

(1994) 12 SHI CK 0003

In the High Court Of Himachal Pradesh

Case No : Civil Writ Petition No. 418 of 1994 & W.P.No. 418 of 1994

Lt. Col. D.S. Dhillon

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 07-12-1994

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 33

Citation : (1995) 1 ShimLC 433

Hon'ble Judges : Gulab C. Gupta, C.J.; Kamlesh Sharma, J

Bench : Division Bench

Advocate : R.P. Singh, for the Appellant; K.S. Rathore, Additional Central Government Standing Counsel, for the Respondent

Judgement

Gulab C. Gupta, C.J.—Petitioner is a Lt. Colonel presently posted as Staff Officer at Headquarters, Army Training Command, Shimla, and feels aggrieved by his supersession for further promotion as a Colonel and has, therefore, preferred this writ petition under Article 226 of the Constitution, challenging the legal validity thereof. According to him, his ACR for the year 1987-88 has been mala fide and intentionally down-graded and is the cause of his supersession. According to him, this ACR is inconsistent with his over all career profile and otherwise arbitrarily written. He has, therefore, prayed that this ACR be quashed and the Respondents directed to re-consider his promotion in accordance with the existing Rules.

2. According to the Petitioner, he has a outstanding career and has never been superseded till 1986. According to him, he was commissioned as a second Lieutenant in the year 1968, promoted as Lieutenant in the year 1970, Captain in 1971, Major in the year 1977 and Lt. Colonel in the year 1986, on due dates and on proper appreciation of his merits. These promotions would, by themselves indicate that he was rated a meritorious Army Officer and given his due promotions from time to time. Even after 1987-88 his ACRs are "above average" like his ACRs prior to 1985-86. The ACR for the year 1987-88, according to him,

has been arbitrarily written in a manner as to down-grade him and the same has, therefore, resulted in his unjustified supersession. The Petitioner attributes this to one Col. U.D. Thorat, who according to him has done this arbitrary marking as Initiating Officer without obtaining full facts and details about the Petitioner's work and performance and did not himself had an opportunity of watching the Petitioner's performance. The Petitioner claims to have submitted complaints against the same but the same have been rejected without giving them any serious thought by Memos. Ex. PD, PK and PL Since the ACR for the year 1987-88, according to the Petitioner, deserves to be quashed by this Hon'ble Court, orders Annexures PL, PK and PL also deserve to be similarly quashed.

3. The Respondents in their reply raised a preliminary objection to the maintainability of this writ petition on the ground that the Petitioner had filed a similar writ petition (CWP No. 5987 of 1989) in the High Court of Punjab and Haryana, assailing the ACRs of 1986-87 and 1987-88 and the said High Court had considered his grievances about them but only directed that the Petitioner's case for promotion to higher rank be considered on the basis of his seniority, record of service and performance in accordance with the directions issued by Respondent No. 2 on 13th April, 1988. It is, therefore submitted that yet another petition on the same subject-matter is not maintainable. On merits, it is submitted that ACR of 1987-88 was written in the normal course and in accordance with the existing instructions and is in accordance with the existing rules. The procedure followed in grading the ACR, according to the Respondents, is such that no prejudice can be caused to any Army Officer. According to the Respondents, the Initiating Officer first gives marks based on performance of the officer and writes his opinion about him which is reviewed by the Reviewing Officer and further reviewed by a Special Reviewing Officer. Each of the three officers do grading independently and the over-all-assessment of ACR is done on the basis of these three grading. It is, therefore, submitted that the Petitioner's ACR for 1987 88 has been written properly. Allegations of bias of Col. Thorat are emphatically denied. As regards proceedings of the selection-board, it is submitted that the selection boards consist of high-army-officials who took decisions on over all profile and batch merits of the officer. This, according to the Respondents, has been done six times and that too by different selection boards constituted by different officers and all of them have found the Petitioner unfit for promotion. The Respondents have also filed a copy of the Selection-System (Annexure R-4) which according to them, ensures objectivity in the matter of selection. It is, therefore, submitted that the petition is devoid of substance and should be dismissed.

4. We note that we have been invited to probe into a sensitive area relating to army discipline. We have the realisation that this discipline can be best maintained, by relying on the wisdom and judgment of those who have been made responsible for it. And yet, we are undertaking this exercise as it is our constitutional duty and obligation to ensure all concerned that justice has been done to them. If in this process it is held that justice has been denied to any

Army Personnel, like the Petitioner, we would consider it our constitutional obligation to remove the clog and do justice. Frustration among army rank, in our opinion, is detrimental to our national interest and must be avoided. Then Article 14 of the Constitution has not been inapplicable to army personnel in spite of Article 33 which permits making it inapplicable and hence it is our constitutional duty to ensure protection of the said Article of the Constitution to the Petitioner. In this connection, we note with satisfaction that such probe has been undertaken by other High Courts and even by the apex Court from time to time as would be clear from a judgment of the apex Court in *Ex Naib Subedar Katar Singh Vs. Union of India (UOI) and Others*,

5. Article 14 of the Constitution has by now developed into a judicial culture and ensures fair play in action. It is a mandate against arbitrary decisions and actions and has by progressive and constructive interpretation become all pervasive. Under the circumstances, all administrative actions including those of Army Officers must not be arbitrary and must ensure justice and fair consideration. In its application to promotions, this Article ensures just, fair and due consideration to an officer for further promotion. This, in the opinion of this Court, is not only the public policy but also "legitimate expectation" of officers like the Petitioner. Since the Petitioner complains that his grading in 1987 ACR is arbitrary and has adversely affected his chances of promotion, it is necessary to consider the same in the context of aforesaid law.

6. Before considering the facts of the case, it is necessary to consider the preliminary objection. It is true that the Petitioner had filed a writ petition in the Punjab and Haryana High Court complaining his non-selection as Colonel in November 1988 and sought a direction that he be promoted. From the judgment of the Court (Annexure R-I), it does not appear that his ACR of 1987-88 was directly under challenge. In spite of it, his writ petition was allowed and the Respondents were directed to consider the case of the Petitioner on the basis of his seniority, record of service and performance for promotion to the higher rank in accordance with the directions issued by the Chief of Army Staff on 13th April, 1988. It is common ground that the Petitioner's case was thereafter considered and yet he was not found fit for promotion. The said judgment, in our opinion, would not bar challenge by him to the decisions of the selection-board pursuant to the aforesaid order. It is the Respondent's own case that pursuant to the aforesaid order a special review was undertaken in August 1992 based on cut-off ACR of 1987-88 and he was found unfit. The said judgment would not debar challenge to this decision and decisions subsequent to it. Under the circumstances, this Court finds no substance in the preliminary objection.

7. Respondents have in para 5 of their reply admitted that Petitioner was first considered for promotion as a Colonel in September 1988 based on his ACR of 1987-88. This was also the basis for his fresh special "review in August 1992. Apparently, therefore, the ACR of 1987-88 was relevant) for, both these considerations. This ACR has been taken into consideration in the first review and

final review as well as in the first special review and final special review. Special first review, according to the Respondents, has been undertaken because of the direction of the Punjab and Haryana High Court. It is, therefore, apparent that if the Petitioner's ACR of 1987-88 is not, as it should be, his non-selection would be illegal. Under the circumstances, it is necessary to consider his ACRs which show the rating as under:

Period Grading Assessment

Jan. 79 to May 80 7,7 High Average.

June 80 to Dec. 80 7,7 High Average.

June 82 to May 83 8, 7, 7 Above Average.

1983-84 8, 8, 8 Above Average.

1984-85 8,8, 7 Above Average.

1985-86 6, 8, 7 Above Average

1986-87 ACR set aside by the department.

1987-88 6, 6, 6 High Average.

June 88 to Feb. 89 8, 8 Above Average.

Feb. 89 to May 89 8, 8, 8 Above Average.

June 89 to March 90 8, 8, 8, 8 Above Average.

These figures would show that starting from 1982, the Petitioner was assessed as "above average" officer except in the year 1987-88, when his performance has been down-graded to 6, 6, 6 (high average). Since this rating stares at us, we are compelled to ascertain reasons for the same. Has the Petitioner deteriorated in any manner during the year? It must be kept in view that he was promoted as Lt. Colonel on 1-9-1986 and hence it is reasonable to assume that the selection board, which must have considered him for the purpose, must have remained satisfied with his merits and performance. In order to understand the rational behind the aforesaid grading in 1987-88, we had sent for the original dossiers of the Petitioner and gone through it. We note that all the three officers, namely, I.O. (Initiating Officer), R.O. (Reviewing Officer) and S.R.O. (Special Reviewing Officer) have recommended the Petitioner not only for time scale promotion to next rank but also for selection grade pay. The comments of the three Officers about his work and performance are as under:

Comments of the I.O.

1. A smart and well built officer who has solidierly bearing. Is intelligent and conducts himself with confidence.
2. Deljeet's professional knowledge and social adjustment are satisfactory. He

can handle routine correspondence.

3. He has a good verbal expression and gives out his views with confidence.

4. A satisfactory performance.

Comments of the R.O.

1. A cheerful and a well built officer. Intelligent with lots of confidence. Assesses his subordinate correctly.

2. As AQMG his performance has been very satisfactory. Given the guide-lines, he produces a satisfactory staff work within the time frame.

3. He should be able to command an Armed Bde. with reasonable satisfaction.

Comments of the S.R.O.

1. As AQMG of the Division, this officer's performance has been satisfactory. He can handle well defined problems within given parameters. He is lively and social in his behaviour.

If the Petitioner is intelligent, conducts himself with confidence, has professional knowledge and given satisfactory performance, as commented by the I.O., what better is expected of an officer in the Army? Similarly, if the R.O. has found him Intelligent with lot of confidence, giving very satisfactory performance and able to command an Army Brigade, with reasonable satisfaction, what else is expected of an officer like the Petitioner? Similarly, if S.R.O. has found his performance satisfactory and " found him capable of handling problems within the given parameters, what else would be required of an officer like the Petitioner? These comments do not explain "6, 6, 6" grading by these officers. Indeed, these comments would indicate that the grading is wholly arbitrary. In this connection comments of the I.O.R.O and S.R.O. appearing in ACR of 1984-85 also deserves mention:

A spirited officer with impressive bearing. He is receptive and clear headed. Is decisive and can make sound decisions in a short time. He is forth right and highly dependable. He has a remarkable ability to be able to organize things with dispatch at short notice-a quality which is a great asset in an armour commander. He understands well the functioning of an armoured regiment in peace and war. However, he is obese and needs to reduce his weight. He also needs to go into the details of his work.

"I.O."

I concur with the remarks and assessment of the I.O. An intelligent, hard working officer who has been an asset to the regiment.

"R.O."

I have seen this officer during training as also during the fire power Demo, for a

foreign delegation. Very hardworking, dependable, sharp, spirited and quick on the uptake. Will make a suitable Commanding Officer, however, I feel he has been over rated both by the I.O. and SRO.

"S.R.O."

These have given the Petitioner promotion to present rank and must, therefore, be satisfying. How these comments are different than the comments in 1987-88? We may also notice comments of ACR for the year 1988-89, which are as under:

A tall and well built officer who is physically tough. Is keen, hard working and sincere and accepts additional responsibility cheerfully.

Daljit is professionally sound and has an equally good application. He is capable of putting in sustained hard work.

He is sharp, intelligent and capable of making a balanced judgment of his subordinates. Can express himself well both verbally as well as in writing. The officer has the makings of a good regimental commander and a staff officer.

"I.O."

A smart and well disciplined officer, who is hard working and carried out the assigned duties of AQ (Wks), with dedication and sincerity He exercised initiative and promptness in dealing with multifaceted station problems arising at short notice. He willingly accepted additional obligations of duty and could always be depended upon.

He is intelligent and quick on the uptake Remains cheerful in all situation Willingly co-operatives with colleagues and seniors.

"R.O."

8. The S.R.O. has not written any comments during this year.

If these comments could earn him 8, 8 grading, it would require some explanation as to why similar comments in 1987-88 have given him 6, 6, 6. Similarly, I.O , R.O. and S.R.O, have given the following comments about the Petitioner and have given him 8, 8, 8 .grading for February 1989 to May 1989:

A keen and zealous officer who strives to improve. He is a well mannered and an affable officer who can easily adjust according to demands of the circumstances. He is imaginative and uses his discretion He is honest and upright in his dealings with , others Takes pride in belonging to an out fit and has esprit- de-corps. Being positive by nature he enjoys respect from his subordinates and superiors. Accepts additional responsibility cheerfully and discharges his obligations unwaveringly.

"I.O."

A smart and cheerful personality, who takes on additional obligations of duty

willingly. He accomplishes given task tactfully and pursues these till completion of his own.

He is intelligent and quick on the uptake, while dealing with a variety of such matter has maintained a cordial atmosphere, despite pressures.

"R.O."

A matured and a balanced officer who is professionally well up to the mark. He takes on additional responsibilities cheerfully. Socially adaptable he fits in well in to a seasoned, remains unperturbed under-stress.

"S.R.O."

These comments though written differently, mean one and the same thing i.e., that the Petitioner is an intelligent officer, accepts responsibilities smilingly, performs them satisfactorily. Apparently, therefore, this is a case where though the comments of all the years are more or less similar, the grading for all the years except the year 1987-88 are also almost similar but grading in 1987-88 is lower. This needed some explanation by the Respondents which is not forthcoming. An arbitrary, grading - which has far reaching consequences, cannot be accepted as correct grading. Under the circumstances, this Court has no hesitation in holding that the aforesaid grading of 1987-88 is arbitrary and unjustified. It violates Article 14 of the Constitution and hence deserves to be quashed. Then our considered view is that if comments of the officers mentioned above are taken into consideration, the Petitioner's grading for the year 1987-88 would not be less than 8, 8, 8 "above average" and the same, without doubt, improve his chances of selection. Since this ACR with the aforesaid grading has been taken into consideration by all the Selection Boards, their decisions must be deemed to have been effected by this arbitrary grading. For these reasons, the proceedings of all the Selection Boards-also deserve to be quashed. The grading in ACR 1987-88 and proceedings of the selection-board, in so far as the Petitioner is concerned, are, therefore, quashed.

9. Since the Petitioner has earlier approached the Punjab and Haryana High Court and has not got any relief in spite of clear and specific direction by that Court in this behalf, it is necessary to give further clear cut directions so as to ensure relief to him. We would, therefore, direct the Respondent No 2 by a writ in the nature of Mandamus to grade the Petitioner as 8, 8, 8 (above average) for the year 1987-88, treating (6) as (8) in the said report and further direct consideration of his case for promotion by a selection board on that basis, Since we have no doubt that after grading as aforesaid, the selection board is bound to find him fit for promotion. The Petitioner will be given his promotion from the due date. The exercise aforesaid will be completed within a period of four months from today. No costs.