
(2005) 01 DEL CK 0033
In the Delhi High Court
Case No : C.W. 4239 of 1998

Lt. Col. M.P.S. Gill

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 10-01-2005

Acts Referred:

Citation : (2005) 79 DRJ 618 : (2006) 2 SLJ 84

Hon'ble Judges : B.N. Chaturvedi, J;B.A. Khan, J

Bench : Division Bench

Advocate : Sunil Mittal, for the Appellant; Rajinder Nischal, for the Respondent

Final Decision : Dismissed

Judgement

B.N. Chaturvedi, J.—The petitioner was commissioned on June 11, 1977, as 2nd Lieutenant in Artillery Regiment of Indian Army. In due course, he rose to the rank of Lt. Colonel by December, 1994. On his turn for further promotion to the rank of Colonel, he was bye-passed by virtue of being not approved by the Selection Board. A non-statutory complaint to the respondent No. 2 against his supersession, filed by the petitioner on May 12, 1997, was rejected by an order dated June 6, 1997. He, on July 28, 1997, made a statutory complaint to respondent No. 1 but the same was also rejected vide order dated 12.11.1997. This was followed by another statutory complaint dated 11th February/31st March, 1998 to respondent No. 1 impugning the ACR for the period 6/92-4/93. The respondent No. 2 vide his letter dated 14.5.1998 declared the same as untenable. By his letter dated 14.5.1998, the petitioner requested respondent No. 2 for reconsideration of his aforesaid statutory complaint. He, however, did not receive any response to such a request.

2. Setting out background facts, the respondents, in their counter, state that promotion in the Army up to the rank of Major are by time scale and from Major to Lt. Colonel and above are through Selection Board. The officers of a particular batch are considered together with same cut-off ACR and inputs and on the basis

of individual profile and batch merit and, accordingly, approved/not approved by the Selection Board. In terms of promotion policy, an officer is entitled to three considerations only for promotion to the selection rank, i.e., from Major to Lt. Colonel and above, as fresh case, first review case and final review case. Unlike a fresh case, on being approved as a first review or final review case, one would lose his seniority vis-a-vis his original batch. On being unsuccessful on three considerations, the officer is deemed finally superseded.

3. The petitioner, state the respondents, was considered as a fresh case by No. 3 Selection Board in December, 1996 but was rejected with cut-off ACR, September, 1995 to May, 1996. Thereafter, during December, 1997 with cut-off ACR June, 1996 to March, 1997, he was considered as first review case of 1997 batch by another Selection Board but again failed to make the grade. A number of factors such as wars/operation reports, course reports, ACR performance in command and staff, honours, awards and disciplinary background account for consideration by the Selection Boards. Selection/rejection, it is pleaded, is based upon overall profile of an officer vis-a-vis his comparative batch merit. On his overall profile compared to his batch merit, according to the respondents, the petitioner missed the grade, hence, not approved by the two distinct Selection Boards.

4. The petitioner recounts his ACR for the period 6/92-4/93 as stumbling block in his non-selection to the rank of Colonel. Low figurative assessment of his mandatory qualities/demonstrated performance is, according to him, attributable to malafide and bias on the part of the Reviewing Officer, Brig. P. Subramanyam. He dishes out more than one reason for alleged malafide and bias, which would be taken note of individually while examining the validity part of the grounds of challenge. The petitioner feels that he would make the grade for promotion to the rank of Colonel if the impugned ACR is left out of consideration. He has, Therefore, inter alia, prayed for quashing of the same. Alleged short shrift treatment to his non-statutory/statutory complaint at the hands of respondents 1 & 2, in view of dismissal thereof by a non-speaking order, is another point of grievance which the petitioner seeks to canvass to make out a case for interference by this Court in exercise of its power of judicial review. It is complained that non-statutory/statutory complainants were dealt with perfunctorily in mechanical fashion without application of mind.

5. The prayers in the writ petition, which survive for consideration, are:

"Pass an appropriate writ/order/directions to the respondents to consider the petitioner for promotion from Lt. Colonel to Colonel without taking into consideration the impugned ACR for the period 6/92-4/93 in the Selection Board which is going to be held in the month of December, 1998.

Pass an appropriate writ/order/directions to the respondents that the impugned ACR for the period 6/92-4/93 be either quashed or be taken of the records/dossier of the petitioner.

Pass an appropriate writ/order/directions to the respondents to promote the petitioner as Colonel with retrospective effect giving all the pass consequential benefits.

Pass any other or further orders/directions as deemed just and proper in the circumstances of the case in favor of the petitioner and against the respondents."

6. Besides, the petitioner had also sought, in the nature of interim relief, deferment of consideration of his name by the next Selection Board for promotion to the rank of Colonel and a vacancy in the post of Colonel being kept reserved, pending disposal of the writ petition, but no orders in these respects were ever passed.

7. The petition comes up for consideration before us on a second run. Earlier, on 4th of May, 1999, it was dismissed by a learned Single Judge of this Court against which the petitioner went in appeal. On hearing, the dismissal order was set aside and the matter was remitted to the appropriate Bench.

8. Though the petitioner seeks to be promoted to the rank of Colonel with retrospective effect, there is no challenge to the Selection Board proceedings as such. The respondents defend the non-selection of the petitioner to the rank of Colonel by the First Selection Board as well as by First Review Selection Board in view of his failing to make the grade in terms of his overall profile and comparative batch merit. The petitioner does not, as a matter of fact, stake his claim for promotion independent of his overall profile and comparative batch merit.

9. Conscious of the fact that low figurative assessment of mandatory qualities and demonstrated performance in his ACR for the period 6/92-4/93 jeopardised his promotional prospects, the petitioner's challenge is primarily directed against the said ACR. The ACR in question, pleads the petitioner, lacks in objectivity being actuated by malafide and biased disposition of the reviewing officer. To elaborate, he sets forth a number of grounds. It is pointed out that the same Brigade Commander, Unit Adm., who recorded low figurative assessment, particularly in demonstrated performance in petitioner's ACR, adjudged the unit performance under his command as 'outstanding'. The petitioner seeks to refer to his previous and subsequent ACRs to assail low figurative assessment of his demonstrated performance in his impugned ACR and alleges violation of paras 5 & 95 of Special Army Order 3/S/89 and paras 1,2,3,11 & 85 of Instructions on Rendition of ACRs of Officers, 1989. It is added that the impugned ACR is rendered invalid in view of subsequent amendments effected in para 4.a, 5,6 & 7 of Part I of the ACR form by the IO/RO without intimation to the petitioner in terms of para 88 of SAO 3/S/89. Challenge to impugned ACR is also made on account of non-communication of low figurative assessment and drop in relevant variables of personal qualities and demonstrated performance by way of guidance/counseling/warning. According to the petitioner, the ACR contains unwarranted remarks pertaining to the period not covered under assessment

period. It is complained that the review of the impugned ACR was deliberately delayed by five months without any reason, thereby violating para 54 of the Mandatory Special Army Order 3/S/89 and para 47 of the Instructions of Rendition of ACR for Officers, 1989. The petitioner felt that the initiating officer of the impugned ACR was forced/coerced by the RO to give low figurative assessment of his personal qualities and demonstrated performance as he took an offence on account of his posting order, which coincided with the move of the petitioner's unit to peace station. His further plea is that since he had served under the RO for three/four months only, he was not in a position to properly assess his performance professionally.

10. Raising of ACR being an annual exercise, the figurative assessment of relevant variables of personal qualities and demonstrated performance has to be with reference to the nature of performance of the reported during the subject period. The assessments in these respects in previous ACRs should bear no effect if objectivity in assessment is to be maintained. Similarly, a creditable performance reflected in the ACR of immediate following year may not necessarily lead to conclude that the performance of the ratee would have been equally good during the period of impugned ACR as well. Thus, unless the reported is able to show that his performance is underrated due to malice, bias or on account of some extraneous reasons during a particular year, mere citing of better ACR rating during the preceding or subsequent years would not provide a valid ground to upset the impugned ACR. In the context of challenge to ACRs, unless there is a clear and significant infraction of the rules, orders and regulations/instructions or malafides are specifically alleged and found to exist, the scope of jural interference by the court in exercise of writ jurisdiction is very restricted.

11. In *Amrik Singh Vs. Union of India (UOI) and Others*, , where the petitioner had been denied promotion to the post of Colonel in view of an adverse remark in one of his ACRs and the IO made figurative assessment of the ratee at 7 but the RO and SRO respectively assessed the same at 5 & 5 and the assessment was questioned by ratee on the ground that the subsequent ACRs were very good in view of his figurative assessment being 7,8 & 9 in a number of years, the Supreme Court declined to interfere, specially since the petition did not contain specific allegations of mala fides.

12. The respondents do not dispute that the performance of the unit under temporary command of the petitioner from 11th of November, 1992 onwards was adjudged as outstanding by the same Brigade Commander, namely, Brig. P. Subramanyam. However, the plea of the respondents is that performance of a unit in an event like annual administrative inspection does not reflect on the capability of the Commanding Officer alone, rather on the unit as a whole. It is contended that the petitioner, thus, could not claim the entire credit to himself. Certainly, the performance of the unit as a whole may not necessarily be indicative of overall performance of its Commanding Officer in various respects,

particularly when the Commanding Officer is temporarily officiating in that capacity for a regular Commanding Officer yet to be posted in place of one who has proceeded on some other posting.

13. The record of the ACR in question, that was produced for perusal, shows that while the box grading recorded by the IO was 8, the RO and SRO brought it down to 7. In his previous ACR for the period 1st of June 1991 to 31st of May, 1992, box grading in respect of the petitioner recorded by the IO and RO both, was 8. Thus, compared to his box grading in the previous year, it was not a case of steep down-grading in the year 6/92-4/93. As a matter of fact, box grading of 8 & 7 reflect positive grading both being 'above average'.

14. The grievance of the petitioner is that in view of his performance being graded 7 as compared to the previous year's better box grading, on a drop in performance being noticed, the ACR in question was liable to be communicated to him. Counter plea of the respondents is that it is only in the event of an adverse report being recorded that the same need be communicated to the officer concerned. Rejoinder argument on behalf of the petitioner was that even though the impugned ACR could not strictly be characterised as adverse, the same being below the cut off point for the purpose of being favorably considered for promotion, the same had the effect of adverseness and was, Therefore, liable to be communicated to him.

15. In LPA 23/95 entitled "Lt. Col. Krishan Chand v. Union of India & Others" , decided by a Division Bench of this Court on 11.10.1996, a similar plea came to be raised placing reliance on two Supreme Court decisions in State of Haryana Vs. P.C. Wadhwa, IPS, Inspector General of Police and Another, & U.P. Jal Nigam and others Vs. Prabhat Chandra Jain and others, , which was negated in view of Apex Court's another decision in "Lt. Col. K.D. Gupta v. Union of India", AIR 1989 SC 1393. In Lt. Col. K.D. Gupta (supra), the Supreme Court laid down:

16. "8..... the defense services have their own peculiarities and special requirements. The considerations which apply to other Government servants in the matter of promotion cannot as a matter of course be applied to defense personnel of the petitioner's category and rank. Requisite experience, consequent exposure and appropriate review are indispensable for according promotion and the petitioner, Therefore, cannot be given promotions as claimed by him on the basis that his batch-mates have earned such promotions. Individual capacity and special qualities on the basis of assessment have to be found but in the case of the petitioner these are not available. We find force in the stand of the respondents and do not accept the petitioner's contention that he can be granted promotion to the higher ranks as claimed by him by adopting the promotions obtained by his batch-mates as the measure."

17. In yet another decision of a Division Bench of this Court in LPA.456/99 entitled "Chief of the Army Staff & Others v. Hav. Sedu Ram & Another", decided on 21.5.2001, wherein on being rated 'average' as compared to his 'High

Average" grading in previous years, the aggrieved party challenged the particular ACR down grading him as `Average" on the ground that being adverse it was required to be communicated to him and the learned Single Judge accepted his contention and substituted it with `High Average" as recorded by IO and ordered his promotion to the next higher rank, and on examination of ACR recored, it was noticed that it was not a case where the grading was toned down in one particular year only and also as it was not a case of one time steep down grading, it was observed:

"the assessment/evaluation of service performance was likely to differ at times depending upon the relative perception and judgment of the Assessing Authorities. There is no cut and dry formula which could be applied to rate and measure such performance in exact terms. An initiating authority may sometimes grade the performance/conduct etc. higher than the Reviewing Authority or vice versa. All this is a part of the process. So long as a Reviewing Authority enjoys the power to vary/review the grading/rating, it cannot be said or held that his action was necessarily motivated or arbitrary. It is a different matter where it is proved actuated by any mala fides or is shown to be perverse lacking in material basis. Otherwise it would tantamount to expecting the Reviewing Authority to sign on the dotted line. By that logic such Authority would cease to be the Reviewing Authority vested with a power to review the assessment made by the initiating authority....."

18. In any case, in the present case, though box grading of the petitioner in the impugned ACR, in comparison to his grading during 6/91-5/92 came down from 8 to 7, it continued to be in the category of `above average" and was, thus, not required to be communicated to the petitioner pursuant to any order/instructions in vogue on the subject.

19. The ACR Form submitted by the petitioner initially indicated the period of reporting from 1st June, 1992 to 25th April, 1993. However, it was, subsequently, amended by the IO to read as 21st April, 1993 instead of 25th April, 1993 at pages 4 & 5. Similarly, at page 5 in the column indicating employment during the period under review, in place of `01.8.91 to 25.4.93", it was amended to read as `01.6.92 to 21.4.93" with consequential correction in total number of days from `148" to `144". These amendments appear to have been duly initialled by the IO. The contention of the petitioner is that he was not informed of such corrections/amendments in the ACR Form and, Therefore, the entire ACR is rendered invalid being in contravention of para 88 of SAO 3/S/89. The argument is hyper-technical. Taking into account the nature of corrections made in the dates and number of days of petitioner"s employment under the Initiating Officer, the correction was rather in the nature of rectification of clerical mistakes that had crept in the ACR Form submitted by the petitioner, with no prejudice of any sort being occasioned to him on that account.

20. Next challenge to the impugned ACR is that the same contains unwarranted remarks pertaining to the period not covered under assessment period and that

the RO delayed to forward the same to the MS Branch by five months without any reason, thereby violating para 54 of the Special Army Order 3/S/89 and para 47 of the Instructions for Rendition of ACR for Officers, 1989. The petition omits to make specific mention of alleged unwarranted remarks which, according to him, are not covered under assessment period. The petition being vague in this regard, it is rendered difficult to appreciate the merit of such a plea.

Para 54 of SAO 3/S/89 provides that in respect of officers of the rank of Major and Lt. Colonel, due date of initiation of ACR would be 1st of June and the reports are to reach M.S. Branch within 75 days from the due date of initiation. In the present case, impugned ACR(6/92-4/93) was initiated by the IO on 3rd of July, 1993 and the same was forwarded to the MS Branch, after review, only in November, 1993. Thus, even though the ACR in question had not been sent to the MS Branch within the time prescribed Therefore, infraction being not so significant and no prejudice of any sort being caused to the petitioner, the ACR in question cannot be termed as invalid and liable to be quashed.

21. The next plea of the petitioner that the initiating officer of the impugned ACR was forced/coerced by the RO to record low figurative assessment of his personal qualities and demonstrated performance lacks in factual content and the same rather tends to travel in the realm of speculation. No basis to support such an allegation is set forth by him in his writ petition. Perusal of impugned ACR would, in any case, reflect a better rating in all respects by the IO in comparison to ones endorsed by the RO, on review, of his performance assessment. In a situation where the RO himself was competent to tone down or dilute the performance assessment recorded by the IO, there could be no reason for him to exert any kind of pressure on the IO to underrate the performance of the petitioner during the period in question. The petitioner's plea, as aforesaid, Therefore must fail.

22. On account of mala fide and bias attributed to the RO, the allegation of the petitioner is that the factum of petitioner getting a posting order outside the unit, which coincided with the movement of his unit to peace station, was not to the liking of the RO and he, Therefore, took an offence to it, which was, eventually, reflected in underrating of his performance in the impugned ACR. To supplement his allegation, as aforesaid, the petitioner makes mention of delay caused in reporting at his new place of posting by one day. Pursuant to his posting order, the petitioner was to take over his new assignment of GSO-2(Army) at defense Services Staff College Wellington on 21st of June, 1993. After handling over the charge of his unit-871, Light Regiment to new Commanding Officer, Lt. Col. A.D. Singh on 4th of June, 1998 he started preparing to move to his new place of posting and was to fly to Chandigarh by Leh Courier Flight on 8th of June, 1998. However, on 7/8 June, 1998 night he was ordered by Brig. P. Subramanyam (Reviewing Officer) not to proceed to his new place of posting and instead to move with the unit by road from Leh to Srinagar. Normally, in Army, states the petitioner, the Brigade Commander would invariably not issue orders direct to unit officers where commanding officer is present in the unit and such orders are

passed by the commanding officer of the unit only. The petitioner, on receiving the aforesaid order from Brig. P. Subramanyam, brought it to the notice of his unit commander Lt. Col. A.D. Singh as well as to Brig. P. Subramanyam that in the event of his moving with unit by road from Leh to Srinagar, he would not be able to reach his new place of posting by due date. Notwithstanding this, Brig. P. Subramanyam, however, decided not to change his order and, consequently, the petitioner had to move with the unit by road from Leh to Srinagar and, thereby getting late in reporting at his new place of posting by one day. There is no indication in the petition if reporting at new place of posting on 22nd of June, 1998 instead of 21st of June, 1998, in terms of posting order, had any adverse effect on his service career. He was, in any case, acting in terms of command of his superior officer, who even after being told about the prospect of getting late in reporting at his new place of posting thought it expedient to direct the petitioner to accompany the unit by road from Leh to Srinagar and refused to change his order in that respect. To ensure a smooth and safe movement of the unit to peace station, detailing of the petitioner to accompany the unit by road, could by no reasoning be characterised as a move on the part of brigade commander, actuated by mala fide.

On his being posted out, the petitioner has omitted to spell out any specific reason which could have caused annoyance to Brig. P. Subramanyam (Reviewing Officer). Petitioner's indispensability to the unit or his seeking posting order against the wishes of RO does not appear to be the case here. At least his ACRs for the last five years prior to the period of impugned ACR do not indicate that the petitioner was such an outstanding officer that the Brigade Commander did not want to lose him on account of his new posting outside the unit. In the given situation, it is rendered difficult to find a single reason which could have possibly worked to make the Brig. P. Subramanyam displeased to the detriment of the petitioner to an extent that he gave vent to his anger in the impugned ACR by down grading his performance, which, according to him, had otherwise been creditable enough to earn him a better grading. In the circumstances, the alleged down grading in the impugned ACR cannot be held to have been actuated by any mala fide or bias on the part of the reviewing officer, as alleged, and, thus, no interference with the assessment recorded therein would appear justified.

23. The other plea that the RO was not in a position to assess the performance of the petitioner properly in view of his having worked under him only for 3/4 months is equally untenable. Admittedly, the petitioner had served for requisite number of days under the RO and, thus, he(RO) was quite competent to make his own assessment of the petitioner's performance to record the same in his impugned ACR. It was for RO alone to decide if he possessed sufficient knowledge of petitioner's working to make an objective assessment of his performance during the relevant period.

24. The other plank of petitioner's argument concerning disposal of his non-statutory/statutory complaints by respondents 1 & 2 by non-speaking order loses

its relevance once the various material pleas raised by him in his non-statutory/statutory complaints have been examined by us after proper hearing to the petitioner and adjudged to be not acceptable. Thus, even if the impugned orders rejecting non-statutory/statutory complaints of the petitioner suffer from the vice of being non-speaking ones, the same are not liable to be quashed as the grounds on which the petitioner sought to question the impugned ACR and non-promotion to the next higher rank of Colonel stand already examined by us and held to be devoid of any merit. The validity of selection process, as such, by the Selection Board being not under challenge, there is no scope for interference with rejection of petitioner's candidature for promotion to the rank of Colonel.

25. In sum and substance, finding no merit, the petition is dismissed with no order as to costs.