

(2003) 12 GAU CK 0077
In the Gauhati High Court
Case No : Civil Rule No. 6368 of 1998

Sameer Rai (Major)

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 23-12-2003

Acts Referred:

Constitution of India, 1950 — Article 16

Citation : (2004) 1 GLT 198

Hon'ble Judges : Biplab Kumar Sharma, J

Bench : Single Bench

Advocate : N. Dutta and U. Bhuyan, for the Appellant; S. Bhattacharjee, CGSC, for the Respondent

Final Decision : Allowed

Judgement

B.K. Sharma, J.—Initiation and recording of confidential rolls and denial of promotion on that basis is the subject matter of grievance in this writ petition. The Petitioner is a member of the Indian army and is holding the rank of Major and aspires for his promotion to the rank of Lieutenant Colonel. The annual Confidential Rolls (ACRs) in question are for the periods 1992-93 and 1994-95. The Petitioner who was also aggrieved by initiation and recording of ACRs for the year 1993-94 got redressal in respect of the same through departmental remedies available for him under the rules. However, the grievance made in respect of the ACRs for the period 1992-93 and 1994-95 by way of exhausting Departmental Channel did not yield any result. His case for promotion to the rank of Lieutenant Colonel was considered taking into account the said ACRs and thereafter again upon rendering the ACR for the period 1993-94 as technically invalid upon entertaining his statutory complaint. Such considerations were made in February, 1996, September, 1997 and in August/September 1998. On all the occasions, he was not approved for such promotion. Hence, this writ petition making a prayer for setting aside and quashing the ACRs for the years 1992-93 and 1994-95 and for a direction to reconsider the case of promotion of the

Petitioner.

2. Adverting to the facts of the case, a Court of Inquiry was ordered against the Petitioner on 10.4.93 on the ground of shortage of a Rifle during his temporary tenure as Company Commander of a Battalion. Accordingly, the Court of Inquiry was held to investigate the circumstances under which the Rifle was lost. The proceedings of the Court of Inquiry was placed before the General Officer commanding on 13.4.1994 who directed that administrative action be taken against the Petitioner. Thereafter, a show cause notice was issued to the Petitioner on 19.9.94 as to why administrative action should not be taken against him for the purported lapse on his part. The Petitioner submitted his reply on 15.10.94 explaining the circumstances towards exonerating him from the proposed administrative action. The Petitioner, however was awarded with a non-recordable censure by order dated 26.10.94.

3. Amidst the aforesaid proceeding against the Petitioner, his case for promotion to the rank of Lieutenant Colonel was considered by the Selection Board in February, 1996 and was not cleared for such promotion. It was the apprehension of the Petitioner that his ACRs for the aforesaid three years i.e. 1992-93, 1993-94 and 1994-95 might have been responsible for his not making to the grade. Being aggrieved, the Petitioner made a Non-Statutory complaint on 6.5.1996 praying for setting aside the said ACRs and to consider his case for promotion afresh by the Selection Board, which, however was rejected as communicated by letter dated 27.9.96. The Petitioner's case for promotion was again considered by the Selection Board in September, 1997, but was again rejected. Being aggrieved by such rejection and also rejection of his Non-Statutory complaint, the Petitioner lodged a Statutory complaint dated 23.9.97 which yielded partial relief to the Petitioner by way of setting aside of the ACRs for the year 1993-94 on technical ground. However, there was no redressal in respect of the other parts of the grievance as was raised in the Statutory complaint. The Petitioner's case for promotion was again considered on that basis by the Selection Board in August/September, 1998 as a Special Review case, but was not approved for such promotion. It was at this stage, the writ petition was filed.

4. I have heard Mr. N. Dutta, the learned Senior Counsel for the Petitioner assisted by learned Advocate Mr. U Bhuyan. I have also heard Mr. S. Bhattacharyya, learned Addl. CGSC for the Respondents. Mr. Dutta, in his usual eloquence submitted that the ACRs for the years 1992-93 and 1994-95 are wholly unsustainable and are liable to be set aside and quashed on the same very grounds and reasonings for which the ACRs for the year 1993-94 was set aside while entertaining the Petitioner's statutory complaint. Referring to the provisions of the special Army Order and the Special Instructions as quoted in paragraphs 15 and 16 of the writ petition, Mr. Dutta submitted that the Controlling Officer while writing the ACRs of the Petitioner for the aforesaid periods lacked objectively, impartiality and fair assessment. According to him,

the ACRs were written and adopted without any independent scrutiny and assessment. His basic thrust of argument so far as the ACRs for the year 1992-93 is concerned is that the same very consideration which rendered the ACRs for the year 1993-94 as technically invalid is applicable for the said year and accordingly ought to have considered on that basis. Elaborating his argument, Mr. Dutta submitted in reference to the statements made in paragraph 17 of the writ petition that as per the provisions contained in para 28 of the Standing Army Order (SAO), the COI having been ordered on 10.4.93, the very initiation of ACR for the said period was wrong and technically invalid and thus the same very consideration as was given in respect of the ACRs for the year 1993-94 so as to render the same technically invalid was also available for the said period of 1992-93 and could not have been initiated against the Petitioner during the period when a COI on his character was going on. Thus, it is submitted that the ACR for the said period was technically invalid and ought to have been set aside as was done in respect of the ACRs for the year 1993-94. In this connection, the provisions contained in paragraphs 26,27 and 28 of the SAO are quoted below:

Initiation of Reports when Ratee or the Reporting Officer is involved in a disciplinary Case

26. When an officer is the subject of a disciplinary case, ACR will be initiated on him only after finalization of the case. Where, however, such a case is not finalized for more than one year and the officer has been performing regular duties in a specific appointment, an ACR will be initiated. It will, however, be ensured that the report is objective and does not contain reference of the disciplinary case.

27. When a report cannot be initiated because of disciplinary case, a non-initiation from giving detailed reasons will be forwarded to the MS Branch, though the prescribed reporting channels.

28. An officer will be considered to be the subject of a disciplinary case with effect from the earlier of the following two dates:

(a) The date on which a Court of Inquiry is ordered involving his character or military reputation, or

(b) The date on which formal cognizance of an offence is taken against him.

5. In the above context, the averments made in para 17 of the writ petition and the reply thereto in para 16 of the affidavit-in-opposition are quoted below:

17. That, averting to the facts of the present case, the Petitioner states that Court of Inquiry for loss of the weapon was ordered on 10.4.1993. The final directions of the GOC were endorsed on 13.4.1994. Show-cause notice was issued to the Petitioner on 19.9.1994 and he was awarded a non recordable displeasure on 26.10.1994. During this period the following ACRs were initiated - (1) ACR for the period 1.6.92 to 31.5.93 and (2) ACR for the period 1.6.93 to

31.5.94. For both these ACRs, the 10 and RO were Col.R.S. Lamba was witness and blamed in the said Court of Inquiry whereas the RO Brigadier Jitendra Singh had ordered the Court of Inquiry and subsequently recommended the Petitioner for award of administrative action. The aforesaid ACRs are heavily biased, prejudiced, influenced and initiated at the heat of the moment. In view of the provisions of the SAO as referred to above, the aforesaid ACRs for the period 1.6.92 to 31.5.93 and 1.6.93 to 31.5.94 are vitiated, technically invalid and are liable to be set aside and quashed. In this connection, it would be pertinent to state that pursuant to the statutory complaint filed by the Petitioner, the Central Government granted partial redress by setting aside the entire confidential report for the period 1.6.93 to 31.5.94 on technical grounds. That being the position, on the same ground the confidential report for the period 1.6.92 to 31.5.93 ought to have been set aside. But unfortunately, the same has not been done. The action of the authorities, therefore, is wholly inconsistent, violative of the provisions of the SAO and is as such liable to be appropriately interfered with by this Hon'ble Court.

16. That with regard to the statement made in para 17 of the writ petition, it is submitted by the deponent that as per Petitioner's own averment a court of inquiry to investigate the loss of weapon was ordered on 10.4.93. The means no liabilities or responsibilities were fixed on 10.4.93 and it was for the court of inquiry to investigate the loss and give their findings to the competent authority to arrive at a conclusion for fixing the responsibility. Therefore, there was nothing adverse against the Petitioner at this stage. As per the Petitioner's own pleadings the G.O.C. who is the competent authority to issue directions on court of inquiry affixing liabilities on various persons, gave his direction on 13 April, 1994 inter alia holding the Petitioner too responsible for certain lapses. As is evident, these directions by which formal cognizance of lapses against the Petitioner was taken, have been given much later than the confidential Reports for the period June 1992 to May, 1993 was initiated. Therefore, the provisions of Paragraphs 26 to 28 of SAO 3.5.89 read with para 17 to 20 of Instruction for Rendition of Confidential Report for the period June 1992 to May 1993 was considered technically valid. However, Confidential Reports for the period June 1993 to May 1994 was found to have been hit by the instructions as stated above and therefore under the provisions of para 26 and 28 of SAO 3.5.89 the said Confidential Report was held to be technically invalid and accordingly the same was expunged from the Petitioner's record.

6. As regards the ACR for the year 1994-95, Mr. Dutta, the learned Senior Counsel, referring to the averments made in para 18 and 20 of the writ petition, submitted that the very initiation of the ACR was subjective, biased and violative of the provisions of SAO and the Special Instructions. He further submitted that the Petitioner has been meted out with discriminatory treatment in as much as Major SB Singh against whom disciplinary action was ordered pursuant to the COI as against the administrative action ordered against the Petitioner has been favoured with promotion to the rank of Lt. Colonel upon setting aside the crucial

ACRs by way of accepting his statutory complaint. In this connection, the averments made in paragraphs 18 and 20 and the replies thereto in para 17 and 19 of the Affidavit-in-opposition are worth quoting.

18. That, it may further be stated that disciplinary action was ordered against Maj. S. B. Singh pursuant to the said court of Inquiry as against administrative action ordered against the Petitioner. The gravity and blame of offence was more on Maj. S.B. Singh than on the Petitioner. However, the crucial ACRs of Maj. S.B. Singh were set aside pursuant to his statutory complaint No. 8-2029 and M.S. Branch letter No. 36501/2674/Infy96 MS complaints dated 17.2.1996 and he (Maj. S.B. Singh) has subsequently been approved for the rank of Lt. Col. in special Maj. S.B. Singh has been given redressal, the Petitioner has been denied the same though both of them in the same footing as regards technical ground vis-a-vis ACRs for the period in question.

20. That, the Petitioner's ACR for the year 1.6.94 to 31.5.95 could not be initiated by his 10 Col. K.J. Singh as he met with a serious accident in March, 1995 and the Petitioner had served only 86 days with him (as against the mandatory requirement of 90 days). Therefore, his ACRs for the said period was initiated by his RO Brigadier K.S. Sindhu, who did not have adequate and in-depth knowledge of the Petitioner as he had met the Petitioner on very few occasions. Besides, Brigadier K.S. Sindhu was posted as Commander 80 Infantry Brigade in July, 1994 and the first impression he got of the Petitioner on his arrival was of award of non-recordable censure on 26.10.1994. The RO initiated the Petitioner's ACR for the said period, which was subjective, biased towards the Petitioner's, LMC and carried the impression of the award of non-recordable censure. The initiation of the Petitioner's ACR for the said period by the RO is against the provisions of the SAO and the Special Instructions and as such the same is vitiated.

17. That with regard to the statement made in para 18 of the writ petition the deponent denied the on the grounds of vagueness and that no comparison can be drawn between the Petitioner's case and Major S.B. Singh's case. Allegations of the Petitioner that his case and Major S.B. Singh's case are on the same footing are denied being Petitioner's own apprehensions.

19. That with regard to the statement made in para 20 of the writ petition the deponent beg to state that allegations against Brig. K.S. Sindhu are denied for want of knowledge. However, it is submitted that consequent to the non statutory and statutory complaint submitted by the Petitioner the Confidential Reports for the period June 1992 to May 1993 and November 1994 to May 1995 were analyzed in detail and were found to be objective and technically valid.

7. Finally, it was argued by the learned Senior counsel that the ACRs for the years 1992-93 and 1994-95 are liable to be set aside on the aforementioned grounds and the Petitioner's case for promotion is required to be considered afresh on account of change of profile and that such considerations necessarily

will have to be as of the earlier considerations by the Selection Board.

8. On the other hand, Mr. Bhattacharyya, the learned Addl. CGSC in his persuasive pursuits supporting the case of the Respondents submitted that the ACRs for the year 1992-93 does not come within the purview of para 28 of the SAO and that the ACRs of 1994-95 were recorded in its true perspective with objectivity and consequently there is no question of setting aside the said two ACRs and consideration of the case of the Petitioner afresh for promotion. Mr. Bhattacharyya specifically referred to the statements made in para 20 of the writ petition and asserted that the statements are vague, based on conjectures and surmises and founded on presumptions. Referring to Annexure III dated 26.10.94 by which the Petitioner was conveyed with "on-recordable Severe displeasure". Mr. Bhattacharyya submitted that the same was not recorded in the ACRs and was not taken into account while considering the case of the Petitioner. The Selection Board did not find him suitable for promotion and the case of the Petitioner as projected is merely on presumptions.

9. Having heard the learned Counsel for the parties at length and on perusal of the materials on records, the following issues are framed for consideration.

(a) Whether the ACRs for the year 1992-93 is technically invalid on the same very ground on which the ACRs for the year 1993-94 was held to be technically invalid.

(b) Whether the ACRs for the year 1994-95 are liable to be set aside and quashed on the ground of lack of objectivity and being founded on biased consideration.

(c) Whether, there is unequal consideration of the case of the Petitioner in reference to the case of Maj S.B. Singh against whom disciplinary action was ordered as against the administrative action ordered against the Petitioner.

(d) If the aforesaid issues are answered in favour of the Petitioner, what relief(s), he is entitled to.

10. Para 26 of the SAO referred to above, debars initiation of ACRs. when the officer is subject of a disciplinary case. According to para 28 of the SAO, an Officer will be considered to be the subject of a disciplinary case with effect from the earlier of the date on which a COI is ordered involving his character and military reputation or the date on which formal cognizance of an offence is taken against him. In the instant case, the COI was ordered against the Petitioner on 10.4.93. Partially accepting the Statutory Complaint submitted by the Petitioner, the Central Government by Annexure VII order dated 9.7.98 set aside the ACRs for the year 1993-94 on the technical ground being technically invalid in view of the order for COI and the progress thereof. If that be so, the same very consideration ought to have been given in respect of the ACRs for the year 1992-93. The report of 1992-93 is the period from 1.6.92 to 31.5.93 which includes the period from 10.4.93 to 31.5.93 in which the COI was in progress.

The ACRs for the said year was initiated when the COI was in progress and thus technically invalid as in the case of the ACRs for the year 1993-94. Setting aside of the Petitioner's ACR for the year 1993-94 in partial acceptance of the Statutory Complaint by the Central Government is itself a clean indicator of this position. The ACRs for the year 1992-93 also falls under the same purview. This being the factual and legal position the issue No. 1 is answered in the affirmative and as a consequence the ACRs for the year 1992-93 is set aside and quashed on the same very ground on which the Central Govt. had set aside and quashed the ACRs for the year 1993-94.

11. As regards the issue No. 2 pertaining to the ACRs of the Petitioner for the year 1994-95, the averments made in the writ petition in para 18 and 20 of the writ petition and the replies thereto in para 17 and 19 quoted above are noteworthy. The Petitioner in these paragraphs has made categorical and definite statements as to how Col.R.S. Lamba and Brigadier Jitender Singh who were the IO and RO respectively had roles to play in the COI Col.R.S. Lamba was a witness and blamed the Petitioner in the COI. On the other hand, Brig. Jitender Singh had ordered the COI and subsequently recommended the Petitioner for according of administrative action. It is the specific case of the Petitioner that these factors rendered the ACRs for the year 1994-95 heavily biased, prejudiced and were initiated at the heat of the moment. Further, case of the Petitioner is that the RO initiated the ACRs of the Petitioner for the said period which was subjective, biased and the awarding of non-recordable censure was the foundation for the same.

As against such specific assertions of the Petitioner, the stand of the Respondents in their affidavit as indicate above is evasive. Surprisingly their reply to the specific assertions made in para 20 of the writ petition is that the allegations are denied "for want of knowledge". Law is well settled that when a point is ostensibly a point of law the same is required to be substantiated by facts, and the party raising the point must plead such facts in the writ petition, if he is the writ Petitioner and in the Counter affidavit if he is the Respondent. In the instant case, as against the specific facts and assertion pleaded in the writ petition, there is no specific denial in the counter affidavit filed by the Respondents. The test of bias is whether a reasonable man, fully apprised of all circumstances would feel a serious apprehension of bias. The test is not whether in fact, a bias has affected the decision. It is this sense that it is often said that justice must not only be done, but must also appear to be done. Their own SAO and Special Instructions as quoted in the writ petition emphasize the need for objectivity in assessing the Officer's credentials and that all reporting officers must, therefore, be fair, impartial and objective in their assessment. These are some of the basic principles to be followed towards initiation and adoption of ACRs, lest the Officers get demoralized which would be deleterious to the efficacy and efficiency of army service.

Having noticed the factual and legal aspect of the matter, the irresistible

conclusion in my considered opinion is that the ACRs for the period 1994-95 is liable to be set aside which I accordingly do. Thus the issue No. (b) is answered in the affirmative.

12. Coming to the issue No. 3, I find that the same is more or less akin to the issue No. 2. As against the specific assertion and pleading that the gravity and blame of offence was more on Maj. SB Singh than on the Petitioner and that his crucial ACRs were set aside pursuant to his statutory complaint and consequent thereto he was subsequently approved for the rank of Lt. Colonel in Special Fresh Review, it is a case of general denial of the Respondents without highlighting anything on fact. However, there is not enough materials so as to come to a definite conclusion that there was unequal treatment in the matter of promotion. Upon answering the issue Nos 1 and 2 in the affirmative, the case of promotion of the Petitioner will have to be considered afresh and I leave it to the authority to consider this aspect of the matter as well while doing so. The issue No. 3 is answered accordingly.

13. This brings as to the 4th issue as to what relief the Petitioner is entitled to upon answering the first three issues as aforesaid. This issue is related to fairness in the matter of consideration of an officer for promotion under Article 16 of the Constitution of India and as to the manner in which adverse remarks can be taken into consideration. The issue Nos 1 and 2 having been answered in favour of the Petitioner, the case of the Petitioner for promotion to the rank of Lt. Col. will have to be considered afresh as of the dates, when his promotion became due on the basis of the Annexure-IX policy dated 27.7.95 or any other such policy, rules, guidelines holding the field. This flows from the general principle applicable to consequential orders. Once the basis of a proceeding is gone, any action taken preceding the same would fall on the ground. The Respondents while considering the case of the Petitioner as above will bear in mind that every officer has a right to be considered for promotion under Article 16 of the Constitution of India to a higher post subject however, to eligibility and being within the zone of consideration and that the manner of such consideration must be fair according to established principles governing service jurisprudence.

14. In view of the above discussions and conclusions, the writ petition stands allowed granting the prayers made in the writ petition by way of setting aside and quashing the Petitioner's ACRs for the period 1.6.92 to 31.5.93 and 1.6.94 to 31.5.95. Consequently his case for promotion to the rank of Lt. col. be considered as a fresh case by the No. 4, Selection Board from the due dates. There will be no order as to costs.