
(2007) 04 DEL CK 0212

In the Delhi High Court

Case No : Writ Petition (C) No. 3025 of 1994

Major S.P. Bhardwaj

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 20-04-2007

Acts Referred:

Army Act, 1950 — Section 27
Constitution of India, 1950 — Article 21, 226

Citation : (2007) 2 BC 37 : (2007) 137 DLT 362

Hon'ble Judges : T.S. Thakur, J; S.N. Aggarwal, J

Bench : Division Bench

Advocate : K. Digamber Singh, for the Appellant; A.K. Bhardwaj, for the Respondent

Final Decision : Dismissed

Judgement

S.N. Aggarwal, J.—Aggrieved by his supersession, the petitioner has filed this writ petition seeking a writ of certiorari quashing of impugned order dated 16.6.1994 (Annexure J) as well as quashing of un-communicated adverse/advisory remarks in his Annual Confidential Reports. The petitioner has also prayed for a writ of mandamus directing the respondents to hold a fresh selection board for his promotion to the rank of Lt. Colonel Selection Grade.

2. Before we examine the merits of the case, at the very outset, we would like to mention that during the pendency of this writ petition the petitioner got premature retirement from Army service from the rank of Major w.e.f. 11.3.1998 (Afternoon)(vide Annexure P-8 at page 174 of the paper book). During the hearing of this writ petition, the petitioner has raised some controversy regarding his premature retirement. He contended that after he had made a request to the respondents for premature retirement on 2.9.1996 and before he was actually retired from service, he had withdrawn his request for premature retirement by making an application to the respondents on 23.12.1997 and, Therefore, according to him, the respondents could not have retired him pre - maturely

w.e.f. 11.3.1998 (afternoon). This contention raised on behalf of the petitioner merits no consideration by us in view of the statement made by his counsel before this Court on 20.11.1997 to the effect that the petitioner would not ask for reinstatement in the event his request for premature retirement is accepted by the respondents and would restrict his relief only to consequential benefits flowing from the outcome of the writ petition. Vide order passed on 22.9.1998, it was made clear to the petitioner that the question of his premature retirement will not be gone into unless he makes amendment in the writ petition and challenges his premature retirement. Despite that the petitioner chose not to make any amendment in his writ petition so as to challenge his premature retirement and in that view of the matter we need not go into the validity of premature retirement.

3. The question that calls for consideration in this writ of certiorari is whether the respondents were justified in superseding the petitioner and promoting his juniors of the same batch to the rank of Lt. Colonel Selection Grade and also whether in the facts and circumstances of the case, would it be appropriate to direct holding of fresh selection board for consideration of the petitioner for his promotion from Major to Lt. Colonel Selection Grade ignoring his adverse ACRs, if any.

4. The necessary facts relevant for the disposal of this writ petition are summarized as follows:

The petitioner was commissioned as a Second Lieutenant in Madras Regiment on 16.6.1974 and he reckons his seniority from that date. His promotion up to the rank of Major were based on time scale subject to the pre-requisite of his having passed the next promotional examination. The petitioner was promoted to the rank of Captain in June, 1976 and from Captain to Major in 1981. The petitioner has stated that till the time he worked in the Army, he was a highly motivated trained soldier and had accepted his career with utmost pride and honour to achieve highest results to a given task. His work was recognized and appreciated by his Commanding Officer and also by his other superiors. The petitioner, having displayed his professional competence of highest order as required of an officer, was alleged to have earned his well deserved Confidential Reports from his Commanding Officer (Initiating Officer) to the level of above average with overall performance as 7.91. In Para 4 of the petition the petitioner has given the details of his ACRs from 1974 till 1994 which most of them according to him were above average with box grading 8. He has stated that at no stage he had ever been given any kind of performance counseling in writing or verbal either by the Initiating Officer or any other officer in the chain of recording of Annual Confidential Reports. The grievance of the petitioner in this writ petition is that though he had very good ACRs all along but while he was considered by Selection Board No. 4 for promotion from Major to Lt. Col. Selection Grade, why and how could he be ignored in preference to officers of his own batch juniors to him. He has stated that he was qualified for promotion to the rank of Lt. Colonel

in all respects as per provisions enshrined in the Army Act, 1950 and rules and regulations framed thereunder. He has further stated that he was never communicated any adverse ACR or was given counselling either by the Initiating Officer or by the superior reviewing authority till the time he was considered for promotion to the rank of Lt. Colonel and, Therefore, according to him, the uncommunicated adverse ACRs, if any, could not have formed the basis for his supersession. This, according to him, violates his fundamental rights under Article 21 of the Constitution of India. The petitioner has stated that he had made a non statutory complaint dated 5.3.1992 to the Chief of Army Staff against his supersession pursuant to which he was granted only partial redress to the extent of expunging Initiating Officers figurative award against Para 13(1) in ACR for 86/87. Thereafter he had made a statutory complaint against his supersession u/s 27 of the Army Act to the Chief of Army Staff and his said statutory complaint was finally rejected vide impugned order dated 16.6.1994. Aggrieved therefrom he has filed this writ petition and has prayed for a writ of certiorari quashing the impugned order dated 16.6.1994 and to direct the respondents to hold a fresh selection board for his selection to the rank of Lt. Colonel Selection Grade with all consequential benefits.

5. In response to notice of this writ petition, the respondents have filed their counter affidavit in reply to the writ petition and have denied the assertions made by the petitioner in the said writ petition. The plea of the respondents is that as there were no adverse remarks in any of the ACRs of the petitioner till May"1993, the question of communication of alleged adverse remarks to him did not arise. The respondents have admitted that the petitioner was never given performance counselling either verbally or in writing as according to them it was not required as the petitioner never earned any adverse remarks in any of his ACRs till the time he was considered by Selection Board No. 4 for promotion from Major to Lt. Colonel. It is contended that in view of his overall performance, the petitioner was not approved for promotion to the rank of Lt. Colonel by the various Selection Boards held from time to time. As he was not found fit for promotion by the successive Selection Boards, he stood finally superseded. It is further stated that the promotion in the Army from Major to Lt. Colonel and above are through Selection Board and is based on overall profile and batch merit of the officers. The selection is not vacancy based and each officer is given three considerations for promotion by the Selection Board unless the officer concerned gets some relief in any of the ACRs considered by the Board which entitles him to a Special consideration and for two more considerations. To maintain objectivity, the identity of the officer under consideration is not disclosed to the Board members. Officers approved for promotion are empanelled and then promoted in order of seniority on occurrence of the vacancies. In the case of the petitioner, he was considered for promotion with his batch-mates in February" 1992 and again in February"1993.

6. However, he was not approved for promotion. Before the final consideration could be given to him, on the basis of his non-statutory complaint dated

23.3.1992, on 5.3.1993 the Chief of the Army Staff had expunged the Initiating Officer's figurative assessment in ACR for the year 1986-87. As it resulted in change of the petitioner's profile, he was given a Special fresh consideration and Special first consideration in August" 1993 and February" 1994 respectively.

7. However, in view of his overall profile, he was still not approved for promotion. Subsequently, in July"1994 he was finally considered but still not approved for promotion to the rank of Lt. Colonel Selection Grade. According to the respondents, the right of the petitioner extends only to a fair consideration by the Selection Board and not for promotion itself. The suitability for the promotion is judged by the Selection Board not only on the basis of ACRs but also taking into consideration a number of other factors such as war/operational reports, honours and awards, disciplinary background and grade report in the course examination etc. The respondents have contended that in view of the overall profile of the petitioner, he was not found fit by the successive Selection Boards for his promotion from Major to Lt. Colonel and now he cannot be heard to make any grievance in relation to his supersession. The respondents have prayed for the dismissal of this writ petition.

8. We have heard the learned Counsel for the parties at length and have also carefully perused the entire material placed before us.

9. The petitioner has given details of his ACRs from 1974 till 1994 in para - 4 of the writ petition, according to which, he had earned "Above Average" and "Box Grading 8" in most of his ACRs for these years. The petitioner has also alleged that he was once recommended by his Superior Authority for grant of Vishisht Sewa Medal ("VSM") and, Therefore, according to him, on the basis of his work and conduct, he could not have been ignored by the Selection Board while recommending his other batch-mates junior to him for promotion from Major to Lt. Colonel Selection Grade. Admittedly, the petitioner was not awarded "VSM" and he was merely recommended for the same by his Superior Authority once. In our view, recommendation made by the Superior Authority for conferring any honor or medal upon the petitioner, simplicitor, does not give him a vested right for promotion to higher rank.

10. There is no dispute about the fact that the petitioner never got any adverse remarks in most of his ACRs considered by the Selection Board. With regard to his ACR for the year 1986-87, Chief of the Army Staff had granted partial redress to the petitioner to the extent that the adverse remarks contained in Column 13(a) of his ACR for the said year were expunged vide order passed on his non-statutory complaint dated 23.3.1992 on 5.3.1993. The assessment of the Reviewing Officer in the ACR of the same year i.e. 1986-87 was set aside by the Chief of the Army Staff during internal assessment in February "1990 itself. The petitioner was considered by the Selection Board No. 4 for his promotion from Major to Lt. Colonel for the first time in February" 1992 and was again considered by another Selection Board by way of first review in February" 1993. Both these times he was found not fit for promotion to the rank of Lt. Colonel.

Since a portion of Initiating Officer's figurative assessment in his ACR for the year 1986-87 was expunged by the Chief of the Army Staff on 5.3.1993 on the basis of the petitioner's non-statutory complaint dated 23.3.1992, there was a change in his profile on account of which he became entitled to Special fresh and Special first review considerations. He was, accordingly, considered by the three consecutive Selection Boards held in August"1993, February"1992 and July"1994 but each time he was found unfit for promotion by the different Selection Boards.

11. The scope of judicial review in the matter of assessment of merit for the purpose of promotion has been dealt with by the Supreme Court in the case of Union of India and Others Vs. Lt. Gen. Rajendra Singh Kadyan and Another, wherein it was held as under:

...Critical analysis or appraisal of the file by the Court may neither be conducive to the interests of the officers concerned or for the morale of the entire force. May be one may emphasize one aspect rather than the other but in the appraisal of the total profile, the entire service profile has been taken care of by the authorities concerned and we cannot substitute our view to that of the authorities. It is a well-known principle of administrative law that that when relevant consideration have been taken note of and irrelevant aspects have been eschewed from consideration and that no relevant aspect has been ignored and the administrative decisions has nexus to the facts on record, the same cannot be attacked on merits. Judicial review is permissible only to the extent of finding whether process in reaching decision has been observed correctly and not the decision as such. In that view of the matter, we think there is no justification for the High Court to have interfered with the order made by the Government.

12. The scope of judicial review in the matter of promotions relating to army personnel was dealt with even by a Division Bench of this Court in Colonel Narendar Singh v. UOI and Ors. WP (C) No. 7196/2005 decided on 27.3.2006 wherein it was held as under:

...that scope of judicial review in a matter like this is limited only to the deficiency in the decision making process, if there be any and this Court does not have the right and the jurisdiction to sit over either the assessment made by the Initiating officer or the accepting officer regarding the performance of the petitioner for the relevant period nor it could sit over the assessment made by the Selection Board....

13. In the case of 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 and 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 and 9 in a number of years, the Supreme Court declined to interfere, specially since the petition did not contain specific allegations of mala fides.

14. It was further held by the Apex Court in the said case as under:

In the result, we are not inclined to grant any relief to the appellant in spite of the fact that his performance in the subsequent years has been shown to be very good and his ratings were very high. Ultimately the single adverse remark of 1985-86 by the Reviewing Officer had stood in his way, not only at the time of original consideration but also when the matter was considered afresh pursuant to the directions of the High Court. The result may be unfortunate.

But the scope of the jurisdiction of the High Court being very limited, we cannot go into the correctness of the adverse remarks nor into the assessment made by the Selection Board on the two occasions.

15. In *UOI and Anr. v. Major Bahadur Singh* Civil Appeal No. 4482/2003, decided on 22.11.2005, the Supreme Court had the occasion to consider the modalities provided in the Army for recording and communication of adverse entries. It took note of the policy contained in para-103 of the instructions issued by the respondents on 3.2.1989 and upon consideration of the same held that the figurative assessment in the ACR, which is three or less only needs to be communicated as the same are considered to be adverse. It shall be relevant to refer to para-103 of the instructions issued by the respondents on 3.2.1989 and the same is to the following effect:

103. Assessment contained in a CR will not to be communicated to the officer except in the following contingencies:

(a) When figurative assessment anywhere in the CR is Low or Below Average (i.e. 3 marks). In such cases extract of figurative assessment (i.e. 3 or less) will be communicated to the officer.

(b) When the brief comments (pen picture) contains adverse or advisory remarks. In such cases complete pen picture (excluding the box grading) together with comments on Guidance for Improvements will be communicated to the officer. Further, the box grading will also need communication to the officer when assessment is low or Below Average (3 or less).

16. In *UOI and Anr. v. Major Bahadur Singh* Civil Appeal No. 4482/2003 decided by the Supreme Court on 22.11.2005, Major Bahadur Singh was aggrieved by non-communication of adverse remarks in his ACR. In that context, it was held by the Supreme Court that grievance regarding the non-communication of ACR made by Major Bahadur Singh was clearly indefensible in view of the parameters laid down in the instructions relating to recording and communication of adverse entries in the ACRs.

17. The main thrust of the learned Counsel for the petitioner was that since the performance of the petitioner throughout was very good and, Therefore, he could not have been ignored by the Selection Board while making promotions from Major to Lt. Colonel. To meet this argument of the petitioner's counsel, the counsel for the respondents laid stress on the fact that the petitioner along with

other officers of his batch was considered by different Selection Boards on the basis of his overall profile including ACRs but each time was found unfit for promotion to the rank of Lt. Colonel Selection Grade. As per policy of the respondents each officer was entitled to three considerations what is described as fresh consideration, first review and final review for promotion from Major to Lt. Colonel and above. It was further argued that the assessment of the officers in ACRs were regulated by SAO/3/89 and other applicable policies.

18. The selection and promotion to the rank of Lt. Colonel and above is made by the Selection Board on the basis of a number of factors such as war/operational report, course grade reports, ACRs, performance skill and staff appointments, honours and awards and disciplinary background etc. It was contended that the ACR alone was not the sole criteria for selection. The respondents have annexed a Policy letter dated 6.5.1987 with their counter affidavit and the attention of this Court was drawn to para-10 of the aforesaid policy letter. At this stage, it would be useful to reproduce para-10 of the policy letter dated 6.5.1987 dealing with the selection system and the same is reproduced hereinbelow:

Guidelines for Assessment

10. These directives are approved by the COAS for each rank and are comprehensive by themselves. The salient features of the guidelines are as follows:

- a) Selection is to be based on the overall profile the officer with Special stress on the performance in criteria command appointment.
- b) Due consideration is given to officer who show consistency in overall performance and they are given preference over late starters.
- c) The officer should have been consistently recommended for promotion to the next rank. Credit is given to those officers who have earned positive recommendations for promotion in their very first report in command.
- d) The officer should have done psc/ptsc/post graduate courses and/or worked well in Staff/Instructional Appts. However, qualification of psc, ptsc or HC is neither a substitute for mediocre performance in command in command nor a license for promotion.
- e) Officers should have the potential for being employed or being rotated in Staff, Instructional or ERE appointments.
- f) Character qualities, Disciplinary background and decorations form an important input of the overall profile of the officer and due consideration should have given while assessing border-line cases.
- g) While assessing officers with disciplinary background the gravity and nature of the offence and the Service level at which the offence was committed should be taken into consideration.

h) Cases involving moral turpitude, gross negligence acts of cowardice or un-officer like behavior which reflects on the moral fiber of an officer will not be recommended for promotion.

i) Performance during was forms an important fact of the overall record of the officer.

19. We have examined the grievance of the petitioner against his supersession in the backdrop of the judgments referred hereinabove and the policy of the Government on this subject. We have also seen the original record relating to promotion of the petitioner. The petitioner has not brought any irregularity to our notice in the procedure adopted by the Selection Board, which considered him for promotion along with other officers of his batch. We have further found from the record that the petitioner was found unfit for promotion by the three successive Selection Boards on the basis of overall profile and as his case for promotion was considered by three different Selection Boards during the years 1992, 1993 and 1994, we do not find any challenge of the petitioner against his supersession. We are of the view that this Court exercising its writ jurisdiction under Article 226 of the Constitution cannot sit in appeal over the decision of the Selection Boards and substitute its own opinion. 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 rank as claimed by him by adopting the promotions obtained by his batch mates as the measure.

20. For the foregoing reasons, we do not find any merit in the challenged made by the petitioner in this writ petition and the same, Therefore, fails.

21. This writ petition is hereby dismissed leaving the parties to bear their own costs.