Reporting Officers to visit the ratee and observe his performance during the reporting year. Para 10 of SAO 10/

S/83 (perused by your Lordship during the arguments) makes it obligatory for Reporting Officers to strictly adhere to these instructions. These instructions were grossly violated by the ROs/SROs while endorsing his Reports for the said period.

(b) The assertion of the defendants that the ROs/SROs acquired "Adequate" knowledge about the Ratee" through normal correspondence does not hold water, since his channel of correspondence was through the IO Army HQ. also such method does not constitute the appropriate means of gaining such knowledge as stipulated in SAO 10/S/83. Since my interaction was only with the IOs for the entire period, he has not prayed for quashing of their reports irrespective of gradings awarded by them. His apprehension is that the ROs/SROs have deliberately lowered the figurative assessments awarded by the IOs of that period without any bonafide reasons. He has reason to believe that Lt. General M.L. Yadav influenced them and they succumbed to such influence. A few major issues which confirm his belief are given below:

(i) Instead of ordering a Court of Inquiry against Lt.General M.L. Yadav on allegations leveled by him vide his letter dated 13.4.1985 (page 65 to 74 of CWP 2651/98) a Court of Inquiry was ordered against him and he was made a "Disciplinary Case" without any prima facie.

(ii) None of the officers guarding Lt. General M.L. Yadav while he was under arrest and absconded from custody on 13.2.1987 were punished.

(iii) Lt. General M.L. Yadav reported to Lt.General Deepinder Singh on 1.3.1987 instead of report to his Commanding Officer.

(iv) Lt. General Deepinder Singh who had convened the GCM appeared as a witness in defense of Lt. General M.L. Yadav and deposed in his favor in the year 1996/97. This, in itself made unparalleled judicial history as has been observed by the Hon"ble GCM in its proceedings.

8. The petitioner has also relied upon the judgment of Supreme Court in the case of State of U.P. Vs. Yamuna Shanker Misra and another, . The petitioner also seeks upgradation of IO's report in CR 1994-95 from "above average" to "outstanding". He submits that he earned an "Outstanding" CR for the year 1993-94 from the IO Maj. General S.K. Bhatnagar (Copy of the CR at page 31 to 33 of CWP 2651/98). He was graded "Above Average" in CR for the year 1994-95 by the IO Maj. General B.N. Rao with two `7" point gradings in columns 13(d) and 13(f). By the order of UOI at (b) the `7" point gradings have been expunged (page 107 of CWP 2651/98). He had deliberately lowered his gradings at the behest of Lt.General Surinder Verma, DGOS, since he was approved for promotion to Lt.General and wanted, to become the DGOS on Lt.General Surinder Verma's retirement. Both Maj. General B.N. Rao and Lt. General Surinder Verma were corrupt and as he had become inconvenient to them. They managed to get him transferred from Command of COD Kanpur to DD OS 21 Corps at Bhopal in June 1995, (just after 18 of taking over of Command of COD

Kanpur on 24.12.1993). He wrote a letter (page 83 to 93 of CWP 2651/98) to the MS (respondent 3) with copies to others (page 93) highlighting his achievements and exposing their misdeeds. In spite of every allegation contained in the letter being true, no court of Inquiry was ordered and he was eased out of command of COD Kanpur to a new assignment. A Court of Inquiry was instituted after their retirement and both these officers (Lt. General Surinder Verma and Maj. General B.N. Rao) have been found guilty of major lapses and corruption. Criminal proceedings had been ordered by the COAS to be lodged in the Civil Courts and each one of them have been awarded major fines.

9. The grounds on which he seeks that the CR 1994-95 be upgraded to outstanding are as under:

(a) The figurative assessment (pages 34 & 35 CWP 2651/98) is inconsistent with "Brief comments on the officer (page 36 of CWP 2651/98). Brief comments themselves warrant award of "Outstanding " grading.

(b) No reasons for "Down grading" of entries have been found recorded either in "Brief comments of the officer" or on file of the defendants.

(c) "Down grading" of entries is with an ulterior motive to punish me for not abiding by the illegal dictums of IO and exposing their misdeeds vide his letter mentioned.

He relies upon the judgment of U.P. Jal Nigam and others Vs. Prabhat Chandra Jain and others, in support of his aforesaid submissions.

10. On the other hand, respondents have contended that the ACRs of different years, subject matter of this writ petition as recorded by the respondents are valid and proper and need no interference. The stand taken by the respondents may be summarised in the following manner:

ACR 01 June 1984 - 31 March 85 in respect of Lt.Col.(then) A.S.Saharan, CO 6 FOD Initiating Officer (IO) - Maj. Gen.M.L.Yadav MS ADC Southern Command Reporting Officer (RO) - Lt. Gen. Deepinder Singh COS Southern Command Superior Reporting Officer(SRO)- Lt. Gen. R.S. Dalal GOC-in-C Southern Command ACR submitted by Lt. Col. Saharan - 30 July, 85 Date of Retirement of Maj. Gen. M.L. Yadav - 30 March 1987 No.3 Selection Board for Lt. Col. A.S. Saharan held - 30 March,1987 to 3 April, 1987

11. Maj. Gen. M.L. Yadav was not under disciplinary action during the period July 85 to May 86. He was placed under disciplinary action only 05 May, 86 when cognizance of offence was taken directing disciplinary action. Refer AG's Branch DV-Dte note No.B/31074/AG/DV-5 dated 26 May 1986 (copy enclosed). It is not understood why Maj. Gen. M.L. Yadav did not initiate the report between 30 July, 85 and 05 May 86. After that he was under disciplinary action till he retired on 31 Aug., 86. Lt. Col. A.S. Saharan was "withdrawn" in No. 3 Selection Board held on 30 March 1987 to 03 April, 1987 for want of FACR 1984-85. A case was then taken up and sanction of MS branch was granted 10 Aug.,1987 for initiation of

ACR 6/84-3/85 by RO. RO initiated the report on 21 Sept., 1987. Meanwhile the SRO Lt. Gen. R.S. Dayal had retired on 30th Nov., 1986. Before retirement he endorsed the ACR for 85-86 as SRO on 29 October, 1986.

12. It was further submitted that most of the arguments raised by the petitioner were beyond the pleadings. Still the respondents had produced original records to show that entire exercise was bona fide. It was submitted that the records would show that as far as ACR of 1984-85 is concerned, Maj. Gen. Yadav did not initiate the ACR as a matter of fact. It was further submitted that these ACRs were not written as per the relevant rules and orders. SAO 10/S/83 relied upon by the petitioner was changed in 1989 and it was also submitted that as per the procedure, Initiating Officer initiates the ACR which goes to Reviewing Officer and then Senior Reviewing Officer. Thus three persons report and allegations of influence made by the petitioner in these circumstances cannot be believed to be correct. It was also submitted that the grading done in the case of the petitioner cannot be called "Adverse" and when such ACRs are not "Adverse" or "downgrading" Therefore there was no necessity to communicate these ACRs to the petitioner. It was also submitted that the petitioner was raking up the old issues relating to ACRs for the period from 1984-87 and record relating to this period being old was not available. Moreover, according to the respondents, the grading of the year 1985-86 was consistent with grading of 1984-85 and this fact also shows that apprehensions of the petitioner were totally misconceived. He further submitted that the judgments cited by the petitioner, Therefore, were not applicable to the facts and circumstances of this case. The respondent relied upon the Division Bench judgment dated 11.10.1996 of this Court in LPA No. 23/95 as well as that of Apex Court in the case of Air Vice Marshal S.L. Chhabra, VSM (Retd.) Vs. Union of India (UOI) and Another, .

13. As far as quashing of ACR for the year 1984-85 and for the period 1.6.1985 to 21.9.1987 are concerned, it may be mentioned at the outset that present writ petition seeking this relief is filed in May, 1998 more than 11 years after the ACR for the said period was written. Moreover, I have seen the original record produced by the respondents and I am convinced that the very basis to challenge grading for this year is misconceived inasmuch as Maj. Gen. M.L. Yadav did not initiate the report between 30.7.1985 and 5.5.1986. The allegations that Maj. Gen. Yadav wielded influence with Lt. Gen. Deepinder Singh and Lt. Gen. R.S. Dayal do not stand legally proved. It may be that because of the letter dated 30.4.1985 investigation was ordered by Ministry of defense which resulted into disciplinary action against Maj. Gen. Yadav. However that aspect does not lead to the conclusion that Maj. Gen. Yadav wielded influence upon other officers which led to recording of petitioner's grading. The reasons because of which the CR for this year was initiated late have been satisfactorily explained by the respondents in the counter affidavit. The original record further shows that the ACR for this period is rightly recorded after following the relevant instructions on the subject. For all these reasons it is not appropriate to interfere with these ACRs particularly at this distance of time.

14. As far as CR for the year 1994-95 is concerned, petitioner is rated as "above average". He wants it to be upgraded as "outstanding". In the year 1993-94, he earned an outstanding CR. Petitioner has annexed as Annexure C-I his confidential report for the year 1993-94 as initiated by Major General S.K. Bhatnagar. A perusal of part-II shows that against most of the heads, petitioner is given 8 or 9 marks out of 10. In Part IV, while making brief comments on the, Major General S.K. Bhatnagar has given him 9 marks on the basis of overall assessment of his personal and demonstrated performance. However the CR of 1994-95 was initiated by Major General B.N. Rao and Part-II thereof shows that except against 2 columns, petitioner is given 8 marks in rest of the columns. In two columns, he is given 7 marks each which are as under:

"(d) Exhibition of foresight, depth of understanding and breadth of perspective beyond his limit of specific responsibilities. : 7

(j) Understanding appreciation of the view point of his subordinates, colleagues and superiors.:7"

15. In part IV while giving brief comments on the officer petitioner is given 8 marks and brief comments which read as under:

"Brig. A.S. Saharan has Commanded COD Kanpur exceedingly well. He brought about a cultural change in the work ethics and particularly discouraged malpractices. The labour unions were completely tamed and industrial relations were as their best."

16. Petitioner has also produced CR of 1995-96 initiated by Major General M.S.Shergill as per which in Part II, against all heads petitioner is given 8 or 9 marks and in part IV while recording brief comments overall 8 marks are given. Same is the position in respect of CR of 1996-97. The above material would show that only in the year 1994-95 against 2 columns D & J, petitioner has been given 7 marks because of which his grading came to "above average" in this year. It has otherwise remained as outstanding in other years including previous year i.e. 1993-94. The figurative assessment of columns (d) & (j) goes contrary to the brief comments recorded by the officer in that year. The brief comments which are made by the initiating officer and which are highly appreciative of the petitioner have direct bearing on columns (d) & (j). During this period, if petitioner had commanded COD Kanpur exceedingly well and brought about a cultural change in the work ethics and discouraged malpractices and could tame labour unions and achieved best industrial relations, it cannot be said that his exhibition of foresight or understanding of specific responsibilities was lesser which warranted only 7 marks. Similarly, if he had soft corner in his heart for the welfare of his civilian workers, this relatable to entry of "J" which deals with understanding appreciation of the view point of his subordinates etc. It may be pointed out that against the same heads, for the year 1993-94 he is given 8 marks each and for the year 1995-96 he is given 9 and 8 marks respectively. Therefore if his initiating officer wanted to downgrade him there should have

been specific reasons given by the officer in his brief comments. In any case on the statutory complaint made by him, UOI expunged the 7 point grading aberrative but the overall grading for the year as "above average" has remained the same. In *U.P. Jal Nigam & Ors. Vs. Prabhat Chandra Jain* (supra) the Supreme Court emphasised the necessity of recording reasons for such downgrading on the personal file of the officer concerned and inform him of the change in the form of an advice. This is what the Court had to observe in that case:

"If the graded entry is of going a step down, like falling from 'very good' to 'good' that may not ordinarily be an adverse entry since both are a positive grading. All that is required by the authority recording confidentials 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. If the variation warranted be not permissible, then the very purpose of writing annual confidential reports would be frustrated. Having achieved an optimum level the employee on his part may slacken in his work, relaxing secure by his one-time achievement. This would be an undesirable situation. All the same the sting of adverseness must, in all events, not be reflected in such variations, as otherwise they shall be communicated as such. It may be emphasised that even a positive confidential entry in a given case can perilously be adverse and to say that an adverse entry should always be qualitatively damaging may not be true. In the instant case we have seen the service record of the first respondent. No reason for the change is mentioned. The downgrading is reflected by comparison. This cannot sustain."

17. In the present case also, no such reasons while downgrading the petitioner from "outstanding" to "above average" in the year 1994-95 are given. On the contrary box entries where 7 marks were given against 2 columns have been expunged. After that how the entry of "above average" was maintained is not explained even in the order dated 8.5.1998 passed by Government of India on his statutory complaint. One may also usefully refer to the case of *State of U.P. Vs. Yamuna Shankar Mishra & Anr.* (Supra) decided by the Apex Court wherein object of writing such CRs was highlighted in the following manner:

"It would, thus, be clear that the object of writing the confidential reports and making entries in the character rolls is to give an opportunity to a public servant improve excellence. Article 51-A(j) enjoins upon every citizen the primary duty to constantly endeavor to prove excellence, individually and collectively, as a member of the group. Given an opportunity, the individual employee strives to improve excellence and thereby efficiency of administration would be augmented. The officer entrusted with the duty to write confidential reports, has a public responsibility and trust to write the confidential reports objectively, fairly and dispassionately while giving, as accurately as possible, the statement of facts on an overall assessment of the performance of the subordinate officer. It should be founded upon facts or circumstances. Though sometimes, it may not be part

of the record, but the conduct, reputation and character acquire public knowledge or notoriety and may be within his knowledge. Before forming an opinion to be adverse, the reporting officers writing confidentials should share the information which is not a part of the record with the officer concerned, have the information confronted by the officer and then make it part of the record. This amounts to an opportunity given to the erring/corrupt officer to correct the errors or the judgment, conduct, behaviour, integrity or conduct/corrupt proclivity. If, despite being given such an opportunity, the officer fails to perform the duty, correct his conduct or improve himself, necessarily the same may be recorded in the confidential reports and a copy thereof supplied to the affected officer so that he will have an opportunity to know the remarks made against him. If he feels aggrieved, it would be open to him to have it corrected by appropriate representation to the higher authorities or any appropriate judicial forum for redressal. Thereby, honesty, integrity, good conduct and efficiency get improved in the performance of public duties and standard of excellence in services constantly rises to higher levels and it becomes a successful tool to manage the services with officers of integrity, honesty, efficiency and devotion."

18. In that case also the Court noticed that the concerned employee had constantly maintained a good record earlier to the adverse remarks and subsequently also. He had good CRs. Same is the case here. For aforesaid reasons, I am inclined to agree with the petitioner that CR of "above average" for the year 1994-95 is not properly recorded and needs reconsideration. However the prayer of the petitioner that this Court should upgrade the same to "outstanding" cannot be granted as it is not the function of the Courts to record entries. Therefore while quashing the entry of "above average" in the CR of the petitioner for the year 1994-95 I remand the case back to the respondent for reconsideration consistently with the brief comments "on the officer as recorded" as well as keeping in view that box entries against columns (d) & (j) have been expunged by the respondents. This exercise be done within a period of one month from today.

This writ petition is thus partly allowed to aforesaid extent without any order as to costs.

CWP No. 5654 of 1998

19. The basis on which the petitioner challenges the screening done by Promotion Selection Board is that he was screened by Promotion Selection Board No.1 in October 1997 Along with 12 or 13 more Brigadiers of Army Ordnance Corps (AOC). Against two vacancies arising in the year 1998 due to superannuation of two Major Generals of the Army Ordnance Corps (one on 30th April, 1998 and the other on 31st July, 1998) only one Brigadier (S.S. Bindra) was approved for promotion. Brigadier S.S. Mediratta's name was withdrawn by Respondent No. 3 on the ground of non-receipt of his CR for the period 1st ,1996 to 11th March, 1997. A vacancy was also thus kept for him. On being rejected for promotion, he submitted an appeal in the form of Non Statutory Complaint on

17th January, 1998 to the COAS (respondent No.2). The complaint was put up to the COAS by his Complaint and Advisory Board (CAB) on 6th March 1998 and again on 24th March, 1998 but the COAS rejected the complaint outright and without application of mind. As per order of this Court dated 20th April, 1998 in CWP 1855/98, he submitted an appeal in form of Statutory complaint to the UOI on 24th April, 1998. The contents in the "Non Statutory" and "Statutory" complaints were identical but the UOI granted partial redress vide their order dated 8th May, 1998. The Court vide its order dated 5th June, 1998 in CWP No.2651/98 directed the defendants to hold a fresh Promotion Selection Board for him on or around 8th June 1998 and also restrained the defendants from promoting anyone to the post of Major General pending production of results to the Court. The defendants held the promotion board on 25th August 1998 but did not process the Board proceedings out of fear that the UOI would interfere with the recommendations of the promotion board as he stood rejected by them despite superior records than Brig. S. Mediratta which merited his selection for promotion. Hence they filed an application CMP No. 9099/98 in CW No. 2651/98 (Annexure 'M' in CWP 5654/98) on 1st September 1998 seeking:-

(a) Vacation of stay granted by Hon"ble Court, on the grounds that non-filling of one vacancy of Maj.General was adversely affecting the turn over of MGs AOC Command and also the operational preparedness and efficiency to effectively counter threats from within and outside the boundaries of the Nation.

(b) Permission of the hon"ble Court for promoting officers junior to the petitioner by rendering an undertaking at para 8 of the said application. (I HUMBLY PRAY THAT YOUR LORDSHIP PERUSE THE SAID UNDERTAKING (at page 83 of CWP 5654/98) OF THE DEFENDANT AND KEEP IT IN MIND WHILE ISSUING THE ORDER).

20. The Court on 9th September, 1998 directed the defendants to produce the Promotion Board results on 14th Sept.1998 without fail and that the defendants application would be considered thereafter. The Board proceedings were put in the processing flow on 9th Sept.1998 (after the Hon"ble Judges directions) and the results of "Rejection" produced to this Court on 14th September 1998 (where 12th and 13th Sept.1998 were closing holidays being Saturday and Sunday). The petitioner alleged that on one hand the defendants wanted additional time because the Board Proceeding detailed scrutiny and on the other the entire process of scrutiny was completed in two days. According to the petitioner, the defendant's action to keep the Selection Board Proceeding pending from processing from 25th Aug.,1998 to 9th Sept.,1998 and thereafter processing the same in such haste is "irrational". This was done with a mala fide intentions in harming the petitioner by hardly giving any time to UOI to scrutinise the Board Proceedings including results in detail. The malice and prejudice is discernibly visible (Especially so when this action had been ordered by this Court) from the action of the "Defendants by causing uncalled for delay. On the hand there was no delay on the part of the defendants in promoting Brig. S.S. Bindra (junior to

him) within 2 hours of declaration of the Board results to the Court on 14th September, 1998. The exchange of 'Notings' between defendants thus would be relevant. of only one Brigadier (Brig. S.S. Bindra) by the Selection Board No.1 in October 1997 against two vacancies was done with the ulterior motive of keeping one vacancy reserved for Brig.S.Mediratta. By rejecting 12/13 Brigadiers en-masse in October, 1997 it was ensured that Brig.S.Mendiratta was alone considered by Selection Board No.1 in March 1998 since all these Brigadiers lost one year seniority for promotion because of their rejection. Grant of any kind of redress/relief by COAS on his Non-Statutory Complaint would have amounted to restoring his seniority(lost on account of rejection by Selection Board No.1 held in October 1997) and making it obligatory for the defendant to have him screened by Selection Board No.1 Along with Brigadier S.Mediratta and his records, being superior to Brig. S. Mediratta, would have led to his being selected for promotion. Brig.S.Mediratta alone was screened by Selection Board No.1 on 27th March 1998 and cleared 'fit' for promotion to the rank of Major General by the Selection Board. However, this game plan apparently came to the notice of UOI since the declaration of results in his case took more than one year and have now been issued vide MS Branch (Respondent No. 3) letter No. A/47052/1SB/AOC/MS(X) dated 8th April 1999. The selection for promotion is based on overall profile and his overall profile is superior to that of Brigadier S. Mediratta where as Brig.S.Mediratta stands approved for promotion to the rank of Major General and he stands rejected. Thus the defendants have denied him his right of equality for promotion as enshrined in Article 16 of the Constitution of India and so also the provision contained in Articles 14 and 21 of the Constitution. The petitioner has made a detailed comparison between his overall profile and that of Brig.S.Mediratta and has submitted that the comparison of cases would reveal that petitioner was superior to Brig.Mediratta in all respects but the petitioner was rejected and Brig.S.Mediratta promoted only because the petitioner had filed the cases in this Court and the respondents Therefore had acted in a biased manner.

21. On the other hand, the respondents have refuted the claim of the petitioner on the ground that the Selection Board properly considered the case of the petitioner but did not find him fit for promotion. It was also submitted that the petitioner had only right to be considered for the promotion and no right of automatic promotion. It was also submitted that at the time of selection not only ACRs but many other aspects are considered including courses studied, award earned etc. It was also submitted that the Selection Board which considered the case consisted of very senior and highly placed officers. The respondents have also placed on record the paper of selection system to be followed in such cases which clearly mentions that the post of Major General is selection post. It also stipulates composition of board and guidelines of assessment the considerations which are to be kept in mind by the board are also spelt out. It was submitted that after proper consideration of the cases of all the eligible candidates, the Selection Board recommended the case of Brig. S.Mediratta and did not

favourably recommend the case of the petitioner. This Court would not act as selection body or sitting as Appellate Authority over the recommendations of the Selection Committee. It was also submitted that the petitioner had claimed that for Selection Boards two scoring sheets SS-1 and SS-2 are used and final grading is available in the scoring sheet marked SS-2. The correct position is that the two scoring sheets SS-1 and SS-2 are used under the following conditions:

(a) When Gen. Cadre (Infantry, Mach.Infantry and Armoured Corps) officers are considered for promotion to the rank of Maj.Gen.or Lt.Gen. wherein officers are screened for two-streams viz. "Command and Staff" and "Staff only" streams.

(b) When Non-Gen.Cadre Officers are considered for promotion to the rank of Lt.Gen. only in "Staff only" stream. The petitioner belongs to ADC (part of Non Gen.Cdre) and was being considered for promotion to the rank of Maj.Gen. Hence this scheme is not applicable. Only one scoring sheet is used.

22. It may be stated that consideration of a candidature for promotion is essentially a managerial function. It is for the selection board to consider the candidature of each eligible personnel and adjudged their comparative merit before making the recommendation as to who should get the promotion. The Courts do not sit as Appellate Authorities over such function of the selection bodies nor they have to act as selection committee and compare the candidature of two persons to find out as to who should have been promoted or whether recommendation of selection committee was proper or not. Therefore the comparison sought to be made by the petitioner with that of Brig.S.S.Bindra or Brig. S. Mediratta in order to show his superiority is not permissible.

23. However since in CWP No.2651/98 while quashing the entry of "above average" in the CR of the petitioner for the year 1994-95, I have remanded the case back to the respondents for reconsideration, after reconsideration and recording fresh ACR for the year 1994-95, if there is a change in the ACR for that year, his case for promotion will also have to be considered keeping in view the fresh ACR recorded for the year 1994-95. This exercise should accordingly be done within a period two months from today.

24. Since I am remanding the case for fresh consideration on this ground, I need not go into other submissions made on behalf of the petitioner as recorded above and on the basis of which petitioner has contended that the respondents adopted irrational process in considering his case and there were malafide intentions in harming the petitioner. Before parting however and without expressing any opinion on this aspect and without any intention to influence the minds of the Selection Committee, I may point out that it is clear from the records that petitioner is one of the finest officers (I am intentionally avoiding the expression "outstanding officer" so that it is not confused with the ACRs). His track record bears a testimony to this fact. Neither his integrity is doubtful nor there is any dispute about his competency to perform. When such officers are not promoted and they get the feeling that such non-promotion is because of extraneous

reasons, it is bound to affect the morale of such officers and may be counter productive and it would not be in public interest. Of course there may be cases where even a very good officer who is expecting promotion on the basis of his seniority and competence is still not promoted only because some other officer who is promoted and who is able to steel march over such an officer may be of better merit. When the post is of very high rank to which officers are considered for promotion and only one officer is to be promoted, it is more meritorious person who may get the berth to higher post and such an action of the respondents may be bonafide although the officer who was aspiring for promotion and could not be promoted may develop a feeling that he has been ignored for extraneous considerations. Therefore in such cases, it would be appropriate that appropriate system is evolved as per which the officers who are denied promotion are atleast made to understand that it was because of bona fide exercise of power and not the result of favouratism or victimisation and to that extent there should be transparency in the system.

I hope that while doing the exercise again, the respondents would keep the aforesaid parameters in mind which are rather in the overall interest of the Services.

This writ petition is accordingly allowed to the aforesaid extent.

25. There shall be no orders as to costs.