

(1997) 12 DEL CK 0058

In the Delhi High Court

Case No : Letters Patent Appeal No. 101 of 1997

I.J.S. Boparai

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 19-12-1997

Acts Referred:

Air Force Rules, 1969 — Rule 16(3), 30

Citation : (1998) 44 DRJ 1

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

Bench : Division Bench

Advocate : P.N. Misra, for the Appellant;

Judgement

S.K. Mahajan, J.

(1) I have gone through the judgment prepared by my esteemed brother Hon"ble Mahinder Narain, Acting Chief Justice, but for reasons given in my judgment, I am unable to agree with the decision arrived at by him, as in my view the appeal is liable to be dismissed.

(2) The appellant has challenged his non- promotion from the post of Air Commodore to that of Air Vice Marshal. His contention is that non- promotion is on account of some adverse remarks entered in his Annual Confidential Reports and the said remarks having not been communicated to him and an opportunity having not been given to make representation against the same, his non- promotion is vitiated. The second ground on which the order of the Government in not promoting him as Air Vice Marshal has been challenged is that the Chief of the Air Staff, namely, Air Chief Marshal S.K.Kaul as well as Air Chief Marshal S.K.Sareen had been harboring a grudge and were biased to the appellant which resulted in wrong projection of his case and arbitrary denial of promotion.

(3) It is not denied that till the time of consideration of the appellant for promotion to the post of Air Vice Marshal both in 1995 and 1996, the adverse remarks in his Annual Confidential Reports were not communicated to him. It

was only five days before his retirement that the said adverse entries were communicated to him and he made statutory representation against the same within two days. The representation made was, however, rejected. According to the appellant, in terms of Rules, 30 days time ought to have been given to him to make representation against adverse entries and that having not been done, opportunity to make representation was denied to him and the decision of the authority based upon such entries cannot, Therefore, be sustained.

(4) It is also the contention of the appellant that the alleged adverse remarks were before the authorities when he was granted extension in service and even at the time when he was promoted as Air Commodore and such entries, Therefore, prior to the period of extension as well as promotion to his present rank lost their significance and those remaining on record as part of history. He, Therefore, relies upon the judgments of the Supreme Court reported as Baidyanath Mahapatra Vs. State of Orissa and Another, 1989 (4) Slr 220; Brij Mohan Singh Chopra Vs.State of Punjab 1978 (2) Slr 54; Prakash Chand Sharma Vs. Oil & Natural Gas Commission, 1970 Slr 116 and Gurdial Singh Fijji Vs.State of Punjab and Others, 1979 (1) Slr 804.

(5) In Baidyanath Mahapatra Vs.State of Orissa and Another (Supra), it was held that the adverse entries prior to the period of promotion lose their significance and cannot be looked into for pre-maturely retiring a person. It is, Therefore, contended by Mr.Boparai that entries which appear to have been relied upon by the respondents for denying him promotion could not be considered as they existed even prior to the time when he was promoted to the post of Air Commodore and such entries had, Therefore, lost their significance. It is also held in the judgment that belated communication of entries result in denial of reasonable opportunity to improve the performance and belated communication of adverse entries was, Therefore, not proper.

(6) In Brij Mohan Singh Chopra Vs.State of Punjab (Supra), it was held that adverse entries, if any, awarded to an employee lose their significance on or after his promotion to a higher post and according to the appellant, Therefore, these entries could not have been taken into consideration while considering his case for promotion as Air Vice Marshal, as they allegedly existed even at the time when he was promoted as Air Commodore.

(7) As already stated, the appellant has also contended that he could not be denied promotion as Air Vice Marshal as adverse remarks in his Annual Confidential Reports were not communicated to him till the time he was considered for promotion and for this he relies upon the judgment reported as Prakash Chand Sharma Vs.Oil & Natural Gas Commission (Supra). The appellant has also relied upon the judgment reported as Gurdial Singh Fijji Vs.State of Punjab and Others (Supra), to contend that the principle was well settled that in accordance with the rules of natural justice an adverse report in the Confidential Report cannot be acted upon to deny promotional opportunity unless it was communicated to the person concerned so that he had an opportunity to improve

his work and conduct or to explain the circumstances leading to the report. It is, Therefore, the contention of the appellant that the adverse remarks should not have been considered by the Promotion Board at the time of considering him for promotion as Air Vice Marshal as the same were neither communicated to him nor the statutory representation made by him had been decided. It is his case that he had an outstanding performance as an Air Commodore and had been in-charge of various air force stations. He submits that he had served minimum of 3 years in the substantive rank as Air Commodore and had been credited above average in all relevant numerical criteria laid down under the rules and was also medically fit for duties of his branch. He also contends that he meets with the criteria of seniority and suitability for promotion as Air Vice Marshal and, Therefore, a mandamus is required to be issued directing the respondents to promote him as Air Vice Marshal w.e.f. 1995 when he was considered for the first time for promotion as Air Vice Marshal.

(8) As far as the allegations of bias and malafide are concerned, it will be useful to mention hereinbelow the exact nature of allegations as in our view the allegations made are wholly vague. It is in paragraph 35 of the petition as well as in grounds A & F that the alleged allegations of malafide have been made. Paragraph 35 and grounds A & F of the petition reads as under :-

"That as Director Flight Safety, one of the duty of the petitioner is to have aircraft accidents investigated. Procedure for such investigation is contained in Air Force Order (AFO) No.7/93. One of the points to be looked into as per para 17(j) of the A.F.O. *ibid*, is also to look into "Organisation Failure" which might have directly or indirectly resulted in the accident. This was never looked into by the Courts of Inquiry prior to the petitioner taking over as Director Flight Safety. It was mainly because any adverse comment on that aspect may bring Air HQs planning, training, coordination etc. under and may give poor image of Air Hq which will never be appreciated. Since the petitioner thought that it was a very important aspect in Aviation to avoid in future similar accidents, he insisted that Courts must investigate the same. His effort in this regard was appreciated by his immediate superior, Inspector General (I.G.). However, the petitioner's apprehension is that respondent No.2 and other authorities are biased on account of aforesaid action of the petitioner and on account of that malice wrong facts about his promotion are being projected.

GROUND"A" That the petitioner is a Fighter Pilot who had served with dedication and earned various distinctions. He was decorated with the award of "Vayu Sena Medal" by the President of India. For his excellent performance as A.O.C., Air Force Station, Adampur award of "At Vishisht Seva Medal" was recommended by AOC-in-C Wac which was arbitrarily denied to him due to malafide by respondent No.2 which includes his predecessor as well. It may be because of certain grudge harboured by some of the authorities who mattered and might have been affected due to strict standard of inspection followed by him during his tenure as Directorate of Air Staff Inspection. The Air Force Squadrons/Stations then

commanded by Respondent No.2 and his predecessor were adversely commented by Dasi team & since then they had not been disposed to the petitioner. After attaining the highest office when the Nation expects them to dispense justice impartially so that the morale of the Personnel of the force is not affected, they had brought their old malice to play and had denied the rightful promotion to the petitioner. Further, respondent No.2 had never liked the role of DASI. It is evident from the fact that on becoming head of the gallant organisation, he had been issuing instructions from time to time to make Dasi completely deferent.

GROUND"B" That the petitioner must have always earned the Report status of 07 plus as is evident from the excellent work done by him and the types of appointments held by him. The details of Report status of the relevant years as known to the petitioner are at para 15 above. His Report for the years 1994 and 1995 had been brought down by Reviewing Officer who was respondent No.2. It is manifestly illegal in the light of the law laid down by Honourable Supreme Court in the Case of U.P. Jal Nigam and others Vs. Prabhat Chandra Jain and others, as the petitioner had never been informed of any such down grading."

(9) During the course of arguments it was contended by Mr.Boparai that the remarks of Air Marshal S.K.Kaul in the Annual Confidential Report of the appellant for the period 1st May, 1992 to 30th September, 1992 and as Chief of the Air Staff for the period 28th December, 1992 to 30th September, 1993 were entered on account of conflict in perspective of the appellant with regard to an accident which had happened when the appellant was operating out of Leh air station. It is submitted by the appellant that in order to show the activities of the air force from one of the highest altitude, namely, Leh, a demonstration was organized and for that purpose he had suggested that the demonstrating pilots should be from the air force station at Adampur as they were used to flying in the Leh sector. It is contended by him that he had specifically suggested that pilots from the air force station at Pathankot should not be deputed for the said demonstration flights as they had no experience of flying, landing and overshooting at the Leh sector where the hills at circuit height required familiarization with the circuit pattern in a phased manner. It was allegedly agreed to in the first instance but for reasons not known to him this decision was reversed by Mr.S.K.Kaul, the then Air Officer Commanding in Chief. It is alleged by Mr.Boparai that as a result of the changed decision the demonstration flight was performed by pilots based at Pathankot air station who allegedly were not familiarized with the circuit pattern of the hills at Leh and as a result of the same an accident was caused during this demonstration in which a young pilot lost his life and the air force lost one air craft. This incident, according to the appellant, established a bias against him in the mind of Sh.S.K.Kaul, who was allegedly responsible for the appellant not being considered for promotion and had also resulted in remarks being given by Sh.S.K.Kaul in his Confidential Reports.

(10) From the original record brought to Court and shown to us, we find that Air

Chief Marshal S.K.Kaul had neither downgraded the appellant nor had given any adverse remarks and the arguments of the appellant are, Therefore, not tenable. Moreover, a perusal of the pleadings on record show that no such allegation has been made in the writ petition. Though in the statutory representation made by the appellant to the Chief of Air Staff, the appellant has mentioned about this incident, however, even in that representation he has not stated that because of this accident Mr.S.K.Kaul had any bias against him. In the absence of clear and specific allegations in the writ petition, the respondents did not have any opportunity to reply to these allegations and Sh.S.K.Kaul having not been made a party to the petition, in our view, the respondent cannot rely upon the alleged incident in support of his contention that Sh.S.K.Kaul was biased or had malice against him.

(11) It has been held by the Supreme Court in U.P. Jal Nigam and others Vs. Prabhat Chandra Jain and others, that in the absence of full facts and particulars in the plaint in respect of allegations of malafide, the order of compulsorily retiring the appellant cannot be held to be a malafide order. It has also been held that the authority to which malafides were imputed having not been impleaded as a party, the Court could not declare the action to be malafide.

(12) In State of Punjab and Others Vs. Chaman Lal Goyal, , it was held that in the absence of any clear allegation against any particular official and in the absence of impleading such person eo nomine so as to enable him to answer the charge against him, the charge of malafide cannot be sustained. We are, Therefore, of the view that the allegations of malafide must be specific and clear and as the appellant has not made specific allegation against either Air Chief Marshal S.K.Kaul or Air Chief Marshal S.K.Sareen nor he has impleaded any one of them, this Court cannot look into the allegations of malafide.

(13) The next question is whether the remarks which have been considered by the Promotion Board should have been communicated to the appellant and what is the effect of the same having not been communicated to him till the time of his consideration for the promotion as Air Vice Marshal by the Promotion Board.

(14) Under para 203 of the Air Force regulations, adverse remarks made in paras 12 to 19 of the report are required to be communicated to the officer reported upon. It is in paragraph 12 of the appraisal report that certain remarks had been made. These remarks ought to have been communicated to the officer concerned. However, in case the remarks had not been communicated can it be said that the decision of the authorities, in the facts of this case, in not promoting him as Air Vice Marshal on the basis of the said remarks is required to be set aside.

(15) It is an admitted position that when the petitioner was considered for promotion as Air Vice Marshal, the adverse remarks existing in his Annual Confidential Reports were not communicated to him. The said remarks were communicated to him only five days before his retirement and he had submitted

his representation against the said remarks. Therefore, the position is that at the time of promotion of the petitioner as Air Vice Marshal neither the adverse remarks were communicated to him nor his representation was considered and decided. The representation of the appellant against the adverse remarks was, however, ultimately rejected by the Government. In these circumstances, could the Selection Board take into consideration the adverse remarks and base its decision thereupon for purposes of promotion of the appellant as Air Vice Marshal. Basing upon his arguments upon the decisions of the Supreme Court in Brij Mohan Singh Chopra Vs. State of Punjab (Supra); Baikuntha Nath Das and another Vs. Chief District Medical Officer, Baripada and another, ; and Gurdial Singh Fijji Vs. State of Punjab and Others (Supra), it is contended by the appellant that unless an adverse report is communicated and representation if any made by the employee is considered, it cannot be acted upon to deny the promotion. According to him, it is unjust and unfair and contrary to principles of natural justice to deny promotion to an employee on the basis of an adverse entry which is neither communicated nor the representation made against those entries is considered and disposed of.

(16) In Union of India (UOI) Vs. M.E. Reddy and Another, , it was held by the Supreme Court that all adverse entries need not be communicated to the concerned officer and even un-communicated entries could be considered while making an order of compulsory retirement. In Reddy's case the Supreme Court held that it is not every adverse entry or remark that has to be communicated to the officer concerned. The superior officer may make certain remarks while assessing the work and conduct of the subordinate officer based on his personal supervision or contact. All these remarks may be innocuous or may be connected with general reputation of honesty or integrity that a particular person enjoys and while passing an order under Rule 16(3), compulsorily retiring an officer, it is not an entry here or an entry there which has to be taken into consideration by the Government but the overall picture of the officer during the long years of his service that he puts in has to be considered from the point of view of achieving higher standard of efficiency and dedication so as to be retained even after officer has put in the requisite number of years of service.

(17) The Constitution Bench of the Supreme Court in R.L. Butah Vs. Union of India (UOI) and Others, , has held that the confidential report is intended to be a general assessment of work performed by a government servant subordinate to the reporting authority; the said reports are maintained for the purpose of seeking as data of comparative merit when questions of promotion/ confirmation, etc. arise. They also show that such reports are not ordinarily to contain specific incidents upon which the assessments are made except in cases where as a result of any specific incident an inquiry or warning is issued and when such warning is by an order to be kept in personal file of the government servant. In such a case, the officer making the order has to give a reasonable opportunity to the government officer to present his case. The contention, Therefore, that the adverse remarks did not contain specific instances and were Therefore contrary

to the rules, cannot be sustained. Equally unsustainable was the corollary that because of that action the appellant could not make an adequate representation and, Therefore, the confidential reports were vitiated. It was further held that no opportunity to be heard was required to be given before an adverse entry was made and making of an adverse entry was not equivalent to imposition of penalty which would necessitate an enquiry or the giving of a reasonable opportunity of being heard to the government servant.

(18) In R.L. Butail's case, the facts were that the Departmental Promotion Committee and the Union Public Service Commission which met in 1964 and 1965 did not recommend or select him for the post of Director (Selection Grade). Butail was the only permanent Director at that time and was senior most of all other directors. Butail's allegations were that the adverse confidential reports for 1964 and 1965 were placed before the Departmental Promotion Committee long before they were communicated to him and, Therefore, he could not make any representation against them. Consequently the Departmental Promotion Committee and the Union Public Service Commission had no opportunity of knowing his side of the case and relying on the reports only overlooked his right of promotion. On these facts, the Supreme Court held the fact of non-communication of adverse remarks to Butail and non-consideration of his representation till the time the meetings of Departmental Promotion Committee and Union Public Service Commission were held would not have made any difference inasmuch as the representation, though made subsequently, was actually rejected with the result that confidential report remained unchanged. If representation were to be accepted and confidential report was altered, Departmental Promotion Committee would have reviewed the case but as the representation made by him later on was rejected, there was no occasion for reviewing the decision not to promote him.

(19) In case adverse remarks are later on expunged on the representation of the officer the Court can direct the State to reconsider the case of the officer as had been held in Amar Kant Choudhary Vs. State of Bihar and Others, and Air Vice Marshal S.L. Chhabra, VSM (Retd.) Vs. Union of India (UOI) and Another, .

(20) The proposition of law laid down in Brij Mohan Singh Chopra Vs. State of Punjab (Supra) and Baidyanath Mahapatra Vs. State of Orissa and Another, (Supra), was not followed by a larger Bench of the Supreme Court in Baikuntadas and Another Vs. Chief District Medical Officer (Supra). While considering the said two cases, the Supreme Court held that the principle laid down in M.E.Reddy's case should be preferred over Brij Mohan Singh Chopra and Baidyanath's case on the question of taking into consideration uncommunicated adverse remarks.

(21) In Major General I.P.S. Dewan Vs. Union of India (UOI) and Others, , the facts were that certain adverse remarks had been made against Major General Dewan which were not communicated to him. He was denied promotion to the rank of Lieutenant General though he was the senior most of the several candidates considered for promotion and his record of service was stated to be

best of all. The only reason for non-promotion appeared to be certain adverse remarks made by the then Chief of Army Staff against him. It was contended by Major General Dewan that the procedure prescribed for making the remarks was not followed nor the principles of natural justice observed and the remarks were, Therefore, required to be expunged. The case of the appellant for promotion was considered in July, 1994 when his statutory complaint against the remarks was still pending which was disposed of only in October, 1994. For these circumstances, it was held by the Supreme Court that "indeed adverse remarks, as is well known, can be made by the appropriate superior officer on the basis of mere assessment of the performance of the officer and no enquiry or prior opportunity to represent need be provided before making such remarks -- unless, of course, the Rules so provide. The remedy available to the officer in such a case is to make a representation against such remarks to the appropriate authority or to adopt such other remedies as are available to him in law".

(22) While dealing with the fact of non- disposal of the statutory complaint of Major General Dewan at the time of his consideration for promotion to the rank of Lieutenant General, it was held by the Supreme Court that "Had his statutory complaint been upheld wholly or partly, this grievance could have merited serious consideration but not when it has been dismissed. It is not suggested that the Central Government dismissed the said statutory complaint merely to buttress the non-selection of the appellant by the Selection Board. No allegation of mala fides has been made against the Central Government".

(23) In Air Vice Marshal S.L.Chhabra's case, though the adverse remarks existing in the Annual Confidential Remarks of the officer for the year 1986 were expunged, however, he was cleared for promotion by the Selection Board of 1989 only. According to Air Vice Marshal Chhabra, he should have been considered afresh with reference to the year 1987, as, according to him, the report of 1986 did create a bias against him and though the adverse remarks were not communicated to him still they had been placed before the Selection Board in the year 1987. The Supreme Court while considering the contentions of Air Vice Marshal Chopra, held that :-

"It is well known that a Selection Board, while considering the suitability of an officer for promotion to a higher post or rank, takes into consideration several factors and it is not solely based on the Appraisal Report of the controlling officer. The learned Additional Solicitor General produced the proceedings of the Selection Board of 1987 and pointed out that the Selection Board had postponed the promotion of the appellant on the ground, that only one report was available by that time and as such decision was taken to watch the performance of the appellant at least for a year more, to assess his potentiality and suitability for discharging the higher responsibility attached to the rank of Air Vice Marshal. The aforesaid fact has been mentioned in the proceedings of the Selection Board of the year 1987. In such a situation, it was neither possible for the High Court, nor is possible for this Court to act as a court of appeal against the decision of the

Selection Board, which has been vested with the power of selection of an officer for being promoted to the rank of Air Vice Marshal. No oblique motive has been suggested on behalf of the appellant against any of the members of the Selection Board and there is no reason or occasion for us to infer such motive on the part of the members of the Selection Board for denying the promotion to the appellant with reference to the year 1987. Public interest should be the primary consideration of all Selection Boards, constituted for selecting candidates, for promotion to the higher posts, but it is all the more important in respect of Selection Boards, meant for selecting officers for higher posts in the Indian Air Force. The court cannot encroach over this power, by substituting its own view and opinion. According to us, there is no scope to interfere with the decision of the Selection Board of 1987, merely on the ground that adverse remarks, in the Appraisal Report of 1986, which were placed before the Selection Board in the year 1987, were later expunged".

(24) The court, Therefore, directed the Union to reconsider the case of Air Vice Marshal Chhabra for promotion to the post of Air Vice Marshal with reference to the year 1988 and not 1987 as had been claimed by him.

(25) A conspectus of the aforesaid judgments can lead to the conclusion that though adverse remarks are required to be communicated to the officer who is being considered for promotion, however, in case the said remarks are based upon general assessment and performance of the officer, they need not be communicated. Moreover, even if such remarks are communicated and a representation has been made by the officer against these remarks which has not been considered and disposed of at the time of his consideration for promotion, it would not make any difference in case the representation is ultimately rejected. However, in case the representation is accepted and the remarks are expunged, a direction may have to be given to the authorities to reconsider the officer for purposes of promotion.

(26) With a view to satisfy ourselves, the personal record of the appellant as well as the record pertaining to the minutes of the Promotion Board were directed to be brought to the Court and we had an opportunity to go through the same. A perusal of the record shows that Air Vice Marshal S.K.Kaul had not at any time downgraded the appellant as had been contended by him. On the other hand, in the appraisal report for the period 5th April, 1994 to 30th September, 1994 as well as for the period 1st October, 1993 to 4th April, 1994 Chief of the Air Force, Air Chief Marshal S.K.Kaul has upgraded him in a few traits which resulted in the increase of his rating. We have also seen from the record that even in the years subsequent to his promotion as Air Commodore, there are certain remarks about his performance appearing in the appraisal report which may be said to be adverse. For the period 28th December, 1992 to 30th September, 1993 his immediate superior officer Air Marshal B.D.Jayal wrote in his confidential report as under :-

"In his enthusiasm he sometimes tends to be carried away not appreciating that

he is on extension at this headquarter.... It is sometimes difficult to get him to change his views once he has made up his mind".

(27) On this appraisal report, the Chief of the Air Force Air Marshal Kaul wrote as under :-

"I agree with the IO's assessment and rank him overall 7.3. He has a tendency, however, to a bit rigid in his views at times".

(28) Again in his confidential report for the period 1st October, 1994 to 30th September, 1995 Air Chief Marshal S.K.Sareen as Chief of the Air Staff wrote about him as under :-

"A hard working and dedicating officer, has a tendency to misquote/ exaggerate facts and thus cause misunderstandings during discussions. His overall performance is rated 6.8"

(29) It was on the basis of all this material which was before the Selection Board which had met in the year 1995 as well as 1996 that the Board observed that "though he has good professional background with a fertile mind, all this is neutralised by his qualities of being self innovative, dogmatism, inflexibility, reluctance to appreciate the others point of view for this reason his communication with others suffers. His style of functioning as Aoc has exhibited that he is visibly ambitious and has a strong personal interest which tends to influence his actions. He has also a tendency to magnify problems to attract more attention. Not only that, in his enthusiasm, he sometimes tends to be carried away and it becomes difficult to change his views once he has made up his mind" and "taking into account the above aspects of his personality and performance, the Board concluded that his employability in the higher rank would be highly restricted and hence deferred his case for promotion". The Selection Board comprised of the Chief of the Air Staff, Air Chief Marshal and 12 other Air Marshals of the Air Force which included AOC-in-Cs of various commands. While the proceedings of the Promotion Board of 1995 were presided over by Air Chief Marshal S.K.Kaul; the proceedings of Selection Board of 1996 were chaired by Air Chief Marshal S.K.Sareen and in both these years his case for promotion was deferred for the reasons mentioned above.

(30) The contention of the appellant, Therefore, that the adverse remarks which existed even at the time of his promotion as Air Commodore were considered by the Selection Board is not correct. The Selection Board has taken into consideration the overall performance of the appellant to assess his potentiality and suitability for discharging the responsibilities attached to the rank of Air Vice Marshal. In our view, this Court will not sit as a Court of Appeal over the decision of the Selection Board to assess the suitability and potentiality of the appellant to be promoted as Air Vice Marshal and to assess whether he will be in a position to discharge the higher responsibilities attached to the rank of Air Vice Marshal.

(31) As held by the Supreme Court in Air Vice Marshal S.L.Chhabra,VSM

Vs.Union of India and Another (Supra), "the Selection Board while considering the suitability of an officer for promotion to a higher post or rank takes into consideration several factors and it is not solely based on the appraisal report of the controlling officer. It is not possible for the Court to act as a Court of Appeal against the decision of the Selection Board which had been vested with the power of selection of an officer for being promoted to the rank of Air Vice Marshal. The Selection Board is to assess the potentiality and suitability of the officer for discharging higher responsibilities attached to the rank of Air Vice Marshal. No oblique motive has been suggested on behalf of the appellant against any of the members of the Selection Board and, Therefore, there is no reason or occasion for this Court to infer such motive on the part of the members of the Selection Board for denying promotion to the appellant with reference to the year 1987. Public interest should be primary consideration of all selection boards constituted for selecting candidates for promotion to the higher posts and it is all the more important in respect of the selection boards, meant for selecting officer for higher posts in the Indian Air Force. The Court cannot encroach over this power, by substituting its own view or opinion".

(32) To the same effect are the findings of the Supreme Court in Major General I.P.S.Dewan Vs.Union of India and Others (Supra), where it was held as under :-

"Solar as the non-selection of the appellant by the Selection Board for promotion to the rank of Lt.General is concerned, we see no illegality in the procedure adopted by them. We have also perused the work sheets relating to all four officers considered. Not only the appellant but two other seniors to the person selected were overlooked. The selection, it may be noted, was not based on seniority, but on merit. There is no allegation of mala fides or bias against the members of the Selection Board. All that can be and is suggested against the process of selection is that the Board took into consideration the aforesaid adverse remarks. Assuming that the said remarks were indeed taken into consideration, the non-selection of the appellant cannot be faulted. Firstly, it cannot be said that the said remarks alone were the cause of non- selection; the non-selection of appellant appears to be based on an overall assessment. Secondly, the statutory complaint preferred by the appellant against the said remarks have been rejected by the Central Government, no doubt subsequently to the said consideration. As stated above, the situation may have been different had the said complaint been upheld partly or wholly. In the circumstances, the Court cannot sit as an appellate authority over the acts and proceedings of the Selection Board".

(33) Law laid down by the Supreme Court is fully applicable to the facts of the present case. We also find from the record that it is not only the appellant but even five more Air Commodores who were senior to the appellant and other persons selected, were overlooked for promotion by the Selection Board in 1995. Similarly, the Selection Board of 1996 did not promote another Air Commodore who was senior to the appellant. It is clear, Therefore, from the records of the

Selection Board that it is not the seniority alone which had been taken into consideration by the Selection Board for promotion of an officer to the higher rank but it is the overall performance of the officer and his potentiality and suitability for discharging the higher responsibilities attached to the rank of Air Vice Marshal that has been taken into consideration and the Selection Board having not found the appellant fit to discharge such responsibilities and having not recommended him to the higher rank, in my view, this Court cannot pass an order directing the Government to appoint him as Air Vice Marshal.

(34) I do not find any infirmity in the view taken by Hon"ble the Single Judge. This appeal is, Therefore, dismissed but with no orders as to cost.