

(2008) 12 JH CK 0099

In the Jharkhand High Court

Case No : Writ Petition (S) No. 5756 of 2007

Brigadier Rakesh Sharma

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 10-12-2008

Acts Referred:

Army Act, 1950 — Section 27

Citation : (2009) 57 BLJR 950 : (2009) 1 JCR 526

Hon'ble Judges : Narendra Nath Tiwari, J

Bench : Single Bench

Advocate : Party in Person, for the Appellant; M.M. Khan (A.S.G.I) and F. Rahman (C.G.C), for the Respondent

Judgement

Narendra Nath Tiwari, J.—The petitioner-Brigadier Rakesh Sharma is aggrieved by the denial of his promotion to the rank of the Major General in the General Cadre. He has prayed for quashing the letter dated 11.4.07 (Annexure-8) whereby the petitioner was communicated the result of No. 1 Selection Board informing that he has not been selected for promotion to the rank of Major General. The petitioner has also prayed for quashing the part of the order dated 6.9.07 (Annexure-11), passed by the Ministry of Defence on the petitioner's statutory complaint. By the said order the Central Government has rejected his statutory complaint dated 25.3.07 subject to partial relief granted in Para 6 of the letter observing that the assessment by various reporting officers in all reckonable CRs is objective, well corroborated/moderated and consistent, except in CR 09/99-06/00 which appears marginally inconsistent with the over all profile of the officer and has ordered expungement of only some of the assessments in CR 09/99-06/00. The petitioner has also prayed for expunging/setting aside the entire confidential report for the assessment period from September 1999 to June 2000 and for a direction on the respondents to approve/empanel the petitioner's name for his promotion to the rank of Major General in his original batch without superseding him by juniors. The petitioner has also prayed for other incidental reliefs.

2. According to the petitioner, he was selected as Commissioned Officer in the Indian Army in the year 1974 as the Second Lieutenant, Thereafter he held several posts and got promotion from time to time and at present holds the rank of Brigadier.

3. In 1999-2000 while the petitioner was posted at Kota, he came to know that the respondent No. 5 had made some adverse entry in the Annual Confidential Report of the petitioner for the period from September 1999 to June 2000 which was not communicated to the petitioner. As per the report, he was given "above average grade" (second highest grade), which is treated as an adverse entry for considering promotion to the higher rank.

4. On 14.11.2000 the petitioner filed a statutory complaint against the subjective confidential report which was an adverse entry in Annual Confidential Report for the period from September 1999 to June 2000.

5. The said statutory complaint was not processed properly under the relevant rules and the same was returned unacted observing that the statutory complaint was not tenable because the same was based on assumptions and presumptions.

6. On 23.3.2007 the respondents issued a panel of the officers who were empanelled for promotion to the rank of Major General. The name of the petitioner did not find place in the said panel while the names of his juniors appeared in the list from Sl. No. 8 onwards in the said panel.

7. No reason was assigned for not selecting the petitioner who has excellent service records.

8. The petitioner filed a non-statutory complaint against exclusion of his name from the panel issued for promotion to the rank of Major General. The said complaint was subsequently converted into statutory complaint.

9. By letter dated 11.4.07 the petitioner was informed that in the meeting held by the Selection Board on 13.12.06, the petitioner has not been selected for promotion.

10. Aggrieved by the said denial, the petitioner has preferred this writ petition.

11. The grievances of the petitioner are as follows: (1) Input of non-application of qualities to assess potential (QAPs) to confidential report 9/99-6/2000 sent on 3.6.07 to respondent No. 2 was completely ignored by the respondent No. 1 in his order dated 6.9.07 (Annexure-11). (ii) Another Selection Board No. 1 held on 28.8.07 where all officers of the petitioner's batch who had made complaint and given relief/redressal were considered for promotion again, but the petitioner was not considered. Though his initial complaint was 7 years old, but the same was not processed and his complaint dated 25.3.07 being earlier than most of other complaints, was not finalized. (iii) By order dated 6.9.07 the respondent No. 1 gave partial relief on the petitioner's complaint dated 25.3.07 which was

received on 28.9.07. (iv) As per the said order, all reports are consistent in the reckonable period except the Confidential Report 9/99-6/2000 which was marginally inconsistent. (v) Some of the confidential reports of reckonable period are out standing/near outstanding. If all the reports in reckonable period are consistent to over all profile of the petitioner, logically all the reports must be outstanding/near outstanding and there was no reason for denial of his promotion. (vi) The Qualities to Assess Potential (QAPs) in the impugned confidential report are for promotion from Colonel to Brigadier. Nearly 12 very senior officers have assessed the potential of the petitioner for promotion from Brigadier to Major General Rank. Those QAPs in Brigadier Rank are applicable for promotion from Brigadier to Major General. Application of QAPs in the rank of Colonel for promotion to Major General by the respondent No. 2 is violative of the relevant instructions. (vii) The Army Establishment itself feels that the impugned confidential report is subjective and aberated and injustice has been done to the petitioner. It strongly recommended for redressal. (viii) The respondent No. 2 also accepted that over all merit and profile of the petitioner is very high nearly the best in his batch and his name ought to be among 25 officers who were in the panel.

12. The petitioner has further stated that he has excellent educational qualification and service record. He has done M.Sc, M.B.A. M.Phil and PGDM (ITS Management). In all those degrees, he has obtained First Class or distinction. The petitioner has done all career courses where selection is based on merit, capabilities and performance which indicates his high over all merit. He was selected for Defence Services Staff College as first in the batch, Senior Command and Higher Command courses and has rich experience of command, staff, instructional and ERE appointments. He got six promotions from time to time from Second Lieutenant to Brigadier and fulfils all the merits and seniority to hold the rank of Major General. The petitioner has been awarded various distinguished decorations, campaigns, stars and medals during his long career of service such as Special Service Medal with Clasp Sri Lanka, Videsh Seva Medal Clasp Sri Lanka (O.P Pawan), nine years long service Medal, 20 years Long Service Medal, Special Service Medal with Clasp "Suraksha", Sainya Seva Medal with Clasp (J & K), 50 year Independent Medal and 30 Years Long Service Medal, Samanya Sewa Medal, 1965 with clasp Mizoram, High Altitude Medal, O.P Vijay Medal, served in O.P Parakram, O.P Pawan, O.P Savage, O.P Curb, O.P Trident, O.P Battle Axe, O.P Cactus Lily and other medals. He has had 11 tenures in insurgency affected Eastern and Northern Command. According to the petitioner, all the educational and service achievements have been ignored by the respondents.

13. According to the petitioner, his Confidential Report for the period from September 1999 to June 2000 was governed by the Special Army Order No. 3/S/89. Para 5 of the said Army Order envisages that all reporting officers must be fair, impartial and objective in their assessment. However, the said order has been given a go bye and there has been unjust arbitrary and whimsical

assessment of the petitioner's confidential report. The reporting officer has to ensure with regard to the box grading that it should explain and be in conformity with the potential of the officer. In the impugned confidential report the box grading is 8 by all the reporting officers, but grading in Qualities to Assess Potential has been made low particularly by the respondent No. 5 in connivance with the respondent No. 3 due to extraneous reasons. In practice the grading in QAPs is treated as adverse while Grade "7" is termed as above average and its effect is that of an adverse entry as presence of single 7" is being used to deny the empanelment. A few "7"s have annulled the value of balance of nearly 99.8 % of 9"s and 8"s. Even that biased perception has been indicated by the assessment of 12 very senior officers.

14. The petitioner has, thus, alleged violation of the provisions of Special Army Order 3/S/89, violation of Section 27 of the Army Act as also malafide and non-application of mind by the reporting officer in not recommending the petitioner for promotion to the rank of Major General and on that ground he has prayed for quashing the letter dated 11.4.07 (Annexure-8) by which the Selection Board has communicated that he has not been selected for promotion to the rank of Major General. The petitioner has also prayed for quashing the part of the order dated 6.9.07 (Annexure -11) whereby the Ministry of Defence has rejected the petitioner's statutory complaint by giving only partial relief in paragraph 6 of the letter.

15. At the time of hearing of this writ petition, the petitioner appeared in person and supported his grounds and elaborated his grievances made in the writ petition by referring to several documents on record.

The petitioner also referred to and relied on the following decisions *Gurdial Singh Fijji Vs. State of Punjab and Others*, *Amar Kant Choudhary Vs. State of Bihar and Others*, and *Brij Mohan Singh Chopra Vs. State of Punjab*, He cited the said decisions mainly to support his grievances that the adverse remark made in his ACR should have been communicated to him in advance and that the same has not been looked into objectively and properly.

16. The petitioner further referred to and relied on several rulings on the point that he should have been given notice and an opportunity to furnish explanation against the adverse entry in the ACR and the principles of natural justice should have been followed. He referred to the following decisions: *Brij Mohan Singh Chopra Vs. State of Punjab*, *Badrinath Vs. Government of Tamil Nadu and Others*, , 2007 (2) JLJR 28 (SC) [*ST Ramesh v. State of Karnataka*], 1994 LAB. I.C 1150 [*Brig. KK Sood v. UOI and Ors.*] C.I.C.-28512 H.J.L.T. *Col. Katti Gopal Reddy Vs. Union of India (UOI) and Others* , *A.K. Kraipak and Others Vs. Union of India (UOI) and Others*, , *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, , AIR 2004 SC 4778 [*Bharat Petroleum Corporation Limited v. NR Vairamani*] and *S.N. Mukherjee Vs. Union of India*, .

17. The respondents have contested the writ petition denying the petitioner's

contentions. It has been, inter alia, averred that (i) the petitioner's allegation of discrimination is without any basis. (ii) The petitioner has challenged the remarks made in the year 2000 after about 7 years and the same is not worthy of any consideration. The writ petition is liable to be dismissed on ground of delay itself. (iii) As per the existing policy, when an officer holding the rank of Brigadier is considered for promotion to the rank of Major General, all confidential reports earned by him in the rank of Colonel are also taken into consideration by the Selection Board. The contention of the petitioner that his confidential reports in the rank of Colonel should not have been considered, lacks merit and substance. (iv) The petitioner has got his promotion from the rank of Colonel to Brigadier after taking into consideration the impugned ACR. Thus, the contention of the petitioner that the said CR is an adverse CR is not correct. (v) The impugned CR of the petitioner was initiated strictly in accordance with the provisions of SAO 3/S/89 and the portion of the CR which was required to be communicated to the petitioner under the said provision, was communicated to him. (vi) The Gradings awarded to a ratee in a CR are "9" Outstanding "8" & "7" Above Average, "6" & "5" High Average, "4" Average, "3" or "2" Low Average "1" Below Average. The petitioner's Grade "7" was an above average and the same is in accordance with the profile of the petitioner. The petitioner's contention that the Grading of "7" is an adverse entry is not factually correct. (vii) The statutory complaint dated 14.11.2000 against the CRs January 1999 to August 1999 and September 1999 to June 2000 was based on apprehension and the same was rejected in terms of the provisions of the Special Army Order 3/S/89 being untenable. (viii) The statutory complaint dated 17.11.2005 submitted by the petitioner against the CRs covering the period January 1999 to August 1999 and September 1999 to June 2000 were examined and it was found that there was no adverse remark in the said CRs and the same were rejected being untenable. (ix) The petitioner's contention that his statutory complaint was processed arbitrarily and with malafide has no substance. (x) The petitioner submitted a non-statutory complaint dated 25.3.07 against his non-empanelment for promotion to the rank of Major General. The said non-statutory complaint was converted into a statutory complaint on the request of the petitioner and the same was duly considered by the competent authority i.e. the Ministry of Defence, Government of India. (xi) The competent authority after examination of all the issues raised by the petitioner granted partial redressal to him by way of expunging the following assessments in the CR on the ground of marginal inconsistency:

(a) Para 24 (a) of CR- Foresight and Planning

(b) Para 24 (b) of CR- Delegation

(c) Para 24 (d) of CR - Tolerance for Ambiguity

(d) Para 24 (e) of CR - Professional Competence to handle Higher Appointments

(e) Para 26 (a) of CR - Recommendation for promotion

(xii) After the expunction of the said assessments, the petitioner was given a

Special Review (Fresh) consideration for promotion along with his original seniority against the merit of his batchmates empanelled for promotion. However, the petitioner was not empanelled for promotion on assessment of his overall merit within the batch. The petitioner now stands considered for promotion as a First Review case in the Selection Board held in May 2008 and the result of which is yet to be declassified. (xiii) The decision for promotion to the rank of Major General is taken by a Selection Board consisting of the Chief of the Army Staffs, Army Commanders, Vice Chief of Army Staffs, Military Secretary, who are the senior most officers of the Army. The Selection Board takes decision on the basis of the objective consideration of (a) Annual Confidential Report profile of the officer in the relevant ranks (b) War Reports (c) Battle Awards and Honours earned by the officer during his service (d) Professional courses done by the officer, his performance during the course and grading obtained therein. (e) Special Achievements and weaknesses. (f) Appointments held by the officers including the criteria command/staff appointments (g) Disciplinary background and punishments. (h) Employability and potential including consistent recommendations for promotion to the next higher rank. (i) important character qualities of the officer particularly drive and determination, decisiveness, initiative, dependability, integrity and loyalty. (j) Important aspects of demonstrated performance which indicate an officer's professional knowledge and its application as also the conceptual ability of an officer. (k) Management of resources and technical equipment. (xiv) Thereafter, the entire proceedings of the Selection Board are submitted to the competent authority of the Ministry of Defence for approval. (xv) The Selection Board considers overall merit as per the criteria laid down for selection of the officers. Only seniority is not a criterion for promotion to the rank of Major General. (xvi) The petitioner was considered thrice for promotion, but he was not found fit for promotion. (xvii) The allegation of malafide and discrimination is wholly without merit and substance. The Selection Board is not obliged to record the reasons for not selecting a particular officer for promotion and there is no violation of the principles of natural justice.

18. The respondents have relied on the following decisions : Major General I.P.S. Dewan Vs. Union of India (UOI) and Others, , Union of India and Others Vs. Lt. Gen. Rajendra Singh Kadyan and Another, , Amrik Singh Vs. Union of India (UOI) and Others, and AIR 1989 SC 1393 [Sec. Lt Col. KD Gupta v. Union of India and Ors.].

19. I have heard the parties. The petitioner appeared in person and submitted, Inter alia, that he joined the Indian Army in the year 1974, he has 20 years of unblemished service career in insurgency and terrorist affected areas/task in Jammu & Kashmir, Mizoram, Manipur and in Sri Lanka. The officers, who wrote the impugned CR, did not have even a single day of field area service. The petitioner has an excellent academic and military qualifications. He is the highest academically qualified officer of the batch. He has done all the career courses. The CR in the rank of Colonel is considered only for the next promotion to the

rank of Brigadier. On the basis of the said CR, the petitioner was promoted to the rank of Brigadier. But on the basis of the same CR, he has been denied promotion to the post of Major General. The petitioner was promoted from the rank of Colonel to Brigadier in 2003 on the same CR and thus the said CR cannot be treated as an adverse point for promotion from Brigadier to Major General. Even the said CR in which he has been given only Grade "7", and has been treated as an adverse entry for the purpose of promotion, was never communicated to the petitioner earlier. The respondents, on the one hand, contended that the entry of Grade "7" is not an adverse entry and on the other, in the minutes of the Army Commanders Reference held in September 2006 and April 2007 (Annexure- 16 & 17), it has been treated as an adverse entry and an impediment for promotion. The respondents have claimed that the petitioner's promotion has been denied on the basis of overall assessment, but except the entry of Grade "7" which has been treated as an adverse entry and which has been arbitrary and maliciously used to deny the petitioner's promotion; there is no other criterion to eliminate the petitioner who has got outstanding career as an officer throughout his service period. Prior to this Selection Board for 1974 Batch, the officers who had been given Grade "7", were also approved for promotion. But the said criterion has been arbitrary changed to eliminate the petitioner. An officer against whom an adverse entry is made, which has effect of impeding promotion, has got right to know about the same and make representation against such adverse entry to the concerned authority and the concerned authority is expected to decide the representation in fair manner within a reasonable period. Though the respondents have claimed that the selection has been made on the basis of overall assessment, it has not been disclosed even before this Court as to how the other officers are superior to the petitioner. This shows malafide and arbitrariness in discriminating the petitioner.

20. Mr. M.M. Khan, learned Assistant Solicitor General of India appearing on behalf of the respondents, while making his submissions to oppose the writ petition, emphatically submitted that the decision for promotion to the rank of Major General has been taken by the Selection Board consisting of the senior most Army Officers, the petitioner's allegation of malafide is wholly baseless. The selection of an officer for promotion is based on merit and overall assessment and the seniority alone is not a criterion for such selection. The officers, who were selected for promotion, had better remarks in the merit than the petitioner. The decision of the Selection Board was approved by the Ministry of Defence, Government of India. Therefore, the sanctity of the decision cannot be doubted. Grade "7" awarded to the petitioner was not an adverse entry and the contrary contention of the petitioner is without any substance. The petitioner's statutory complaint was also duly considered by the competent authority i.e. the Ministry of Defence, Government of India and the petitioner's grievance was partially redressed by expunging several assessments in the CR.

21. Though learned Assistant Solicitor General of India explained the processes and procedures of consideration for promotion to the rank of Major General in

great detail emphasizing that the decision is taken by the senior most officers and it is not expected of such Selection Board to commit any wrong or infirmity or malafide, he could not satisfy the Court on the following queries:- (i) What were the considerations on which the petitioner lagged behind the other officers who have been selected for promotion. (ii) When the petitioner was selected and given promotion to the rank of Brigadier from the rank of Colonel on the same Annual Confidential Report, how the same ACR can be adversely used to deny his promotion to the rank of Major General. (iii) When the Point "7" given to the petitioner in assessing his ACR is treated adverse for promotion to the rank of Major General, can the same be used for denying his promotion to the said rank without communicating the said entry and giving him an opportunity to explain. (iv) If according to the respondents, Grade "7" in the CR is not an adverse entry and the same is not required to be communicated to the petitioner, how the said entry in the ACR has been taken as a ground for denying the petitioners promotion to the rank of Major General.

22. The said vital points raised by the petitioner before this Court remained unanswered by the respondents. The said points have not been raised for the first time before this Court, but the same were raised in the statutory complaint as well were not dealt with and considered by the competent authority. According to the provisions of Section 27 of the Army Act, 1950 read with the procedures laid down in Para 364 of the Regulations for the Army, Revised Edition, 1987, all the points raised in the complaint are to be duly considered.

23. The petitioner has complained his elimination from selection for promotion to the rank of Major General only on the ground of a single entry in the ACR which was never communicated to him. It is an admitted position that on the basis of the said entry he had been given promotion from Colonel to the rank of Brigadier. It does not stand to the reason as to how the said entry can be used to deny the petitioner's further promotion to the rank of Major General. In any case, if that entry is considered as an adverse entry for the purpose of promotion to the rank of Major General, the petitioner, who has otherwise outstanding performance in his service career, as claimed by him and not disputed by the respondents, certainly deserves an opportunity to explain that adverse entry. Since the respondents have not done so, this results into grave injustice and heart burning individually to the petitioner and at the same time it may have a devastating effect on the moral of many good officers suffering fear of supersession on the ground never disclosed earlier. Such instances will not be conducive for the Indian Army which has reputation for the highest degree of discipline, integrity, impartiality and excellence.

24. In course of hearing, the respondents informed that in view of the expunction of some of the adverse assessments in the CR by the competent authority while disposing of the statutory complaint made by the petitioner, the petitioner's promotion is being considered afresh. This Court is of the view that the petitioner's representation deserves thorough consideration by the

competent authority point-wise, as has been raised in his representation, afresh including the points taken in this writ petition, which have not been answered by the respondents, as indicated above.

25. In view of the above discussions, the impugned order of the statutory authority dated 6.9.07 contained in Annexure-11 needs to be ignored. Since the petitioner has raised all the points in his representation before the statutory authority, the matter is remitted to the competent authority, the Ministry of Defence, Government of India, for fresh consideration and decision. The said competent authority shall consider the petitioner's representation giving point wise finding and shall pass a reasoned order in accordance with law within a period of two months from the date of receipt/production of a copy of this order.

26. With the above observations/directions, this writ petition is disposed of.

However, there is no order as to costs.