
(2003) 08 SHI CK 0021
In the High Court Of Himachal Pradesh
Case No : Civil W.P. No 160 of 2003

Col. Avtar Singh

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 30-08-2003

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2003) 3 ShimLC 220

Hon'ble Judges : V.K. Gupta, C.J.; R.L. Khurana, J

Bench : Division Bench

Advocate : B.C. Negi, for the Appellant; N.K. Thakur, Sr. Central Government SC, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Gupta, C.J.—This is a case where an officer of the Indian Army, in the rank of Colonel once having been found fit for promotion to the higher rank of Brigadier, but not having actually been promoted to the said higher rank, was subsequently denied the benefit of such promotion on the ground that he had deteriorated in the continued satisfactory performance subsequently. The sufferance in the continued satisfactory performance was directly relatable and squarely attributable to the Petitioner having earned, in the meanwhile, adverse assessment reports from his superior officers because of an unexpected turn of events having taken place during "special review".

2. As is noticed, the Petitioner was approved for promotion to the acting rank of Brigadier in September, 1997 and such approval was conveyed to him on 2nd January, 1998, "Operation Vijay" soon thereafter came into being because of the occurrence of what is commonly known as "Kargil War". Apparently, Kargil War lasted between May, 1999 and July, 1999. Unfortunately for the Petitioner, he being posted in the area covered by the War during this period, had been performing his duties in the theatre of Operation relating to Kargil War. After the War was over, Battle Performance Report with respect to such officers, who had

taken part in the War, was initiated covering the period of War between 8th May, 1999 and 26th July, 1999. In the Battle Performance Report apparently the Petitioner suffered some adverse comments from his two superior officers.

3. Brig. A.K. Duggal, who was the next superior officer of the Petitioner, in his assessment as the Petitioner's Initiating Officer of Battle Performance Report (BPR) gave the following remarks. We quote:

An Intelligent Officer who performed the duties of Col. GS HQ 3 Infantry Div. during Operation Vijay in a satisfactory manner. The Officer has an above average verbal expression which he put to good use for conduct of operational briefing. The Officer monitored operational activities in an adequate manner and was prompt in implementing instructions and decisions issued to him. He delegated tasks to his subordinates judiciously.

4. Major General V.S. Budhwar, General Officer Commanding, 3 Infantry Division was the next Officer, higher in hierarchy who in his capacity as Reviewing Officer (RO) made the following endorsement in the Petitioner's BPR for the same period i.e. 8.5.1999 to 26.7.1999. It reads thus:

The elimination of enemy instructions from the Kargil Sector required movement and development of a large number of troops and other resources into a divisional sector, Col. Avtar Singh as Col. GS was at the center of all operational planning, briefings, issuing of orders and instructions and directing of operations. The Officer worked tirelessly in operation Vijay. He was however, required to be guided, advised and supervised as at times he was impatient and even injudicious in his dealings. The Officer did display pragmatic professional acumen adequately, and assisted in turning an adverse situation around into a victory.

(Emphasis supplied)

5. Finally Lt. Gen. Krishan Pal GOC 15 Corps, the Senior-most Officer in the order of hierarchy and in his capacity as a Special Reviewing Officer (SRO) on 2nd December, 1999 recorded the following in the Petitioner's BPR for the aforesaid period (8.5.1999 to 26.7.1999), and we quote:

An average Col. GS whose performance in Operation Vijay was unsatisfactory. He is casual, does not go into details and displays total lack of commitment failed to manage GS (Operations) Branch of the div. in operations. Unfit for any further promotions.

(Emphasis supplied)

6. Whereas the first officer in the order of hierarchy, namely Brig. A.K. Duggal paid rich tributes to the Petitioner, the next higher officer Major Gen. V.S. Budhwar even though also gave a partial favourable report to the Petitioner, did however, put in his caveat (and this part was treated as adverse), that the Petitioner required to be guided, advised and supervised as at times he was impatient and injudicious in his dealings. Lt. General Krishan Pal, the Senior most

Officer, gave an outright adverse and totally negative report against the Petitioner, whereby he termed the Petitioner as an average officer, whose performance in Operation Vijay was unsatisfactory etc. etc. and declared him unfit for promotion.

7. The Petitioner's contention is that the adverse remarks in the BPR, both by Lt. General Krishan Pal and Major General V.S. Budhwar are untenable. The Petitioner submits that the ACR for the period 1.6.1999 to 4.9.1999 which was termed as "Delayed Confidential Report" did not convey any adverse remarks against the Petitioner and similarly the ACR for the period 6.11.1998 to 31.5.1999 called as "Interim Confidential Report" also did not contain any adverse entries against the Petitioner. Actually in the "Interim Confidential Report" relating to the period 6.11.1998 to 31.5.1999, the Petitioner has relied upon the remarks of Major General V.S. Budhwar in his capacity as RO and Lt. General Krishan Pal in his capacity as SRO and has submitted that the same two Generals, who had given him adverse reports in the BPR had found him quite alright in the "Interim Confidential Report". Major General V.S. Budhwar on 17.6.1999 in the "Interim Confidential Report" of the Petitioner had given the following remarks to him. We quote :

An extremely and sincere officer with excellent verbal and written communication skills. With some guidance, the Officer has started functioning well in the matter of appointment that he holds. His professional knowledge is sound and he is well read. He is discerning, is pragmatic and applies himself with logic. He has worked under duress during Operation Vijay and produced good staff work. He has the ability to contribute to planning at formation level. He has potential to shoulder higher responsibilities.

8. Lt. General Krishan Pal in his capacity as SRO with respect to Interim Confidential Report made the following remarks on 17.7.1999, which read thus :

An above average Officer whose performance as Col. GS of the div. in active LC and AGPL operations has been adequate. IO, just prior to his retirement has been totally subjective in his assessment.

9. The Petitioner's contention is that if on 17.6.1999 and 17.7.1999, i.e. at a point of time when the Kargil operations were on, these two officers gave the Petitioner favourable remarks, how could the same two officers give the Petitioner adverse remarks in the BPR for the period 8th May, 1999 to 26th July, 1999. The answer is very simple. Major General V.S. Budhwar recorded his remarks in BPR on 4.11.1999 and Lt. General Krishan Pal recorded his remarks in the BPR on 2.12.1999. These two remarks by these two Generals on the aforesaid two dates were recorded much, much after Operation Vijay was over on 26th July, 1999. These two remarks by these two Generals in the BPR of the Petitioner were, therefore, recorded almost 5 to 6 months after the conclusion of the activities during the Operation Vijay. Whatever happened, whatever transpired during the Operation Vijay, whatever infirmities, shortcomings,

weaknesses were noticed during the Operation Vijay, after all these would have taken time to be analysed, critically examined and be considered by the officers in the Organisation and, therefore, much later i.e. in November or December, 1999 these two Generals on the basis of the material available to them, on the basis of the inputs available to them, made the aforesaid adverse remarks in the BPR of the Petitioner. The favourable remarks in the Interim Confidential Report, as has been noticed above, were made by these two officers in June and July, 1999, at a point of time when Operation Vijay was still on and whatever infirmities, shortcomings or weaknesses occurred during the Operation Vijay could possibly not have been noticed or conveyed to these two officers in June or July, 1999.

10. The following facts may also at this stage be noticed with advantage.

11. The adverse entries in the assessment of the RQ and the SRO in the Petitioner's BPR were conveyed to him on 3.2.2000. The Petitioner submitted his non-statutory complaint against the aforesaid adverse entries on 9.2.2000. The non-statutory complaint was rejected on 10.1.2001. The Petitioner, thereafter on 6.7.2001 submitted a statutory complaint against the aforesaid adverse entries and this was rejected on 5.3.2002.

12. A Special Review Board for the first time, in so far as the Petitioner was concerned, after adverse entries and the "drop in performance", was conducted in September, 2000 and it was because of this Special Review Board that the Petitioner was de-panelled from the promotion list of Brigadiers on the ground of his "drop in performance". A second Review Board was held in March, 2001 and in this Board also, the Petitioner was not approved for promotion.

13. Mr. B.C. Negi, learned Counsel appearing for the Petitioner has submitted that we should quash and set aside the impugned adverse remarks conveyed to the Petitioner on 3rd February, 2000 as also the rejection of the non-statutory complaint on 10th January, 2001 and the rejection of the statutory complaint on 5th March, 2002. If we agree with Mr. Negi's contention, the consequence of course would be the Petitioner's inevitable promotion to the acting rank of Brigadier. However, as we have noticed above, we have no material before us to come to a conclusion that the recording of the adverse comments by the two Generals in the BPR of the Petitioner can be interfered with by us in this petition. These two Generals, both superior Officers of the Petitioner, one GOC of the Infantry Division and the other GOC of the Corps, were the persons well equipped to assess the performance of the Officers working under them in Operation Vijay and they were the most suited persons to form their opinion about the officers performing their duties under them at that point of time. In the absence of any allegation of mala fides or subjectivity or arbitrariness, we are not in a position to substitute any contrary opinion to the opinion formed by these two officers in so far as the performance of the Petitioner in the battle was concerned. Similarly, merely because the Petitioner might have performed well before Operation Vijay commenced, or merely because the Confidential Reports

for other periods in so far as the Petitioner is concerned might have been favourable to him, cannot be a ground for setting aside or quashing the adverse entries recorded in the BPR because the assessment of the Petitioner's performance during the battle was, and would have been on different parameters than the assessment of his performance in normal periods, on normal parameters of routine nature.

14. Article 14 of the Constitution of India is a safeguard against any arbitrary action. But what we find in this case is total absence of any arbitrary action. The Respondents do appear to have conducted themselves objectively and in a fair manner.

15. Unfortunate though it has been for the Petitioner, very unfortunate as it does appear, the Petitioner was approved for promotion in 1997-98, yet he could not be promoted to the acting rank of Brigadier only because of his having earned adverse entry in his BPR which resulted in "drop in performance". But then Petitioner's right to be promoted to the acting rank of Brigadier even though initially accrued to him in 1997-98, this right was dependent upon, closely linked with and conditional on the Petitioner's continued satisfactory performance till his turn actually came for promotion depending upon the availability of the vacancy. Kargil War had taken place in the meanwhile and the Respondents having decided to record BPR of the officers who had taken part in the Kargil War, the Petitioner earned adverse entry and this therefore resulted in drop in his performance. Not only that, as senior an officer as the GOC of the Corps under whom the Petitioner was serving specifically recommended that because of his unsatisfactory performance the Petitioner did not deserve to be promoted. It is on the basis of these facts that the Special Review Board did not find the Petitioner suitable for promotion.

16. The next contention of Mr. Negi is about the illegality in the holding of the Special Review Board in September, 2000, even while the Petitioner's non-statutory complaint was still pending disposal with the Respondents. It may be recalled that the Petitioner was conveyed about the adverse entries in the BPR on 3rd February, 2000 and he had submitted his non-statutory complaint against the same on 9th February, 2000. The rejection of the nonstatutory complaint took place on 10th January, 2001. The Petitioner's grievance is that before the Respondents could come to a conclusion and take a final decision about the rejection of his non-statutory complaint, holding of the Special Review Board in September, 2000 was an act of arbitrary nature on their part. There did appear some substance in this contention of Mr. Negi at first impression, by way of first glance, but on closer examination, we found that we could not agree with him for the simple reason that the Respondents' case before us is that as per their policy, if the Petitioner's complaint, statutory or non-statutory would have been allowed, the Respondents would have conducted a second Special Review Board on the basis of the result of the complaint and, therefore, no prejudice could have been caused to the Petitioner. The Respondents' clear case before us is that

if the result of the statutory or non statutory complaint would have gone in favour of the Petitioner and if the complaint would have been accepted or allowed and redressal granted to the Petitioner, the Respondents were bound to hold a Special Review Board for the Petitioner once again and if the Petitioner was found suitable, he would have been relegated to the original position of his seniority and could have thus been promoted as a Brigadier, reckoning his seniority from the date when it was originally due to him.

17. Apart from the aforesaid submission on behalf of the Respondents, we also noticed that a Second Review Board was held in March, 2001 i.e. after the date of rejection of the non-statutory complaint of the Petitioner and in this Board also the Petitioner was not approved for promotion to the acting rank of Brigadier.

18. On an over-all consideration, therefore, we are firmly of the view that no relief can be granted to the Petitioner in this petition.

19. The writ petition is dismissed, but without any order as to costs.