
(2002) 01 DEL CK 0158
In the Delhi High Court
Case No : CWP No. 3242 of 2001

M.S. Brar

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 07-01-2002

Acts Referred:

Citation : (2002) 3 AD 611 : (2002) 96 DLT 483

Hon'ble Judges : D.K. Jain, J

Bench : Single Bench

Advocate : K.S. Bhati and Rahul Bhagat, for the Appellant; Pinky Anand, D.K. Singh and Deepak Bharti, for the Respondent

Final Decision : Allowed

Judgement

D.K. Jain, J.—Rule

2. Since a short point of law is involved and there is not much controversy on material facts, with the consent of counsel for the parties, the petition is taken up for final disposal at this stage itself.

3. The petitioner, an Air Vice Marshal in the Indian Air Force, impugns in this petition, under Article 226 of the Constitution of India, legality and validity of the communication dated 2 March 2001, whereby he has been informed by the Air Head Quarters that he has not been granted extension of service up to the age of 58 years in terms of Government of India, Ministry of defense letter dated 4 September 1998.

4. The retiring age of Air Force officers (Flying Branch) of the rank of Air Vice Marshal used to be 56 years, extendable to 57 years. Pursuant to the recommendations of the 5th Central Pay Commission and general policy of the Government, the retiring age of its employees including armed forces personnel was revised and the retiring age of Air Force officers (Flying Branch) of Air Vice Marshal rank, was increased to 57 years, extendable to 58 years. However, in the Army and Navy for the equivalent rank, the retiring age is uniformly 58 years. As

noted above, vide the impugned letter, the petitioner was informed that he was considered for grant of extension of service up to 58 years of age but he has not been granted the extension of service. Against this communication the petitioner submitted a petition u/s 27 of the Air Force Act 1950 (for short the Act) on 20 March 2000, raising the following objections to the denial of extension, to him:

"(a) The reports initiated by AOC-in-C, SWAC, IAF(R3), my IO, when I was posted as Air defense Commander, SWAC, may kindly be expunged being inconsistent with my demonstrated performance.

(b) Mr reports, initiated at the Air HQ, as ACAS(Trg) may be evaluated keeping in view the difficult and diversified assignments which have been given to me.

(c) The previous Board, which considered my extension of service, had Air Marshal S. Krishnaswamy as one of the senior members. He as my IO when I was Air defense Commander at SWAC. Therefore a new Board may kindly be constituted to reconsider my extension of service to ensure that justice is done to me.

(d) Non-granting of extension to me in view of my outstanding career profile is discriminatory, because to the best of my knowledge, no officer of the rank of AVM in the Fighter Pilot stream has been denied any such extension in near past. I request that my case for extension of service my please be reconsidered immediately. This is urgent in view of the fact that I shall be completing 57 years of age in August 2001."

5. Since nothing was heard on the said representation for about two months and the petitioner was completing 57 years of age in August 2001, the present petition was filed. However, during the pendency of the petition, vide letter dated 16 July 2001 (filed with the counter affidavit) the petitioner was informed that his complaint had been rejected by the appropriate authority.

6. According to the petitioner he had always upheld service interest and had endeavored to perform his duties to the best of his ability, to the utmost satisfaction of his superiors; that the fact he had been appointed to various important posts as well as promoted to higher ranks at first look, reinforce his commitment and conviction that his performance would always be recognised; that at no stage in his career spanning over 37 years he had put up any application seeking personal benefits or change in the postings in spite of the fact that his postings to far-flung areas have severely affected the education of his children and that at no stage in his service career there was any occasion when directly, indirectly or even remotely he had been informed of his shortcomings whatsoever. Therefore, the grievance of the petitioner is that in spite of his achievements and performance, he had not been granted extension of service when others have been granted extension in routine and a most severe service wrong has been done to him as, apparently, his consistent performance and merit is being sidelined and overlooked.

7. Apart from the Secretary, Ministry of defense and Chief of Air Staff, Air Vice Marshal S. Krishnaswamy, Initiating Officer (for short the IO) of the petitioner ate the relevant time and against whom some allegations of personal bias have been leveled, have been imp leaded as respondents 1 to 3 respectively.

8. The petition is resisted on behalf of the said respondents by filing a common counter affidavit. By way of preliminary submissions it is stated that in Air Force the lower retirement age of Air Vice Marshal is 57 years while upper retirement age is 58 years and before an officer reaches the lower retirement age his case is processed for extension of service, which is not granted as a matter of course. The extension is based on laid down criteria basically related to the performance of an officer during the preceding five years and the officers who do not satisfy the criteria are not granted extension. For Air Vice Marshal the criteria for grant of extension is stated to be as under:

"During the last 5 years there should be at least 3 gradings of "7" and no grading below "6".

In addition to the numerical gradings, the pen picture of the officers, i.e. IO, RO and SRO"s remarks will also be taken into account."

It is also pointed out that insofar as the petitioner is concerned, though he met the numerical criteria, but while taking into account IO/AO"s remarks in the appraisal report for the period from 1 December 1997 to 30 September 1998, his case for extension of service was not approved by the competent authority. In other words, according to the respondents it were the remarks of the IO which came in the way of the petitioner getting extension of service. It has been denied that respondent No. 3 had been harbouring any kind of ill feelings towards the petitioner because of his being from a minority community and further the appraisal reports having been reviewed by the Chief of Air Staff the petitioner does not have any reason to be aggrieved of on this account.

9. In order to rebut the stand of the respondents a rejoinder affidavit had been filed by the petitioner wherein it is averred that admittedly the petitioner fulfils the criteria of numerical gradings during the preceding five years but his pen picture has affected him adversely and, Therefore, if the pen picture was inconsistent with numerical gradings, it was only fair that the respondents should have moderated and reconciled the same with the numerical gradings. It is asserted that since the inconsistent pen picture of the petitioner has seriously affected him in both the matters of extension of service as well as promotion to the rank of Air Marshal, the pen picture ought to have been equated with adverse remarks, which required to be brought to his notice so that he could exercise his right of representation against the same. It is, thus, pleaded that the same having not been done, he has been denied a valuable right of representation and as such the pen picture deserves to be quashed/ignored. It is also averred that the pen picture of the petitioner cannot be taken into consideration for that it is illogical and inconsistent with the numerical assessment system, which is very

comprehensive, covering the professional competence, vision and strategic perspective, judgment, decisiveness, administrative ability and power of communication besides covering behavior factors.

10. I have heard learned counsel for the parties. The main thrust of the arguments of Mr. K.S. Bhati, learned counsel for the petitioner, is that since, admittedly, petitioner's extension was not approved only because of IO's remarks in the Annual Confidential Report (for short the ACR) for the period from 1 December 1997 to 30 September 1998, these remarks, though styled as pen picture, were in the nature to adverse remarks and Therefore, were required to be communicated to the petitioner to enable him to make representation against such remarks to the higher authorities for review. The submission is that the respondents having failed to do so, have acted against the principles of natural justice and contrary to the settled legal position, vitiating the entire decision making process, rendering the decision not to grant extension to the petitioner, per se, illegal. In support, reliance is placed on the decisions of the Supreme Court in Air Vice Marshal S.L. Chhabra, VSM (Retd.) Vs. Union of India (UOI) and Another, , Badrinath Vs. Government of Tamil Nadu and Others, , U.P. Jal Nigam and others Vs. Prabhat Chandra Jain and others, and Sukhdeo Vs. Commissioner Amravati Division, Amravati and Another, .

11. Ms. Pinky Anand, learned counsel for the respondents, on the other hand, has submitted that the defense services having their own peculiarities and special requirements, the considerations which apply to civil services in the matter of recording of ACR or in the matter of promotions/extensions etc., cannot be applied as a matter of course while dealing with the cases of defense personnel. In support of the proposition, reliance is placed on a decision of this Court in the case of Lt. Col. Krishan Chand v. Union of India (1996) V AD Del 1999. Learned counsel has vehemently submitted that the pen picture of the petitioner given by the IO for the period from 1 December 1997 to 30 September 1998 cannot be construed as "adverse" requiring communication to the petitioner. It is asserted that the same being only "negative" in nature, no illegality has been committed by the respondents in not communicating the same to the petitioner. In support of her stand that such remarks were not required to be intimated, reliance is placed on office instructions dated 5 April 2000. Wherein distinction between "adverse" and "negative" remarks is sought to be explained for the guidance of the IOs, along with illustrations. It is pointed out that according to the said instructions, remarks which match in their significance and meaning with description given under grading "2" or "1" in the transit cover or unqualified remarks which bring out definite and clear weakness in the appraisee are considered as "adverse", whereas qualified remarks, which bring out weakness in the appraisee but are conditional in nature, are considered as "negative. It is, submitted, that IO's remarks in the present case, being qualified, these were only "negative" and were not required to be communicated. It is also urged that petitioner's statutory complaint having been considered by the Chief of Air Staff, no interference in the matter is warranted, particularly

when extension in service is not granted as a matter of course.

12. In rejoinder, Mr. Bhati has contended that since the remarks in question pertain to the period prior to the date of the said office instructions, these cannot be relied upon by the respondents. However, in the alternative, he has also placed reliance on an office order dated 17 May 2001, whereby the Air Headquarters have again instructed the AOs to clearly differentiate between adverse and negative remarks. Learned counsel had laid emphasis on paragraphs 4 & 5 of the instructions, which besides pointing out that it is mandatory that the adverse remarks are communicated to the appraisee in writing, the implications of negative and adverse remarks have also been indicated. It is explained that negative remarks may not have a significant impact on the officer's employability and growth in the organisation, adverse remarks, on the other hand, may affect the officer's chances of promotion/placement since they reflect the weak areas which the officer has failed to overcome despite counselling/warnings and has not demonstrated potential/inclination to show improvement. It is, thus, asserted that since the remarks in question have had a significant impact on petitioner's employability, on respondents' own showing these cannot be said to be mere "negative" remarks.

13. Thus, the only question which requires consideration is whether the IO/AO's remarks for the period from 1 December 1997 to 30 September 1998 can be said to be adverse remarks or not?.

14. Pursuant to the direction by the Court's copy of the remarks (pen picture) given by the Ao for the aforementioned period has been placed on record. Having carefully perused the same, I am of the considered view that for the reasons given hereunder, answer to the question posed has to be in the affirmative.

15. Air Force Order dated 12 December 1997 (AFO-50) issued under paragraph 917 of the General Duties Miscellaneous Provisions, governing the officers of the Indian Air Force, deals with appraisal reports of the Indian Air Force officers. The purpose of the appraisal is stated to be to evaluate and record the performance of all officers (PC/SSC/BC/RE), and make use of this available data for the optimum utilisation of officer manpower resources for achieving the organisational objectives. Appraisal reports form the record of an officer's ability and performance. These reports are extremely important documents as they form the basis for assessing the training and development needs of officers and for determining their suitability for promotion, placements, courses, deputation, extension of service, re-employment etc.

Paragraph 33 of AFO-50 deals with "adverse reports". Since the contents of the paragraph have significant bearing on the issue involved and for the sake of ready reference it would be appropriate to quote the said paragraph in extenso. It reads as follows:

"33. (a) An Appraisal Report of an officer will be considered Adverse if any one or more of the following are observed in his/her AR:

(i) Assessment of 1 or 2 in any of the traits in para 8 and/or 9 in forms P-57A/B/C or para 7 and/or 8 of form p-57-D.

(ii) Comments which match in their significance and meaning with description given under "2" of "1" of the transit cover.

(iii) Any unqualified remarks/comments which conveys a definite and clear negative trait in paras 10,11, and 15 to 18 of P-15As in paras 10,11,& 15 to 21 of P-57Bs, in paras 10,11 & 13 to 19 of P-57C and paras 9,10,12 of P-57D.

(b) Mandatory requirement in respect of adverse AR.

The IO is to complete para 11 of Form P-57(A/B/C) giving necessary details of poor assessment and/or adverse remarks, the action taken by him to inform the appraisee well in advance and the consequent reaction of and improvements in the appraisee. As far as possible, failings of an officer are to be brought to his notice in writing by the appraisers in the reporting channel well before the report is due so as to give him a chance to improve himself. In case of all adverse ARs, the adverse comments given in the AR are to be communicated to the appraisee in writing and a copy of this communication is to be sent along with the AR. This is considered essential to obviate unnecessary representations from the appraisee that his failings were not brought to his notice and he was not given a chance to show improvement. If at the time of raising the report, it is felt that the warning given earlier have had no effect, this point is to be specially mentioned. If RO/SRO wants to reshow an adverse report then he is to follow the procedure mentioned above.

(c) Representation, if any, made by the affected appraisee is to be forwarded in the normal manner.

(d) When, failings in an appraisee are observed very near the due date of rendition of the report, thereby denying reasonable time for issue for a warning and watching any improvements in the appraisee, the rendition of the appraisal report may be delayed by 3 to 4 weeks allowing time for the issue of a warning and watching this results. Such reports when raised should be processed through the prescribed channels speedily so as to reach Air HQ without much delay.

(e) Adverse reports in respect of all officers are to be reviewed by AOS-C-In-C of respective commands. Adverse reports of officers in units directly under Air HQs or on deputation to various organisations will be reviewed by the concerned PSOs at Air HQs.

(f) The intention of report writing is to be factual and must convey the correct impressions. This will help the organisation place the correct man in the correct post. While factual reporting is necessary, IOs must differentiate clearly between an adverse comment/remark and a negative comment/remark. Negative comments are conditional remarks like often, some time usually, generally etc while unconditional comments/remarks are adverse remarks like "He lacks initiative and drive", "He does not take decisions", "He fails to comply with

order", "He misbehaves with others after consuming alcohol" etc."

16. It would be seen that while spelling out certain mandatory requirements in respect of the adverse appraisal reports, which include communications of adverse comments given in the report to the appraisee in writing, sub-para (f) of para 33 also brings out the concept of negative remarks vis-a-vis adverse remarks, perhaps peculiar to the defense forces. While emphasising that the AO's must differentiate clearly between an adverse comment/remark and negative comment/remarks, for their guidance some illustrations are also given to distinguish between the two. On a bare reading of the illustrations, I have no hesitation in holding that even according to the understanding of the Air Force Authorities the relevant remarks in the present case cannot be said to be negative comments or remarks. These are unconditional, reflecting overall ability and performance of the petitioner and are, Therefore, nothing but "adverse". For instance the so called pen picture of the petitioner records: "his professional knowledge and application are not commensurate of his seniority and appointment"----- "his conceptual ability and analytical skills are below the expectations to make any contribution"----- "lacking sufficient depth and confidence, he hesitates at times in directing briefings or chairing discussions"-----"his potential to head senior management post is extremely limited". By no stretch of imagination these remarks can be said to be negative comments, even if tested on the touchstone of the illustrations given in the afore-extracted paragraph of AFO-50.

17. In my opinion Therefore AO's remarks were "adverse" in nature in terms of the aforementioned paragraph of AFO-50 and, Therefore, mandatory requirements, indicated therein, had to be scrupulously complied with, which has not been done.

18. Besides, I am also unable to accept the argument of learned counsel for the respondents that unless a report/entry in the confidential report qualitatively damages a personnel, it cannot be said to be an adverse report/entry. Such a proposition can neither be accepted as an abstract proposition nor is it applicable on the facts in hand inasmuch as in a given case even a positive entry can perilously be adverse if a report is likely to affect the officer at any stage of his career, like in a case of selection post, where comparative assessment is the criteria. As in the present case, despite the petitioner admittedly fulfilling the main criteria of numerical gradings during the preceding five years, the AO's remarks have proved significant, for his further extension. Therefore, each remark has to be weighed in the context it appears.

19. It is true that while exercising power of judicial review the Court should not venture to assess and appraise the merit or the gradings of an officer, more so while dealing with defense services, which have their own peculiarities because the security of the country is of paramount consideration, but it is equally well settled that when the action taken is found to be in violation of the mandatory provisions of law or the authorities have acted in utter violation of the principles of natural justice, the Court shall not hesitate to interfere in cases involving even

the defense personnel. As pointed out hereinabove, in the present case, since the respondents have failed to comply with the mandatory procedure prescribed in AFO-50, the ratio of the decision of this Court in Lt. Col. Kishan Chand's case (supra) does not apply, which is otherwise clearly distinguishable on facts.

20. Since I have come to the conclusion that the remarks in question are per se "adverse" in nature and were required to be communicated to the petitioner, it is unnecessary to refer to various judgments relied upon on behalf of both the sides, except to make a passing reference to the decision of the Supreme Court in Air Vice Marshal S.S. Chhabra's case (supra), since it deals with the same rules. In that case it was observed by the Court that the remarks in the appraisal report, to the effect that the officer concerned "is constantly trying to get around his superiors by sweet talk/visits/gifts, to get what he wants way of good reports, postings, course, decorations etc." were to be considered as adverse remarks, especially in the context with the Indian Air Force, where an officer is expected to be straightforward, upright, conscious of the fact that his recognition and promotion are dependent, only on the merit and the service, he has rendered to the nation. The decision lends support to the view taken above.

21. For the foregoing reasons, the writ petition is allowed; the impugned communication is set aside and the rule is made absolute. The respondents are directed to communicate the remarks in question to the petitioner in terms of paragraph 33 of AFO-50 and take a fresh decision on the question of grant of extension in the age of the petitioner. The said exercise shall be completed as expeditiously as practicable but not later than eight weeks from the date of this order. There will, however, be no order as to costs.