
(1998) 05 DEL CK 0053
In the Delhi High Court
Case No : C.W. No. 4274/96

Sarjit Singh Saharan (Lt. Col.)

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 12-05-1998

Acts Referred:

Citation : (1998) 4 AD 435 : (1998) 74 DLT 145 : (1998) 46 DRJ 355

Hon'ble Judges : K. Ramamoorthy, J

Bench : Single Bench

Judgement

K. Ramamoorthy, J.—The petitioner joined the Indian Army in the rank of Lieutenant and he was working on the date of filing of the writ petition as Lt. Col. He has now sought the following reliefs:

a) Quashing the impugned order of Government of India vide their letter No. 36501/23/AC/89/MS/COMPL/3271/D(MS) dated 9th August, 1996 as well as any un-communicated adverse/advisory/remarks in the Confidential Report by IO/RO/SRO/OR Head of the Department; and

b) Issue writ of Mandamus to hold fresh selection Board for promotion to

2. In April 1992, the petitioner made a statutory complaint praying for setting aside the following ACRs:

a) The complete ACR of 1985-86 including the assessment of IO, RO, SRO and NSRO (if any).

b) The complete ICR for the period 01 Jun 86 to 22 Sep 86 including the assessment of the RO, SRO and NSRO (if any).

3. By an order dated 9th August 1996 that was rejected by the Government of India. In para 6 of the writ petition the petitioner would state:

That the petitioner having displayed his professional competence of highest order as required of an officer having earned his well deserved confidential reports

from his Commanding Officer/formation Commanders to level of Above Average with OAP as 8, the petitioner was aggrieved to have a report Reviewed upon him by Brig. S. Vohra, Commandant 2 ARMD BDE. In contravention of para 31 to 3/5/89 (b) present RO and the Ratee were required to served together for a minimum of 75 days. Whereas on the contrary the HO and Ratee has just served for a period of 9 days only. Hence the report written by RO stands vitiated being in violation to para 31 of SAO 3.5.89 which is an authority on the subject of Rendering Confidential Reports on officers.

4. After referring to some decision in para 12 the petitioner would state:

That the petitioner is qualified in all respect and also entitled for further promotions as enshrined in Army Act, 1950. Army Rules, 1954 and Regulations for the Army (D&R) Revised Edition 1987. He suffers no wrong. His ACRs are above average from the Commanding Officer barring Lt. Col. PJS Sandhu and RO Brig. S. Vohra from the time of his commissioning to his best of knowledge however, any un-communicated remark may be of adverse/advisory would stand vitiated in the light of Army HQ letter No. 32301/34/P/MS-4 coord. dated 21 Aug 89, attached as Annexure-"A" to the petition, as the petitioner was never informed of such weakness, if he had any. Apart, without seeing the work or meeting the officer, personally and awarding/ granting less figurative marks as well as corresponding pen picture would tantamount to harm the officer due to extraneous influence, thus this act be treated as personal and legislative bias.

In ground (A) the petitioner would submit:

Because the petitioner is entitled to setting aside of ACRs pertaining to years (i) From 01 Jan 1980 to 31 May 1981, (ii) from 01 Jan 1981 to 31 May 1982 (iii) from 01 Jan 1982 to 14 Nov 1982 as well as any un-communicated adverse/ advisory remarks by the IO/RO/SHO/NSRO or Head of the Deptt. as enshrined in Rendition of Confidential Reports for officer, SRO 3.5.89.

5. According to the petitioner his rights under Articles 16 and 21 of the Constitution have been infringed.

6. In the counter filed by the respondents, the respondents have given structure of the Indian Army and how the radiation is done and the components taken into account for assessing the suitability of an officer for promotion. In para (b) of the background facts it is stated:

In the case of the petitioner he has been given the following considerations for promotion from Maj to Lt. Col by Mo.4 Selection Board:

Srl. Type Held in Result a) Fresh Apr 89 Unfit b) First Apr 90 Unfit Review c) Final Mar 91 Unfit Review He has thus been considered by three different Selection Boards on three different occasions (when even his identity was not known to Board Members) and has not been found fit for promotion to selection rank of Lt. Col. on the basis of his own overall profile and batch merit. His various complaints against various ACRs on the subject have been considered on

merit by competent authority and rejected. Hence the petitioner has no case.

7. About the mode of assessment by the Selection Board, it is stated by the respondents as under:

The Special Army Order also envisages initiation of ACR by RO himself, if IO cannot do it for any purpose), the officer's assertion about variance between assessment of IO and any superior reporting officer is not correct. In any case the entire ACR is taken into account by the Selection Board and not the assessment of the senior most reporting officer only. As regards the judgment cited, attention is invited to Supreme Court's Judgment in Lt. Col. K.D. Gupta Vs. UOI AIR 1989 SC 1393 (Army has its own system and considerations applied to civilian cannot be applied as a matter of course to Army). Lastly, absence of any adverse comments in records of an officer is no indication of the quality of the officer (Mir Ghulam Hussan and Others Vs. The Union of India (UOI) and Others,).

8. About the remarks in the ACRs by the officer it is stated:

In reply to this para, it is submitted that the factual details averred by the petitioner about his service with Brig S. Vohra (with reference to ACR 6/85 - 6/86 and 6/86 - 9/86) are not correct. In both the ibid ACRs reviewed by Brig Vohra, as per the records, the RO (Brig Vohra) and petitioner have served together for more than the mandatory 75 days. Moreover, the petitioner had submitted a statutory complaint dated 27 May 89 against ACR 85-86 and ICR 06/86-09/86). On a detailed analysis of the case the Chief of Army Staff directed that no interference is warranted with regard to the impugned CRs but assessment of IO in CR 88-89 was expunged. The petitioner was informed of the same vide Army HQ letter No.36501/23/AC/89/MS Compls dated 19 Feb 90.

The petitioner also submitted a statutory complaint to the Central Govt. dated 07 Jun 90 against CRs 85-86 and ICR 06/86 -09/86. The Complaint vide Govt. order No.36501/23/AC/89/MS Compl/4103/D (MS) dated 26 Jul 91 on being satisfied that no injustice has been done to the petitioner. The petitioner was informed accordingly vide Note No.36501/23/AC/89/MS Compls dated 31 Jul 91.

9. The respondents had made it very clear that "all the complaints of the officer were considered and decided by competent authority after due application of mind. While it is correct that one ACR cannot be the decisive factor for approval/non-approval of an officer for promotion, in the case of the petitioner he was not approved by Selection Board (for promotion to Selection rank of Lt Col) due to his overall profile and batch merit. The non selection is not due to any one particular ACR as claimed. Also, no mathematical overall performance (OAP) is calculated by Selection Boards and each and every ACR is considered on its own merit".

10. It is also stated that "there different Selection Boards in Apr 89, Apr 90 and Mar 91 have not found the petitioner suitable for promotion to the next rank

based on his overall profile. Hence having been considered by various selection boards comprising of different members at different times (where even his identity was not known to Board members) and not being found fit and his various complaints against successive ACR having been considered on merit and rejected, the petitioner has no case.

11. The respondents prayed for the dismissal of the petition. The petitioner filed rejoinder almost reiterating the stand taken in the petition. The petitioner has stated:

It is time to bear in mind that soldier who makes great sacrifice for the country, should never be consigned to the State of feeling that he was not fairly treated and that he suffered not because of his bad work but because of bad system. The case on hand seems to contain an ache of what Shakespeare in Othello had held, "but he that fletched from me my good name, robs me of that which not entrenches him, and makes me poor indeed (Othello, Act III Scene3). The petitioner holds that non-selection has tarnished his "good name" and feels that he falls on thorns of life and bias.

12. The petitioner has referred to the importance of the ACR stating:

In an AIR 1969 SC 2218 Baidyanath Mahapatra Vs. State of Orissa and another, it is laid down that "the purpose of communicating adverse entries to the government Servants is to inform him regarding the deficiency in work and conduct and to afford him an opportunity to make amend and improvement in his work and further if the entries are not justified the communications offers to him an opportunity to make representation. It needs to be stated that the respondents have not produced any material whatsoever apart from ACRs as noted above in this petition to show that the petitioner lacked individual capacity, or special qualities of particular standards of efficiency. In the absence of such a material, it is as discussed above, reasonable believed that the decision of the selection board held on all occasions in a mechanical manner has been prejudicially influenced by excludable material like low grading of 5/9 or 6/9 of the Initiating Officer (IO) in the ACR of 1985-86 and ICR June-Sept 1986 and observed. It is reiterated that the despite the fact that ACR 1988-89 of the petitioner having been expunged in respect of the IO, he was not reconsidered afresh as highlighted in the para (a) Page (3) of the counter. It is further reiterated and prayed for by the petitioner in this Hon"ble court to set aside the ACRs for the period 1985-86 and ICR June - September 1986 on the grounds of subjectivity, malice and prejudices. Since these ACRs are likely to be set aside by this Hon"ble Court, the petitioner will be entitled to special Review, first and final review all over again as admitted by the respondent in the counter. As admitted by the respondents that selection Boards take into consideration number of factors such as course grading war/operational reports, CRs, honours and awards, disciplinary background, performance in command and Staff Appointment etc. It is humbly submitted that the petitioner's reports on various course grading are in acceptable grade with positive recommendations ,the

petitioner's war/operational report of Indo-Pak War - 1971 is good, has no disciplinary back ground whatsoever, till date and petitioners performance in command and staff appointments had been above average except ACR of 1988-89 (which has already been expunged) and the ACRs for which redress is being sought. It may be pertinent to submit before this Hon"ble Court that these reports in question pertain to dark era of the Army when the CRs were not shown to officers reported upon and it is that time due to personal vendetta most of the officers careers were ruined and sealed so as to benefit their blue eyed officers to come up in higher echelon by superseding the bright officers like the petitioner and whereby the petitioner also became a victim of the circumstances and of the policies.

13. The petitioner would state that some relief had been granted which he never asked for and his real grievance has not been appreciated.

14. The learned counsel for the petitioner submitted that the respondents have not considered the case of the petitioner having regard to the facts and circumstances of the case and there has been no application of mind. The learned counsel also submitted that assuming that the respondents found some deficiency in the overall performance of the petitioner as per the regulations concerned counselling should have been done and that was not resorted to, to enable the petitioner to improve his overall deficiency if at all that was necessary. According to the learned counsel the performance of the petitioner had throughout been above average and while writing the remarks, the concerned officer had acted out of biased prejudicing his interest. Col. Digamber Singh, learned counsel for the petitioner referred to the judgment of the Supreme Court reported in U.P Jal Nigam and ors Vs. Prabhat Chandra Jain and ors. 1996 (2) S 363. He relied upon para 2 of the judgment which runs as under:

The first respondent was downgraded at a certain point of time to which the Service Tribunal gave a correction. Before the High Court, the petitioners" plea was that downgrading entries in confidential reports cannot be termed as adverse entires so as to obligate the Nigam to communicate the same to the employee and attract a representation. This argument was turned down by the High Court, as in its view confidential reports were assets of the employee since they weigh to his advantage at the promotional and extensional stages of service. The High Court to justify its view has given an illustration that if an employee legitimately had earned an "outstanding" report in a particular year which, in a succeeding one and without his knowledge, is reduced to the level of "satisfactory" without any communication to him, it would certainly be adverse and affect him at one or the other stage of his career.

15. He referred to the judgment of the Supreme Court reported in Narendra Nath Sinha Vs. State of U.P. and ors. 1996 (1) SLR 613. He relied upon para 2 which reads as under:

It is stated by the appellant that on his promotion as Executive Engineer on July

12, 1979 though initially on ad hoc basis, he was confirmed and regularised as an Executive Engineer on June 30, 1980. The writ petition came No. 2447 of 1980 came to be filed by V.N. Mittal on September 29, 1980. In view of the above facts and in view of the directions issued by this Court the consequence would be that the status quo which the appellant had prior to the order passed by this Court, would continue. The rights accrued to the appellant prior to the date of the filing of the writ petition would continue to be available to him, since his promotion and confirmation as such was not quashed. The Government, Therefore, would work out the rights of the appellant accordingly.

16. Col. Digamber Singh the learned counsel referred to the judgment of the Supreme Court reported in State of U.P. Vs. Yamuna Shanker Misra and another (1997) 4 S 7. The Supreme Court had observed in the following terms:

It would, thus, be clear that the object of writing the confidential reports and making entries in the character rolls is to give an opportunity to a public servant to improve excellence. Article 51-A(j) enjoins upon every citizen the primary duty to constantly endeavor to prove excellence, individually and collectively, as a member of the group. Given an opportunity, the individual employee strives to improve excellence and thereby efficiency of administration would be augmented. The officer entrusted with the duty to write confidential reports, has a public responsibility and trust to write the confidential reports objectively, fairly and dispassionately while giving, as accurately as possible, the statement of facts on an overall assessment of the performance of the subordinate officer. It should be founded upon facts or circumstances. Though sometimes, it may not be part of the record, but the conduct, reputation and character acquire public knowledge or notoriety and may be within his knowledge. Before forming an opinion to be adverse, the reporting officers writing confidential should share the information which is not a part of the record with the officer concerned, have the information confronted by the officer and then make it part of the record. This amounts to an opportunity given to the erring/corrupt officer to correct the errors of the judgment, conduct, behaviour, integrity or conduct/corrupt proclivity. If, despite being given such an opportunity, the officer fails to perform the duty, correct his conduct or improve himself, necessarily the same may be recorded in the confidential reports and a copy thereof supplied to the affected officer so that he will have an opportunity to know the remarks made against him. If he feels aggrieved, it would be open to him to have it corrected by appropriate representation to the higher authorities or any appropriate judicial forum for redressal. Thereby, honesty, integrity, good conduct and efficiency get improved in the performance of public duties and standard of excellence in services constantly rises to higher levels and it becomes a successful tool to manage the services with officers of integrity, honesty, efficiency and devotion.

It is seen from the record that the respondent constantly maintained a good record earlier to the adverse remarks made for the aforesaid period. it would appear that subsequently also he had good confidential reports on the basis of

which the clouds over his conduct were cleared and he was given further promotion. Mr. Rakesh Dwivedi, learned Additional Advocate General, in fairness, Therefore, has stated that since the respondent has been regularised after the subsequent good reports, the dispute does not survive for adjudication on merits. But the counter comments made against him by the Secretary were warranted in view of the material on record. He brought to our notice that as on the date when the entries were made, the vigilance enquiry was pending against the respondent and, Therefore, the adverse remarks came to be made. The findings recorded by the Tribunal of malice and arbitrariness on the part of the Secretary as affirmed by the High Court are not warranted for two reasons. Firstly, since the Secretary was not to nominate to the proceedings and had no opportunity to explain the position, it would be violative of the principle of natural justice. Secondly, since the vigilance enquiry was pending, unless the officer was exonerated and cleared from the cloud, necessarily, the Secretary could not clear the conduct and integrity of the officer. Therefore, the adverse remarks cannot be said to be to smack of arbitrariness.

17. The learned counsel for the respondents Mr. A.K. Vali submitted that the respondents had assessed the suitability of the petitioner taking into account all aspects of his career. The respondents had to determine a suitability of the petitioner in the context of the assessment of the Selection Board who had found him not fit and the officer who made the remarks in the ACRs had acted fairly and in accordance with the principles applicable to the recording of ACRs.

18. Col Digamber Singh, the learned counsel for the petitioner made a faint submission that Mr. PJS Sandhu who was an officer and not favourably inclined to the petitioner had acted against the interests of the petitioner because the petitioner had made some remarks about the function of that officer with reference to the number of vehicles used by the officer. The case of the petitioner is that owing to a particular remarks the officer who was to write his ACR became somewhat antagonist against the petitioner cannot at all be accepted. In the statutory complaint the petitioner had given the details about his complaint wherein also he had not given any particulars of bias. The statutory complaint was considered by the Government of India and was rejected. On a consideration on the material placed before me, I am not able to see any irrationality or illegality in the order passed by the respondents. Further no case of mala fide has been made out against any particular officer and even if there is any allegation against the person who has not made any party to the writ petition cannot be countenanced.

For all these reasons I am unable to accept the submissions made by Col. Digamber Singh on behalf of the petitioner. Accordingly, the writ petition stands dismissed. There shall be no order as to costs.