

(1997) 11 DEL CK 0040
In the Delhi High Court
Case No : C.W.No. 4233/96

S.K.Mishra (Air Commdr.)

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 28-11-1997

Acts Referred:

Air Force Act, 1950 — Section 5

Citation : (1998) 1 AD 609 : (1998) 44 DRJ 328 : (1997) 2 ILR Delhi 475

Hon'ble Judges : Usha Mehra, J

Bench : Single Bench

Advocate : Mr. S. Mukherjee, for the Appellant; Mr. P.N. Mishra and Mr. R.Patnayak, for the Respondent

Judgement

Usha Mehra, J.—The sort point raised in this writ petition is whether the promotion of the petitioner could be withheld or deferred on the plea that CBI report was against him particularly when as a sequel of CBI report the petitioner had already been awarded censure of "Reproof"?

2. To answer this question the brief facts relevant for determination of the same are that the petitioner joined Indian Air Force on 1st December, 1961. In 1979 he was selected as a Member of the Selection Committee constituted for the purchase of Jaguar Fighter Air Craft. In 1984 he was selected as officer in charge of Advance Electronics Laboratory at Palam Airport known as AMSE. The Electronic Air Craft is an important equipment for striking ability of the Air Craft. The petitioner was associated as Technical Expert for the selection, inspection and recommendation of the craft that was proposed to be purchased for bringing the Indian Air Force on the pedestal of superior striking ability. In 1989 the Indian Air Force conducted an air defense exercise, however, it was not successful. Hence the task to find out the causes of its failure and poor performance was given to the petitioner. The petitioner submitted his report and furnished reason for the failure to be poor planning and wrong locating of Radars. The responsibility of the operational planning was found to be that of Air

Marshal S.K.Kaul, since responsibility of the failure was leveled against Mr. Kaul, he became based against the petitioner. The Air Marshal S.K.Kaul at that time i.e. in February, 1994 was the Chief of the Air Staff. In February, 1994 itself the Promotion Board of the petitioner met. On account of this bias of the Chief of the Staff and in order to avenge the senior officers manipulated the denial of promotion to the petitioner. Similarly, the petitioner opined against the intended procurement of Collins HF-9000 R/T sets for Air Force Helicopters and for ALH (made by HAL). Because of this opinion he earned enemies though Government benefited in crores by his advise. Because of non procurement of Collins the top brass of Indian Air Force turned against him. This bias and prejudice of the top brass created insurmountable obstruction in his promotion. When posted at AMSE the petitioner brought about radical changes in the administration and approach to the problems faced by AMSE. The petitioner not only improved the Laboratory but also successfully evolved a technique of repairing Air Boarner Electronic System indigenously. The otherwise unserviceable AN-32 fleet was brought back into active operation. Because of this innovative achievement of the petitioner, his name was recommended for the award of AVSM. That the officer superior to him who had failed to achieve such a result conspired to degrade him by foul means. False and anonymous letters were written against him. The petitioner was posted out of the Advance Electronic Laboratory of the India Air Force in 1990. In 1992 petitioner was selected by Ministry of defense to undergo the Highest Level National defense College Course for 1993. The candidates who were selected for this course were those officers who had very high outstanding performance and prospect for serving the nation for not less than five years or so in top ladder. The petitioner passed this course of National defense College in January, 1994 and thereafter was posted to Air Head Quarter. Unfortunate for the petitioner when Promotion Board met in 1994 he was ignored on account of the bias and due to anonymous letters written against him by Sqn. Leader D.K.Ganguli whom the petitioner pulled up for slackness, negligence and dereliction of duty. Mr. Ganguli in league with Sqn. Leader Goel and other subordinates to the petitioner manipulated prejudice against him. They got a Court of Enquiry initiated against him which ended with the finding that the allegation of procedural irregularity leveled against him were false. The matter had been enquired into by the C.B.I in 1990. The Chief of the Air Staff endorsed the view by directing that no action was called for against the petitioner. However, inspire of C.B.I. clearing his name and the court of Enquiry deciding in his favor and the Chief of the Army Staff directing that no action was called for against the petitioner yet the petitioner was not given promotion by the Selection Board met in 1994, 1995 and 1996. The allegation which was looked into by the C.B.I. was that the petitioner used the earlier tender calling form instead of revised form. The form prescribed earlier was used. This petitioner explained that the use of the Tender Calling Form originated from the lower rank officials and not by the final signing authority. It was brought to their notice that since the revised forms were not available at the time hence keeping in view the urgency and important task of fabrication of two bus bodies and two calibration Vans in

AMSE at Palam in 1987-88, the form prescribed earlier were used. Even otherwise the unit enquiry conducted against the petitioner stood vitiated for not recording the statement of accused in his own words and for non-furnishing of copies of material documents. Nor the result of enquiry was conveyed to the petitioner till date. The petitioner had the numerical grade for being selected to the higher post. He had been having higher grades through out. His performance report was favourable. He never got any adverse entry nor till date any adverse remarks or entry communicated to him. The respondents on the other hand took the plea that the petitioner was considered for promotion to the rank of Air Vice Marshal by the Selection Board of 1994. He was not found fit for promotion. Similarly, the Selection Board of 1995 & 1996 did not find him fit for promotion. The reason for deferring his promotion for 1994 was a C.B.I. report indicting him for certain irregularities as a sequel to it he was awarded "Reproof" by the Chief of the Air Staff on 20th December, 1990. From the report of the C.B.I. it is clear that petitioner was Indicted, Therefore, the censure in the form of "Reproof" was awarded to him. The Selection Board considered all these aspects at the time of his selection and Therefore, deferred his promotion. Since the petitioner was involved in certain irregularities while commanding Advance Electronic Laboratory of Indian Air Force at Palam, he was awarded Reproof. His conduct and behavior are matter of record. The Selection Board considered these aspects and came to the conclusion that he was not fit to be promoted. Since the petitioner was awarded censure in the form of "Reproof" by the Chief of the Air Staff for the lapses committed by him and this weighed with the Selection Board. Therefore, the action for the respondent in not promoting the petitioner was based on his employability and pen picture as well as appraisal report as a whole.

3. From the perusal of the above facts one glaring fact which emerges that the respondents did not promote the petitioner in 1994 because of the irregularities alleged to have been committed by the petitioner. Therefore, C.B.I. report admittedly was never communicated or conveyed to the petitioner. As per respondent's own admission it was as a sequel to C.B.I. report that the petitioner was awarded "Reproof" by the chief of the Air Staff on 20th December, 1990. It is also a fact on record that the petitioner was given the acting rank or Air Comdr. i.e. after the report of C.B.I. and after he had been awarded "Reproof". In March 1991 this petitioner was given substantive rank of Air Cmdr. with retrospective effect i.e. November, 1990. When the substantive rank of Air Comdr. was conferred with retrospective effect the Chief of the Air Staff knew about the report of C.B.I. and the censure by way of "Reproof" already having been awarded against the petitioner and yet allowed substantive rank with retrospective effect. It was because Chief of the Army Staff knew that as per practice and rules the censure of "Reproof" was not to come in his way that is why granted him substantive rank with retrospective effect inspire of "Reproof". Mr.S.Mukherjee appearing for the petitioner, Therefore, rightly contended that when substantive rank of Air Comdr. was given in March, 1991 with retrospective effect i.e. from November, 1990 the award of "Reproof" did not come in the way

of the petitioner. If that be so then why should the cause leading to the awarding of "Reproof" should come in his way now when he is to be promoted to the rank of Air Vice Marshal for the Slot of 1994.

4. In order to find out whether the petitioner had numerical grading and why his promotion in 1994 was deferred original record was called for. The same was produced in this Court. The proceedings of the Promotion Board for the year 1994 show that promotion of the petitioner was deferred because it was found that a report was submitted by C.B.I. through MOD which had indicted him for certain irregularities. The Board considering the nature of enquiry decided to defer the case of petitioner for promotion. The Promotion Board also found that the petitioner had met the numerical assessment criteria. However, it was because of the C.B.I. report that his promotion due in 1994 was deferred. What we have to see whether the Board could take into consideration the report of C.B.I. as a sequel of which the Chief of the Air Staff had already taken action against him by awarding "Reproof". In the counter affidavit the respondents have admitted that "Reproof" was awarded against the petitioner as a sequel to the report of C.B.I. Having once awarded "Reproof" the petitioner's promotion on the basis of the C.B.I. report could not have been deferred. This would amount to reopening the case and awarding fresh punishment to the petitioner. On the basis of C.B.I. report the Competent Authority awarded "Reproof". It is not the case of the respondent that on account of "Reproof" promotion of the petitioner was deferred or passed over. Respondent's case is based on the fact that despite "Reproof" awarded by the Chief of Air Force. The Selection Board could go behind, it to find out the cause or "Reproof". Meaning thereby on the basis of cause or the reason leading to the "Reproof" the Selection Board could ignore the petitioner for promotion. To my mind, the Selection Board could not have gone behind the cause or the reason. Once the Competent Authority on the basis of that cause i.e. report of C.B.I. had already taken action the Selection Board could not look into that report. If the award of "Reproof" could be based as the basis of super cession only then the Selection Board could have ignored him or superceded him but not on that cause i.e. report of C.B.I. for which the petitioner had already been awarded "Reproof" because that would amount to review or reopening the case which the Selection Board was not competent to do. Barring the award of "Reproof" the petitioner had met all other criteria for promotion. He had numerical grades which made him eligible for promotion. His promotion could not have been deferred because of "Reproof" nor the Board could base his super decision on C.B.I. report which had already culminated into "Reproof".

5. The word "Reproof" does not appear in the Air Force Act or the Rules made thereunder. It is defined as "a custom of service". Section 5 of the Air Force Act deals with summary and minor punishments. Para 711 of the Regulations of IAF, 1964 deals with the revision summary punishments awarded to a person subject to the Air Force Act. Para 712 deals with the "Reproof" of officers and warrant officers. Since these paras 711 and 712 are relevant for our purpose hence reproduced as under:-

711. Revision of Summary - Punishments awarded to a person subject to the Air Force Act :-

(a) If any punishment awarded by commanding officer appears to a "superior air force authority", as hereinafter defined, to be wholly illegal, then the "superior air force authority" shall direct that the award be cancelled and the entry in the records of the accused be expunged.

(b) If such punishment appears to a "superior air force authority" as hereinafter defined, to be in excess of the punishment authorized by law for the offence, then, the "superior air force authority" may vary the punishment awarded so that it shall not be in excess of punishment authorised by law, and the entry in the record of the accused be varied accordingly.

(c) If such punishment appears to a "superior air force authority", as hereinafter defined, to be too severe having regard to all the circumstances of the case, then, the "superior air force authority" may remit the whole or a part of the punishment awarded and such remission shall be entered in the record of the accused, provided that such power of remission shall be exercised by a "superior air force authority" within a period of two years from the date of the award.

(d) The expression "superior air force authority" means, in the case of punishments awarded by a commanding officer, any officer superior in command to such commanding officer.

712 Reproof of Officers and Warrant Officers :

(a) A commanding officer or any superior air force officer may reprove an officer or warrant officer under his command for an offence which, in his opinion, is not of such a serious nature as to merit disciplinary action under the Air Force Act, 1950. The reproof of an officer or warrant officer is not a recognized punishment under the Act and will not be entered in the Officer's or warrant officer's record though it may be referred to, if necessary, in a confidential report on the officer or warrant officer concerned. In order to avoid any confusion with a "reprimand" under the Act, it is not to be referred to by any terms other than "reprove" or "reproof", (Under linings are mine).

(b) Great care will be taken that the procedure in sub-para (a) is not adopted when superior authority is at all likely to consider that the offence calls for disciplinary action under the Air Force Act, 1950, as the reproof might. In certain circumstances be held to amount a condensation of the offence barring disciplinary action under the Act.

6. Reading of para 712 shows that "Reproof" is not a recognised punishment under the Act. This is not even a reprimand, Therefore, it was not to be entered in the officer's record. Subsequent thereto an Air Force Order No. 227/77 was issued dealing with the Award of Censure. Para No. 14 and 26 which are relevant are reproduced. These show that the censure is a matter of custom of service awarded for offences/lapses, which are not of serious nature as to merit

disciplinary action.

Para 14. Censure is a matter of custom of Service, in accordance with which, it may take the form of "Reproof" "Displeasure" or "Severe Displeasure" and may be awarded for offences/lapses which are not of such a serious nature as to merit disciplinary action under the Air Force Act, 1950, or where disciplinary action is inexpedient. Censure in any of these forms, however, should not be awarded when superior authority is likely to consider that the offence calls for disciplinary action under the Air Force Act, 1950, as award of censure might, in certain circumstances, be held to amount to condensation of the offence barring disciplinary action under the Act.

Para 26. Effect of Censure:-

(a) The award of "Displeasure" or "Severe Displeasure" will carry negative marks for the consideration of the promotion Board depending on the period for which it is expressed.

(b) The award of "Displeasure" or "Severe Displeasure" would be considered only once by that Promotion Board before which the officer's case first comes for consideration irrespective of the pendency of the Censure.

(c) If an officer is awarded "Displeasure" or "Severe Displeasure" but the currency of the "Severe Displeasure" is over before his name comes up for promotion, even then the first Promotion Board before which his case comes up for consideration would count against him the negative marks as stated in sub para (a) above.

(d) The award of censure such as "Severe Displeasure" or "Displeasure" or "Reproof" is not to be reflected in the Confidential Report, but the letter conveying the censure will be kept in personal file of the concerned officer so that, it would be available before a Promotion Board for taking due note of the fact of the awards of the said Censure and the reasons thereof.

7. Sub para (d) of para No.26, as quoted above, makes it clear that the award of "Reproof" is not to be reflected in the confidential report. However, a letter conveying the "Reproof" could be kept in the personal file of the officer concerned and could also be made available to the Promotion Board for taking due note of the fact of the award of reproof. Subsequent thereto a corrigendum to the Air Force Order No. 227/77 was issued by Air Head Quarter Order No. 52 dated 23rd September, 1978, thereby amending para 26(d) of AFO 227/77. The amended para 26(d) reads as under :-

Para 26(d) - Line 2 :-

Delete the words "or Reproof" and add the word "or" between the words "Severe Displeasure" and "Displeasure".

8. By this amendment, the Chief of the Air Staff omitted the word "reproof". After the amendment the "Reproof" was neither to be reflected in the confidential

report nor in the personal file of the officer concerned. BY this amendment the Air Force Authority made it clear that from September, 1978 the award of the "Reproof" was not even to be kept in the personal record what to talk of putting the same in the confidential report. Hence the award of the "Reproof" to the petitioner awarded in 1990 could not have been kept or placed on his confidential record or personal file nor could have been placed before the Promotion Board of 1994. Since the respondents placed the cause leading to the Award of "Reproof" before the Promotion Board it did prejudice the mind of the Board. The Selection Board took cognizance of the same hence deferred his promotion. Mr. P.N. Mishra's contention that by amendment an advantage accrued to the respondent. Now after amendment the "Reproof" could be placed in the confidential report as well as in the personal file of the official. To my mind, this argument if accepted would lead to harsh results. As per AFO-227 "Displeasure" or "Severe Displeasure" cannot be reflected in the confidential report but if "Reproof" which is the least, Lesser or mildest form of punishment is allowed to be reflected in the confidential report as well as in the personal file of an officer then not only he would be adversely discriminated but greatly prejudiced. This argument, of my mind, is without substance. We have to see the rationale behind the Corrigendum No. 52 issued by the respondent. By deleting the word of "Reproof" in para 26 (d) vide this Corrigendum the respondent in fact wanted that the "Reproof" be not reflected either in the confidential report or in the personal file of an officer because "Reproof" is much less a punishment in comparison to displeasure or Severe Displeasure. Therefore, when the censure of "Displeasure" and "Sever Displeasure" was not to be kept in the confidential report of the officer then the respondent must have realised that the lesser punishment may as well be not kept either in the confidential report or in the personal file nor made available to the Promotion Board. "Reproof" after the amendment of para 26 (d) is not to be available or accessible to the Promotion Board. For this conclusion support can be had to the Army Regulation Vol. I [Section 327 sub-para (c)], which is reproduced as under:-

"(c) Warning a minor censure may take the form of reproof and be administered verbally or in writing to service personnel by the officer commanding or by an authority superior in command to the officer commanding. A warning will not be recorded in the service documents of the person concerned."

9. Reading of this Section 327 shows that reproof can be administered verbally under the Army Regulations. May be to bring the Award of "Reproof" at par with Army Regulations that amendment was made in para 26 (d) vide Corrigendum No. 52 of 23rd September, 1978 thereby deleting the word "reproof" from para 26 (d). If "reproof" under the Army Regulations can be administered verbally, the Air Force authority in its wisdom by amending para 26 (d) achieved the same results. That is the reason the "Reproof" has not to be reflected in the confidential report or on the personal file of the officer as per the amended para 26 (d). Moreover the censure of displeasure or Severe Displeasure have the effect of negative marks up to the extent of the currency of the censure. It would

be an anomalous position if "Reproof" is allowed to result in total denial of promotion while the censure of Displeasure result in reduction of just mark in the total grading. As already referred to above "Reproof" as compared to Displeasure is the lesser and mildest punishment. If as suggested and argued by Mr. Mishra is accepted the result would be that "Reproof" would become the strongest punishment which the drafters of Air Force Order never intended.

10. Now turning to para 712 of the Regulations quoted above, it nowhere indicates that "Reproof" will form part of the confidential report. It only provides that the award of "Reproof" can be considered by the initiating or reviewing authority if it so likes. But the fact remains that in the confidential report of the petitioner recording authority has not mentioned about the "Reproof" nor the respondents have placed any material on record to show that the competent authority recording the confidential report ever took note of this "Reproof" while recording the confidential report for the years 1991, 1992, 1993 or 1994. On the contrary it has been consistent stand of the petitioner that the Chief of the Air Staff closed the matter on 28th December, 1990 by awarding Reproof". Even at the risk of repetition, it must be mentioned that the petitioner was promoted to the acting rank of air Cmdr. on 18th March, 1991 i.e. three months after the award of "Reproof". Therefore, I am in agreement with the contention of Mr. Mukherjee, counsel for the petitioner that as soon as the petitioner was promoted to the acting rank of Air Comdr. in March, 1991 it washed away the effect of the "Reproof" (if there was any). It has not been placed on record nor the respondents produced any material to show that the competent authority was not aware about "Reproof" while recording the confidential reports of the petitioner. The petitioner was recommended for promotion in the Selection Board held in February, 1990. The result was kept in abeyance to await the disposal of C.B.I. inquiry regarding AMSE (Depot) of which petitioner was the Commanding Officer. The show clause notice was issued on 4th December, 1990. Petitioner replied on 7th December, 1990 and the matter was closed by the Competent Authority on 28th December, 1990 by award of "Reproof". Thereafter the respondent took three months to promote the petitioner to the rank of Air Cmdr. Thus the promotion given to the petitioner on 18th March, 1991, to my mind, washed away the effect of "Reproof" awarded in December, 1990. He got acting rank on 18th March, 1991 and thereafter in the middle of 1991 he got the substantive rank with retrospective effect from November, 1990. Had the award of reproof any effect on the promotion of the petitioner, then respondents would not have granted him the rank of Air Cmdr. nor the substantive rank of Air Cmdr. with retrospective effect. This shows the "Reproof" as such would not effect the promotion chances of an officer. Even otherwise the effect of award of "Reproof" if there was any stood washed away when the petitioner was given substantive rank of Air Cmdr. in the middle of 1991. It was not correct for the Selection Board of 1994 to take those factors into consideration in 1994 in order to deprive the petitioner his promotion.

11. The Board which assembled on 2nd February, 1994 to select the penal of

officers for the vacancies of Air Vice Marshal recorded that following be kept for consideration in mind:-

1. Promotion to the acting rank of Air Vice Marshal should be by selection.
2. Fitness of promotion being determined on the basis of ability (in field and staff appointment) cum seniority in the branch.

12. It was further observed that while numerical assessment criteria generally followed by the Ministry of defense i.e. three reports with overall numerical grading of "7" and above in the last five years with two such reports having been earned in the last three years, would be taken as a guideline for clearing an officer for promotion, greater emphasis should be placed on the officer's potential to hold the responsibility of the next higher rank as discerned from the reports on him in various appropriate appointments held by him in the past.

13. Keeping this criteria in mind, the name of the petitioner was considered. The perusal of the Board Meeting of 2nd February, 1994 shows that the petitioner met numerical assessment criteria. It was only the report submitted by C.B.I. that his promotion was deferred.

14. The contention of Mr. Mukherjee that this Court should declare the petitioner having been selected for promotion to the post of Air Vice Marshal cannot be accepted. Even though the petitioner according to the Selection Board met the numerical grade i.e. the criteria laid down, still this Court cannot declare the petitioner to be promoted. It would be in the fitness of things that direction should be given to the respondent to consider the case of the petitioner for promotion to the rank of Air Vice Marshal for the slot of 1994 on the basis of criteria it laid down and as quoted above. The Selection Board will reconsider the case of the petitioner for the slot of 1994 de hors the alleged report of C.B.I. or any other extraneous circumstance. Order accordingly. The case of the petitioner for promotion for the slot of 1994 be done within two weeks by Constituting Special Selection Board and till then petitioner will continue to be in service.

15. With these observations the petition stands disposed.