

(2008) 09 DEL CK 0125
In the Delhi High Court
Case No : Writ Petition (C) 2661 of 2003

Lt. Cdr. K. Kochhar

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 18-09-2008

Acts Referred:

Navy Regulations — Rule 235, 236, 239

Citation : (2008) 09 DEL CK 0125

Hon'ble Judges : Sanjay Kishan Kaul, J; Mool Chand Garg, J

Bench : Division Bench

Advocate : Major K. Ramesh, for the Appellant; A.K. Bhardwaj, for the Respondent

Final Decision : Dismissed

Judgement

Mool Chand Garg, J.—The petitioner was posted as a Lt. Commander in the Indian Navy at the time of filing of this writ petition. He was aggrieved by his non-promotion consecutively by the three promotion Boards, on the ground, that his ICRs/ACR for various period had not been written properly. He was also aggrieved on account of rejection of the representation made against his non-promotion vide order dated 31st May, 2001. He prayed for quashing of the aforesaid order and holding of a fresh selection board for considering him for promotion to the rank of Commander after setting aside his ICRs/ACR.

2. The petitioner claims that he is one of the excellent officers in the Indian Navy with proven track record. It is stated that the petitioner on successful passing out from the Naval Academy was granted permanent commission in Indian Navy on 1st January, 1986 and was considered for the prestigious "Sword of Honour" amongst the first five cadets in overall merit and also won the coveted Western Fleet, Astro Navigation prize and has been a highly motivated officer having taken part in operation Brasstacks, operation Pawan and operation Vijay. It is the grievance of the petitioner that despite being a true soldier, he was denied his dues right from 1991 to 2002 by his non-promotion to the rank of Commander

and was also denied the prestigious Staff Course whose criteria the petitioner meets fully. In this writ petition, besides challenging the order dated 31st May, 2001, he has also assailed the Interim Confidential Report (for short "ICR") from 11th February, 1996 to 18th September, 1996, ICR from 19th September, 1996 to 31st May, 1997, ICR from 1st June, 1997 to 31st October, 1997, ICR from 1st November, 1997 to 30th April, 1998 and ACR from 1st May, 1998 to 21st October, 1998.

3. The petitioner before filing this petition had also filed a complaint in terms of Rules 235 and 236 of Navy Regulations Part II, which was rejected. This necessitated the petitioner to address his complaint to the next superior authority in accordance with Rule 239 of the Navy Regulations Part II requesting for forwarding his complaint to the next superior authority and to the Chief of the Naval Staff to be dealt with in accordance with Sub-regulations (1) and (2) of the said Rule. The Division Bench which dealt with the matter on 4th March, 2005 gave directions to the Navy Authorities to dispose of the complaints filed within the time fixed and disposed of the writ petition. However, later on it transpired that before passing of the order dated 4th March, 2005, the statutory complaint of the petitioner had been disposed of and therefore, on an application filed by the petitioner, the petition was revived.

4. The relevant portion of the order dated 23rd March, 2004 rejecting the statutory complaint is reproduced hereunder:

WHEREAS, Lt. Cdr. K. Kochhar (02955R) has submitted a statutory representation dated 29.1.2003 pleading expunction and review of his CRs as under:

(i) The reports for the period 10.2.96 to 18.9.96 and from 19.9.96 to 31.5.97, rendered by very senior officers, be set aside, being technically invalid as he was attached to the Western Fleet staff during this period without defined duties, thus, depriving him of opportunity to show his potential.

(ii) Report for the period 1.6.97 to 31.10.97 and 1.11.97 to 30.4.98 be set aside due to lack of interaction with his Reviewing Officer and delay in reporting.

(iii) Report for the period 1.5.98 to 20.10.98 be moderated by PARB.

(iv) His all reports in the rank of Lt Cdr be re-PARB'd and a fresh Selection Board be ordered to consider him for promotion to the rank of Cdr.

AND WHEREAS, this Ministry has carefully considered the officer's representation and has found that as regards Point (I) raised by the officer, he had got CRs keeping in view the duties assigned to him in view of his being low in medical category. As these reports matched with his past profile, the question of having deprived him an opportunity to show his potential does not arise. As regards his contention that during the period June-October, 97 he did not have interaction with his RO, it is clarified that CR for this period was rendered not from the fleet staff but from WATT (MB) and, therefore, the RO was not Fleet Commander but

the Chief of the Staff who rightly endorsed the CR as RO. Delay in rendering of the ACR does not constitute an infirmity. The question of setting aside the CRs, as desired by the officer does not arise as these reports were already PARBed and re-PARBed and suitable relief was given to him wherever necessary. Therefore, no injustice has been done to the officer.

NOW THEREFORE, the representation submitted by Lt Cdr K. Kochhar is rejected, being devoid of merit.

By order etc.

Under Secretary to the Government of India

5. One more fact which has come on record in the synopsis filed by the respondents is that the petitioner had been promoted to the rank of Commander with effect from 16th December, 2004, consequent to the implementation of the AVSC recommendation. In fact, the petitioner was also superannuated, yet he has pressed the writ petition on merits.

6. In a nutshell, it is the case of the petitioner that the five ICRs/ACR, as aforesaid, suffered from material infirmities and needs to be set aside and as a consequence thereof the petitioner is required to be considered by a Review Promotion Board. Once he is promoted, he would also be entitled to all consequential benefits.

7. The petitioner has detailed the infirmities in the aforesaid ICRS/ACR in Para 9 of the writ petition, which are as under:

(i) About the ICR (from 11th February, 1996 to 18th September, 1996) , it is the case of the petitioner that he was never given any appointment with Rear Admiral De" Silva who had given an arbitrary and an irrational report in the capacity of Initiating Officer (for short "IO") as well as Reviewing Officer (for short "RO") without having fair assessment of the petitioner"s performance. It is also submitted that the said ICR is contrary to para 27(e) of the Naval Regulations. It is also submitted, that the petitioner was being assessed for a seagoing designation of FNBCDO i.e. Fleet Nuclear Biological Chemical Damage Control Officer, whereas being a Low Medical Category of S3A2 Unfit for sea service and practically away from his IO he was not even going for sea combat duties at all. The petitioner should have been posted either to a designation in a Shore Establishment or Fleet HQ and assessed therein in a distinct appointment for a fair appraisal.

(ii) Regarding ICR (from 19th September, 1996 to 31st May, 1997), the petitioner claimed that he was away on official temporary duties for 176 days and even the IO was absent for 32 days and thus there was only 42 days remaining left when the petitioner was on duty whereas the mandatory period was 90 days of physical service and, therefore, according to the petitioner, there was hardly any occasion for the IO to judge the performance of the petitioner and as such, there was no occasion to make assessment of the petitioner"s

performance only for 42 days particularly when mandatory period prescribed for making assessment was 90 days.

(iii) While challenging the third ICR commencing from 1st June, 1997 to 31st October, 1997, the petitioner urged that it was a tainted report as the IO Capt. P.R. Choudhary did not have any interaction with his RO, Rear Admiral Y. Prasad and, therefore, in the absence of these two mandatory requirements, the RO instead of making assessment of the petitioner's performance ought to have endorsed remarks "inadequate knowledge.

(iv) Regarding the fourth ICR (from 1st November, 1997 to 30th April, 1998) it has been alleged that this report had been initiated in 2001 i.e. almost three years after it was due and after the petitioner had been considered by the promotion board, therefore, according to the petitioner, this report was only an eye wash and not based on the actual performance of the petitioner.

(v) Regarding the fifth ACR (i.e. from 1st May, 1998 to 21st October, 1998), the allegation of bias has been levelled against the IO. In this regard, it is also the case of the petitioner that during the aforesaid period the petitioner was on the strength of Head Quarter Fleet Office. The immediate superior of the petitioner, namely, Captain S. Chakravorty was apparently biased against him being a close relative (brother-in-law) of Captain S. Neogi, the erstwhile officer in charge of Signal School against whom the petitioner had represented in the year 1993. Although the petitioner forwarded a lot of misgivings to his superiors on this IO's conduct in dealing with him the important aspect of him not even being interviewed on joining or any other time or even at the time of his transfer out which are important considerations for a strong malice and bias as these Performance Appraisal Discussion (PAD) had to be conducted in accordance with the stipulated rules and regulations. The petitioner submits that lack of PAD's led to a few communication gaps with his superior officers besides being against the letter and spirit of appraisal system. In the light of above two reasons, the petitioner apprehended that he did not get a confidential report commensurate to his potentials and outstanding demonstrated performance and his service profile.

8. Respondents have denied the allegations made by the petitioner. About the first ICR, it is stated that the respondents that the petitioner was sent for Long "C" course in 1991 but he failed to clear the course. Subsequently he underwent Nuclear Biological and Chemical Damage (NBCD) Control Course in 1995. During the period, the Petitioner performed such duties which were assigned to him in accordance with his Low Medical Category, and, on the basis of his performance the petitioner has been assessed in the impugned CR. The CR form was filled up and submitted by the petitioner himself to the IO for assessment. Even his primary duties were also similarly mentioned by him as Fleet NBCD (FNBCD). His contention that he did not have any fixed designation or charter of duties is, therefore, incorrect. In the impugned report, his IO has clearly mentioned that the officer was attached to the Fleet Staff (Officer) since he was downgraded in medical category. Since he did not go to sea, he was given the charge as

FNBCDO 1 and then 2 for most of the time. The fact that he was assisting the entire Fleet Staff in general and the Fleet Nuclear Biological Chemical Defence and Damage Control Officer (FNBCDO) in particular in the performance of his tasks, has been admitted by the petitioner himself. In fact, even the comments made by the RO are similar to what have been made by the IO. Even otherwise the petitioner had not challenged the CR in his first complaint dated 12th March, 2001 and, therefore, it is evident that the challenge to the first ICR is an afterthought.

9. Regarding the second ICR which is for the period 19th September, 1996 to 31st May, 1997, it has been submitted by them that there is no provision for discounting periods of leave from the duration of CR. Further, the petitioner himself has submitted CR for this period to his IO for his assessment. It is evident that the petitioner, as an afterthought, has requested to set aside the same CR which he himself has submitted for initiation. The impugned CR is technically valid and there is no ground to expunge the same. It is submitted that the very fact that the petitioner filled up the CR himself and did not request for non-initiation report during the period shows that he was aware that he had completed 90 days period.

10. Dealing with the allegation of the petitioner qua the third ICR, the respondents have submitted, that prior to 1st March, 1999, although a minimum period of three months service was necessary under the IO, no such period was prescribed for the RO. Since the impugned report relates to the period from June, 1997 to October, 1997, there is no technical infirmity in this regard. A minimum period of three months for RO/SRO has, however, been prescribed in 1999 vide Naval Headquarters letter No. RS/1250/98 dated 19th February, 1999 made effective from 1st March, 1999. The petitioner has been observed for the entire period of the report by his IO. It is also submitted that the gradings awarded by the RO are better than those awarded by the IO. More so, petitioner has not challenged the CR in his first complaint dated 12th March, 2001 and, therefore, it is evident that the challenge to this CR is an afterthought.

11. In respect of the fourth ICR pertaining to the period 01 November, 1997 to 30th April, 1998, the respondents submitted that the petitioner's impugned CR was delayed and it was not available in 2000 when he was considered first time by the Promotion Board (PB 3/2000). However, as per the practice followed in all cases, petitioner's all available rank reports were considered by the Board along with those of his peers. The petitioner was not selected primarily due to his being very low in the merit list (last officer selected for promotion was at merit position - 84 (threshold) while the position of the petitioner was 111. It has been stated that in 2001 and 2002, the impugned report, along with other reports were considered by PB3/01 and PB3/02 but on both the occasions the petitioner could not be selected as he was found well below the respective threshold. It is also submitted, that even if the impugned report is taken into account for PB 3/2000, the petitioner would have remained well below the selection threshold.

12. Regarding the fifth ACR i.e. for the period (1st May, 1998 to 21st October, 1998), the respondents have stated that the petitioner's apprehension are incorrect inasmuch as, the grades are in tandem with his overall profile in the rank, which was considered by the Promotion Boards on three occasions. The impugned CR is, therefore, well within the petitioner's normal CR profile. No element of bias, as alleged by the petitioner, is visible anywhere in the remarks column of his IO. In fact, the IO has been quite appreciative in his comments on the petitioner's performance.

13. Dealing with the highlights mentioned by the petitioner about his achievements, the respondents have denied the stand of the petitioner and have submitted that it is not entirely correct for the petitioner to hold in this petition that he qualified training courses mostly with distinction. He stood 26th out of 45 as a cadet in the Naval Academy in which he was graded "Average" in all respects and it was remarked in his report that he needed to show more initiative. In his Training ship, the petitioner's performance was judged to be "below average all throughout". He subsequently failed in Seamanship in the final examination. In his Midshipman's course the petitioner was judged to have officer like qualifications (OLQ) of only 70 per cent. He was sent for Long "C" course in 1991 but failed and had to be withdrawn. Subsequently, he underwent Nuclear Biological and Chemical Damage (NBCD) Control course in 1995. His subsequent appointments have been in accordance with his specialization. It is submitted for the consideration of this Court that the career of an officer with such failures in training courses cannot be expected to soar very far. Insofar as petitioner's achievements during his tenure as Lt Cdr rank is concerned, it is submitted that he, like other officers, has been assessed by his respective IOs/ROs/SROs during the period and his overall profile along with those of his peers was considered by three Promotion Boards held in 2000, 2001, 2002. However, in all the three looks, the petitioner could not meet the respective thresholds due to his lower inter se merit and, hence, was not selected for the rank of Commander on all the three occasions.

14. It is also the case of the respondents that the structure of the Armed Forces is steeply pyramidal and only 60% (Approx.) of Lt Cdrs can be promoted to the rank of Commander (Pre-AVSC recommendations). As a result, there are many officers who cannot be promoted to higher rank due to lack of vacancies. In order to make sure that no deserving officer is held back, the promotion system allows for each officer to be considered by three Promotion Boards but failed to secure promotion because each time he was considered for promotion, other officers were found to be more deserving than the petitioner. He has not been able to reconcile to the fact that he missed out promotion in just and fair competition, like many other officers - some of whom possessed service profile better than that of petitioner. As a result, he has been representing to various authorities by picking up certain CRs out of those considered by the Promotion Board, with the request to set them aside on one ground or the other. His representations have been examined both by the Naval HQ and the Ministry of

Defence in the past, and rejected being devoid of merit. Now he has submitted this petition to the High Court for setting aside 5 out of 11 CRs which were considered by the Promotion Board, on invalid grounds. The petitioner could not be selected for the higher rank solely because of his lower position in the respective merit lists coupled with limited number of vacancies in the higher rank and that the petitioner's request to set aside 5 out of 11 CRs is devoid of merit.

15. We have considered the rival submissions made by the parties and have also perused the written submissions filed by them along with the original ICRs/ACR and the record of the three Promotion Boards for the purpose of satisfying ourselves.

16. Having gone through the submissions made by the parties and the records produced before us, we are satisfied that the apprehensions in the mind of the petitioner have no legs to stand. While considering him for promotion, the three Promotion Boards have taken into consideration the overall profile of the petitioner as well as the confidential reports as given to him by his superior officers which shows that there is no difference between the gradings given to the petitioner by his IO and the RO, which are "above average". Except for the first ICR, that is, for the period 11th February, 1996 to 18th September, 1996, the grading of the petitioner is "above average". There is no difference of opinion between the IO and the RO. Rather on several occasions the RO's gradings are better than that of the IO. Same is the position of the pen picture. Even regarding the last ACR assailed by the petitioner alleging bias, we find that the grading given to him by the RO as well as by the IO is "above average" and is in accordance with his overall profile. Insofar as the first ICR impugned by the petitioner is concerned, the same was given at the time when, admittedly, the petitioner was in a low medical category and was posted in Fleet NBCD (FNBCD) which fact has been written by the petitioner himself while filling the CR forms. Here also, the rating given by the RO is similar to that given by the IO. The CR form had been signed by the petitioner.

17. Perusal of the comparative charts prepared by the respondents on the basis of the record of the Selection Board also supports the stand of the respondents that it is neither on account of any bias nor on account of lesser gradings given in the ICRs/ACR by the IO or the RO that the petitioner could not be selected but in fact his non-selection is on account of his ranking, which is much lower than the last selected candidate. Those charts for the sake of reference is reproduced hereunder:

CONFIDENTIAL Position of Lt. Cdr. K. Kochar (02955-R) in Promotion Boards-2000, 2001 and 2002 (WP(C) No. 2661/2003) PROMOTION BOARD - 2000 -----
----- Rank Reports Gradings Selection Threshold Petitioner's
Position Remarks considered by the Board ACR Order of ACR Order of Average
Merit Average Merit (A/A) (OOM) (A/A) (OOM) -----
----- Feb 96-Sep 96 73

72 Excluding CR from Nov 97- Apr 98 which was Oct 96-May 97 72 72 not available at the time of PB 2000 Jun 97-Oct 97 72 72 May 98-Oct 98 73 72 14.613 84 14.517 111

Dec 98-May 99 73 74

May 99-Oct 99 73 73 -----
----- Position after inclusion of CR from Nov 97 -
Apr 98 -----
----- Feb 96-Sep 96 73 72 It may kindly be noted that although the Oct 96-May 97 72 73 petitioner's position in the merit list improved Jun 97-Oct 97 72 73 from 111 to 87 after inclusion of CR from Nov Nov 97-Apr 98 74 74 97-Apr 98, he still remains below the May 98-Oct 98 73 73 threshold OOM which is 84. There are 08 more Dec 98-May 99 73 74 14.613 84 14.600 87 officers with the same OOM (87) who have also May 99-Oct 99 73 73 not been selected due to remaining below threshold -----

CONFIDENTIAL Promotion Boards-2001 -----
----- Rank Reports Gradings
Yearly Gradings Selection Threshold Petitioner's Position considered by the Board ACR Order of ACR Order of Average Merit Average Merit (A/A) (OOM) (A/A) (OOM) -----
----- Feb 96- Sep 96 73 72 7.3 7.2

Oct 96- May 97 72 73 7.2 7.3

Jun97- Oct 97 72 73

Nov 97- Apr 98 74 74 7.4 7.4 14.680 79 14.660 89

May 98- Oct 98 73 73

Dec 98- May 99 73 74 7.3 7.4

May 99- Oct 99 73 73

Nov 99- Jun 00 73 73 7.4 7.4

Jul 00- Oct 00 74 74

7.320 7.340 -----

CONFIDENTIAL Promotion Boards-2001 Rank Reports Gradings Yearly Gradings Selection Threshold Petitioner's Position considered by the Board ACR Order of ACR Order of Average Merit Average Merit (A/A) (OOM) (A/A) (OOM)

----- Feb 96-Sep 96 73 72 7.3 7.2

Oct 96-May 97 72 73 7.2 7.3

Jun 97-Oct 97 72 73

Nov 97-Apr 98 74 74 7.35 7.3 14.680 79 14.660 89

May 98-Oct 98 73 73

Dec 98-May 99 73 74 7.3 7.35

May 99-Oct 99 73 73

Nov 99-Jun 00 73 73 7.33 7.33

Jul 00-Oct 00 74 74

Nov 00-Jun 01 75 75 7.5 7.5

7.330 7.338 -----

18. The respondents have even given the position of the petitioner after the inclusion of CR for the period November, 1997 to April, 1998, which was submitted late. Even then the petitioner does not gain any advantage and cannot be promoted.

19. Thus, taking into consideration all the facts of this case and having perused the records including the gradings given to the petitioner by his IO/RO as also the record of the Selection Board, we find no merit in the case of the petitioner. Hence, the writ petition is dismissed with no orders as to costs.