
(1995) 02 MP CK 0003

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 712 of 1991

Lt. Col. Gurdip Singh

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 16-02-1995

Acts Referred:

Army Act, 1950 — Section 191, 192, 193, 27
Constitution of India, 1950 — Article 226

Citation : (1995) 2 MPJR 47

Hon'ble Judges : S.K. Dubey, J

Bench : Single Bench

Advocate : Mohan Singh, for the Appellant; Indira Nair . Advocate, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Dubey, J.

By this petition under Article 226 of the Constitution of India, the petitioner who was commissioned on 30th June, 1963 in the Corps of Electrical and Mechanical Engineering (EME) of the Army after completion of the Officer's training was allotted Indian Commission No. IC-14847 P, and was promoted up to the rank of Lt. Col. in June, 1988, his challenged his reduction in seniority, brought it with the batch of 1965 sticking to the original seniority, that is, date of commission 30th June 1963 and has questioned the ACR for the year 1984-85 and for grant of promotion to the rank of Colonel.

Facts giving rise to this petition are these: Petitioner after his commission in the Army, carried out and discharged various duties as EME officer right from the rank of 2nd Lt. from September. 1963 to March 1965; Captain April, 1965 to January 1966; Captain March 1968 to December 1969, Major January 1970 to November 1983 and Lt. Col. 1983 to the date. The record of service of the petitioner is unblemish and was awarded one War Star and 7 Medals in addition to an award for publishing technical paper in EME Year Book in 1982. The

petitioner got all the promotions upto the rank of Major but for the promotion of Acting rank of Lt Col, the petitioner was placed junior by his coursemates by one and half year of his original seniority contrary to the paragraph 68 of the Regulations for the Army. 1962. On lodging a statutory appeal before the Union of India, the petitioner acquired the promotion of Acting Lt. Col. The Petitioner's Initiative Officer Brigadier Amarjeet Singh (10) was having an eye on the petitioner. Petitioner apprehended that his service career will be ruined by writing adverse ACR. hence the petitioner applied for his posting out from his unit: but that was not done. The petitioner was degraded in the ACR for the year 1984-85 and 1985-86 which were assessed by Brigadier Amarjeet Singh. The ACRs were not communicated to the petitioner. Having come to know about the entry in ACRs the petitioner lodged a statutory complaint it to the Government of India vide petition dated 5.7.1986 (Annexure. A) The Government of India, vide order dated 29.4.1987 (Annexure-B) set aside the ACR for the year 1985-86. but withheld the ACR for the year 1984-85. The petitioner avers that both the ACRs were written by the same IO. who was biased, entry in ACR of 1984-85 also ought to have been set aside, but. that was not done which affected the selection of the petitioner for the rank of Acting Colonel, the petitioner was superseded by Army Headquarter. The reasons for the supersession were not communicated to the petitioner. The petitioner also suspects that the reason for supersession was the interim ACR assessed by IO-Brigadier M. R. Kochar in the line of Brigadier Amarjeet Singh, as Brigadier M. R. Kochar was having knowledge of statutory complaint submitted by the petitioner against his predecessor. Therefore, he was also prejudiced. The petitioner had a satisfactory record of service, but because of the uncommunicated ACR, interim ACR and the bias of the two IOs. the petitioner was superseded to 200 Juniors to him who were promoted. The petitioner made statutory complaint (Annexure-D) again on 25th May. 1988 against his supersession which was rejected vide order dated 29th September. 1989(Annexure-F) whereby the petitioner was communicated that the petitioner's final review for the promotion to the rank of Acting Colonel on the basis of the ACR have been carried out by the 3 Selection Board, and on over all performance and the record of service the petitioner was not considered for the promotion as the petitioner was not found fit for 3 consecutive review and therefore, the petitioner was no longer eligible for further consideration. The petitioner also avers that with effect from January. 1990 ACRs are being shown to the petitioner wherein the petitioner is getting above-average report every year. Therefore, in view of the paragraph 66, 67, 68, 69 of the Regulations for the Army 1962. as the petitioner is qualified technically and educationally and is medically fit. deserves to be promoted.

The respondents in their return have contended that right from the commission upto the rank of Major the appointments and promotion are normal being time bound promotion and are generally given to the EME Officers in their service in the given rank. The petitioner belonged to 1963 batch of Officers who was considered for promotion from the rank of Major to the rank of Lt. Col., alongwith

other officers of his batch, as a fresh case in October. 1980 by a duly constituted Selection Board. But on the basis of his over all career profile and comparative merit, the Selection Board found that the petitioner was not of acceptance grade, hence he was rejected for the said promotion. Subsequent to this, there was a change in the petitioner's record of service due to setting aside of his ACR for the period February 1978 to July 1978 as a result of acceptance of his statutory complaint. Hence, the petitioner was given a special review consideration for the promotion to the rank of Lt. Col. in December. 1981 by the Selection Board, but the Board again found him unfit for the said promotion. Thereafter, the petitioner was given two more reviews, as per the existing rules: one in March, 1982 and another in December, 1982, each time with fresh inputs on record. The petitioner was not found fit for promotion by the Selection Board again in March 1982. However, he was found fit for the rank of Lt. Col. by the Selection Board in the final review consideration held in December 1982.

According to the existing Rules, an officer is given three chances of consideration for promotion to a particular rank, i.e. (a) Fresh consideration, (b) First Review consideration: (c) Final Review consideration. If the officer does not make the grade in the fresh consideration but is selected in the first review he loses one year seniority for the purpose of all future promotion. If he does not make the grade even in the first review and is selected in the final review, he loses two years seniority for the purpose of all future promotion. The petitioner got promotion to the rank of Lt. Col. in final review selection, therefore, his seniority was reckoned with the 1965 Batch of officers for further promotion. This criteria for reckoning the seniority was a matter of policy, equally applicable to all (Annexure R-2). According to the records of the Army Headquarters, the petitioner never approached for his premature move on transfer. As regards the ACR the petitioner filed the statutory complaint u/s 27 of the Army Act 1950 (for short the "Act") which was examined by the Government of India and after giving due consideration set aside the complete ACR of 1985-86 written by Brigadier Amarjeet Singh, but did not interfere with the ACR of 1984-85. Since no adverse comments were endorsed in the ACR for the year 1984-85 and 1985-86 the said ACRs were not communicated as per existing Rules.

Promotion in the Army from the rank of Lt. Col. and above are made by selection, by a duly constituted Selection Board, constituted of;

I. Chairman

Corps Commander (Lt. Con./Lt. Gen. on staff who has commanded a Corps)

2. Member

Divisional Commander (Major General) (2) Major General on Staff (2)

3. Secretary

Deputy Military Secretary (B)

The assessment in respect of each officer is made on the basis of over all profile, service record and comparative merit within his own batch, in accordance with the guide lines laid down regarding employability of officers in the next rank by making an objective Box grading of the officer being screened. Thereafter, the case is recommended of an individual officer to the Competent Authority for promotion.

The assessment of the Selection Board is recommendatory in nature and is not binding until approval by the Competent Authority, viz., the Government of India, who have the inherent powers to modify, review, approve with variation or repal the recommendation of the Selection Board. The petitioner was considered thrice and was given ample opportunity to prove his worth, for promotion to the higher post and since he was not recommended by the Selection Board in all the three chances, he lost his chance for promotion to the higher rank. The petitioner cannot make any grievance as the respondents have acted in good faith and no motive or malafide can be attached to their action. This Court will not interfere in the matter of policy, nor can scrutinise the recommendations of the Selection Board as a Court of appeal.

Learned counsel for the petitioner contended that uncommunicated ACRs were written by the same IO. If the entries affecting the career of the petitioner would have been communicated to point out the shortcomings, the petitioner would have satisfied the competent Authority that the entry is not correct. The contention that only adverse reports are communicated is not correct because all the ACRs are put up for consideration at the time of selection, proceedings. ACRs not communicated containing adverse entries and report cannot be used for the purpose of promotion of Selection. When one ACR was set aside, written by Brigadier Amarjeet Singh on the statutory complaint, the other ACR of the previous year ought to have been set aside written by him as he was prejudiced with the petitioner. If that ACR is set aside, the petitioner becomes eligible for consideration for promotion to the rank of Colonel. Learned counsel also criticised the entries of Box grading and placing reliance on the decisions of Supreme Court in case of Col. A.S. Sngwan Vs. Union of India (1) and K.I). Gupta Vs. Union of India (2) and an unreported decision of the Punjab High Court, submitted that the policy once formulated with regard to promotion of employees in the different Cadres of Defence services, the cases of such personnel should be considered according to that policy.

Therefore, the pensioner's case ought to have been considered repeatedly without restricting it to three chances as the Regulation 69 does not restrict the officer for fitness in existing policy to higher rank to only three chances and as such it was submitted that the instructions of the Central Government to that effect of considering the case of an individual only for 3 chances are intact beyond the scope of Regulation 69.

Alter hearing counsel and on going through the record of grading and that of statutory complaint, this Court is of the opinion that the petition is devoid of

merit for the reasons to follow. True, the promotion is a normal incidence of service. A provision for promotion is made for increasing the efficiency of public service while stagnation reduces the efficiency and make the service ineffective. It is often said and indeed authority an organisation public or private does not "hire a hand" but engages or employs a whole man. The person is recruited by an organisation not just for a job, but for a whole career. One must, therefore, be given an opportunity to advance. This is the oldest and most important feature of the free enterprise system. The opportunity for advancement is a recruitment for progress of any organisation. It is an incentive for personnel development as well. *Sec Council of Scientific and Industrial Research Vs. K.G.S. Bhatt.*(1)

However in defense services, the defense personnel have peculiar incidence of service. Life's course does not run smoothly for every one. The defense services have their own peculiarities and special requirements. The consideration which apply to other Government servants in the matter of promotion cannot as a matter of course be applied to defense personnel. Requisite experience, consequent exposure and appropriate review are indispensable for according promotion and, therefore, an officer cannot claim promotion on the basis that his batch mates have earned the promotion. Individual capacity and special qualities on the basis of assessment have to be found in the case of an individual. See *Lt. Col. K.I. Gupta's case.* (2).

It is not disputed that promotion to the rank of Colonel is by way of selection, as it is a selection post and an officer is given a grade for promotion to the rank of Acting Colonel based on his over all performances, comparative merit, employability and potential including consistent recommendations along with the batch mates and to that an individual cannot claim exception.

Regulation 60 for the Army 1962 deal with the claim for promotion which lays down that the officers will normally be considered for promotion in the order of seniority in their corps but an officer whose early advancement is in the interest of service may be specially selected for promotion to fill in a vacancy whatever his seniority in the rank at that time. It further lays down that the cases of officers who are superseded for promotion will be kept under review.

Regulations for the Army 1962 are issued under the authority of the Government of India, and are defense service regulations, but the same have not been published in the Gazette. Section 191 of the Act gives power to the Central Government to make rules for the purpose of carrying into effect the provisions of the Act, for the matters provided in sub-section (2) Clause (a) to (m) which does not deal with promotion to a higher rank. Section 192 of the Act speaks about the power of the Central Government to make Regulations for all or any of the purposes of the Act other than those specified in Section 191. Though the Regulations were framed in the year 1962 but were not published in Gazette as required by section 193 of the Act. which lays down that all rules and regulations made under the Act shall be published in the Official Gazette and on such publication shall have effect as if enacted in the Act. In view of the fact that the

Regulations have not been published as required by section 193 of the Army Act in the Official Gazette, the necessary consequence is that the Regulations are merely executive instructions, but. are having statutory status and are binding. See the decision of the Supreme Court in case of Captain Virendra Kumar Vs. Union of India (1) and Captain Rachpal Singh Vs. Union of India (2).

For considering the promotion of an officer to a higher rank the Government of India amended the criteria confining the consideration of an officer to 3 chances only. It was contended that this restriction needs to be upset as is contrary to the criteria laid down in Regulation 69 which has no merit. As amended criteria of considering the case of an officer restricting the case of an officer by the selection cannot be said to be inconsistent or contrary to Regulation 69 which is applied without any exception uniformly and equally to all in the Army Services, being a policy matter and is supplemental and in amplification to Regulation 69 with due regard to the interest of Army services.

It is well settled that the policy formulated is not good for ever it is perfectly within the competence of the Union to change it. rechange it, adjust it and readjust it according to the compulsions of circumstances and the imperatives of material considerations. There is no bar to its changing the policy formulated earlier if there are good and weighty reasons for doing so. It is entirely within the reasonable discretion of the Union of India. It may stick to the earlier policy or give it up but if it does change its policy it must do so fairly and should not give the impression that it is acting by any ulterior criteria or arbitrarily. Whatever policy is made subsequently should be done fairly and made known to those concerned. Sec Col. A.S. Sangwan's case (supra).

Restricting the consideration of three chances of promotion to the selection rank right from Lt. Col. is known to all which is applicable equally to all and does not infringe any constitutional or statutory provisions, therefore, no judicial review can be made as it is well settled that the constitution docs not permit the Court to direct or advise the executive in the matters of policy or to sermonize qua matter which under the constitution lies within the sphere of legislative or executive, provided these authorities do not transgress their constitutional limits or statutory powers. Sec the decision of Supreme Court in case of Indian Railway Services of Mechanical Engineers Association and others Vs. Indian Railway Traffic Service Association and another. (3)

The petitioner's case was considered thrice on the basis of the appraisal Report which was not based only on the ACR of 1984-85 but on the basis of over all assessment of record of services of the petitioner, the Selection Board did not recommend the petitioner for promotion to the rank of Acting Colonel. the petitioner has also not attributed any oblique motive to the selection Board, hut. the contention of the petitioner that if the ACR of 1984-85 would have been ignored, as written by the same 10 who recorded the ACR of 1985-86 which was expunged by the order of Government of India, vide Annexure B dated 29-4-1987, on the statutory complaint Of the petitioner, the result of the

selection would have been different, has also no merit. It is not disputed that the case of the petitioner was considered thrice by the Selection Board, and on objective assessment, according to the guidelines for assessment for objective grading of the petitioner the petitioner was graded as "R" i.e. unfit for promotion to the next higher rank. This assessment was based on the comparative merit of the over all profile of the petitioner on the material placed before the board, demonstrating the personal qualities and performances. It was not necessary to go into the record, but in all fairness Smt. Indra Nair learned counsel for the respondents placed the confidential proceeding of the three considerations, before this Court, wherein all the members of the Selection Board on the over all profile, and weak points graded the petitioner as "R". The public interest is the primary consideration for all Selection Boards for selecting candidates for promotion but it is of common importance meant for the Selection Board to select the best officer for higher post in defense services. The members of the Selection Board are the experts, therefore, this court, will not make the judicial review and make the venture to assess the merit of grading of an officer particularly when no oblique motive is attributed to the Selection Board.

True, the ACR of 1984-85 was also placed before the Selection Board, but, in the opinion of this Court that does not make any material difference in the grading. The contention that the ACR 1984-85 ought to have been set aside as written by the same 10 who recorded ACR of 1985-86. Therefore, the non-speaking order of Government of India, dated 29-4-1987 Annexure-B, rejecting the statutory complaint, so far it relates to the ACR of 1984-85 deserves to be quashed as is against the principles of natural justice. The question whether the principles of natural justice required as Administrative authority to record reasons while rejecting the representation was considered by the Supreme Court in the case of Union of India Vs. E.G. Nambudiri (1) and, in para 10 it was observed thus :

There is no dispute that there is no rule or administrative order for recording reasons in rejecting a representation. In the absence of any statutory rule or statutory instructions requiring the competent authority to record reasons in rejecting a representation made by a Government servant against the adverse entries the competent authority is not under any obligation to record reasons. But the competent authority has no license to act arbitrarily, he must act in a fair and just manner. He is required to consider the questions raised by the Government servant and examine the same, in the light of the comments made by the officer awarding the adverse entries and the officer countersigning the same. If the representation is rejected after its consideration in a fair and just manner, the order of rejection would not be rendered illegal merely on the ground of absence of reasons. In the absence of any statutory or administrative provision requiring the competent authority to record reasons or to communicate reasons, no exception can be taken to the order of rejecting representation merely on the ground of absence of reasons. No order of an administrative authority communicating its decision is rendered illegal on the ground of absence of reasons ex facto And it is not open to the Court to interfere with such orders

merely on the ground of absence of any reasons. However, it does not mean that the administrative authority is at liberty to pass orders without there being any reasons for the same. In governmental functioning before any order is issued the matter is generally considered at various levels and the reasons and opinion are contained in the notes on the file. The reasons contained in the file enable the competent authority to formulate its opinion. If the order as communicated to the government servant rejecting the representation does not contain any reasons, the order cannot be held to be bad in law. If such an order is challenged in the Court of law-it is always open to the competent authority to place the reasons before the Court which may have led to the rejection of the representation. It is always open to an administrative authority to produce evidence aliened before the court to justify its action." 18. In the light of law laid down in E.G. Nambudiri's case (supra), learned counsel for the respondents placed before this Court the record of the statutory complaint made in respect of two ACRs. On going through the record, I find that the plea of bias, of the 10 against the petitioner which led to these two ACRs and comments of the IO, thereafter the comments of the Reviewing Officer (RO) and that of Recommendations of General Officer commanding wherein it was found that no injustice was done to the petitioner as, on objective assessment the petitioner was in numerical grading was found rightly placed. Thereafter, matter went to General of Army COA S, who in view of the petitioner's clash of personality with the IO and its possible influence on the RO and SRO's assessment, to meet the ends of justice, ordered that ACR of 1985-86 be set aside, but the ACR of 1984-85 was maintained. All this record was placed before the Government of India, Ministry of Defense, wherein, a detailed order was passed, though, the Government of India was of the opinion that the statutory complaint deserves to be dismissed hut because of the C O A.S in his wisdom has granted partial redress by expunging the complete ACR for 1985-86. that was maintained. Therefore, on going through the record dealing with the Statutory complaint. I am of the view that the grievance of the petitioner relating to his statutory complaint for ACR 1984-85 meritless.

As a result of the aforesaid discussion, the petitioner has no merit and is dismissed with no order as to costs. The outstanding amount of security, if any he refunded to the petitioner.