
(2020) 08 AFT CK 0017
In the Armed Forces Tribunal
Case No : Original Application No. 446 Of 2020

Sunil Dutta

APPELLANT

Vs

Union Of India And Others

RESPONDENT

Date of Decision : 24-08-2020

Acts Referred:

Armed Forces Tribunal Act, 2007 — Section 14

Citation : (2020) 08 AFT CK 0017

Hon'ble Judges : Rajendra Menon, J; Philip Campose, Member (A)

Bench : Division Bench

Advocate : Rajiv Manglik, VVVMBS Pattabhiram, Harish V. Shankar

Final Decision : Dismissed

Judgement

1. This application is filed under Section 14 of the Armed Forces Tribunal Act 2007 seeking the following reliefs:

(i) Declare the action of the respondents as unjust, arbitrary and illegal;

(ii) Call for complete record of the proceedings of No. 3 Selection Board held in April 2016, including the dossier of ACRs of the applicant and the

comments of various officers received by the respondents on the statutory and non-statutory complaints filed by the applicant and scrutinise the same;

(iii) Quash and set aside the impugned order dated 25.01.2017 and the earlier order dated 22.12.2015 on non-statutory and statutory complaints

respectively;

(iv) Quash and set aside the result of No. 3 Selection Board of the applicant for promotion to the rank of Colonel;

(v) Quash and set aside the ACR for the period 07/06-12/06 and 01/07-12/07 initiated by Respondent No. 4;

(vi) Direct the respondents to consider the applicant by the Special Review (Fresh) Selection Board for consideration to the rank of Colonel and on

being declared fit by the Selection Board, grant consequential benefits, including pay and allowances; and

(vii) Award exemplary costs upon the respondents in the facts and circumstances of the record.

2. We summarise the factual milieu of this case as under: The applicant was commissioned in the Army (Corps of EME) on 12.12.1998. In course of

time, he was promoted to the rank of Lieutenant Colonel. The applicant claims to have undergone many courses like EME YOs, JC, etc. In July 2006,

after the completion of the Degree Engineering Course with AI grading, he was posted at 621 EME Battalion, where he claims to developed some

difference of opinion with the fourth respondent, who was his Commanding Officer, and thereafter the applicant claims that he was harmed in his

ACRs for the period 07/06-12/06 and 01/07-12/07. Therefore, the applicant filed a statutory complaint on 01.07.2014, wherein he had expressed his

apprehension that the assessment by 10 in these CRs was subjective and did not corroborate to his performance during the period. He also pointed out

various incidents to highlight the vindictive behaviour of the 10. However, the respondents found that the CRs were well corroborated, performance

based and technically valid and there being no evidence of any bias, subjectivity or inconsistency and finding no merit for interference, they rejected

his statutory complaint vide order dated 22.12.2015. In April 2016, the applicant was considered for selection to the rank of Colonel by the No. 3

Selection Board, but he was not empanelled. Against his non-empanelment. the applicant filed a nonstatutory complaint on 11.06.2016 mainly

questioning the ACRs for the period 07/06 - 12/06 and 01/07 - 12/07 written by the fourth respondent. which also resulted in rejection allegedly by a

cryptic order. Hence the instant O.A.

3. Mr. Rajiv Manglik, learned counsel for the applicant has submitted that the impugned orders dated 25.01 2017 and 22.12.2015 rejecting the non-

statutory complaint against the non-empanelment for promotion by the No, 3 Selection Board (Fresh) held in April 2016 and the statutory complaint

against the ACRs 07/06 - 12/06 and 01/07 - 12/07 are illegal, as the applicant was not assessed fairly by the 10 in the ACRs. Learned counsel for the

applicant has also contended that the applicant was not fairly assessed in his first two non-criteria ACRs from 07/06 - 12/06 and 01/07 - 12/07 in the

rank of Major and his interaction with ROs was negligible since they were located in separate stations. Furthermore, his assessments by the ROs in

these two CRs were purely based on the inputs of the 10. Despite his hard work, his efforts were not adequately highlighted by his 10 due to

professional differences. Compared to his overall performance, these ACRs were lukewarm, which had a detrimental effect on his Board result. If

there were any aberrations, inconsistencies and subjectivity in his profile. it was due to the inadvertent reporting or inadequate knowledge of the

RO/SRO.

4. Learned counsel for the applicant has also submitted that both his statutory and non-statutory complaints were rejected in a whimsical manner.

without giving any reason, which resulted in great hardship to the applicant. In this regard. the learned counsel relied on the decision of the Lucknow

Bench of this Tribunal in Lt Co/ Anil Chandra v. Union of India and others (T.A No. 26 of 2014), wherein it was held that order not based upon

reasons is bad in law.

5. Respondents 1 to 3 have opposed the instant O.A by filing a counter affidavit, in which they have supported the orders issued by the respondents

and stated that the Army has a pyramidal rank structure and the number of vacancies in higher ranks is limited. From the broad base of the pyramid.

only those officers, whose record of service within a particular batch are better. are selected to fill up the vacancies available in the higher ranks. As

per the promotion policy which was applicable till 15.12.2004. promotions in the Army up to the rank of Major were by time scale and thereafter,

promotions from Major to Lieutenant Colonel and above are decided through Selection Boards as per the policies existing at the relevant time and the

applicant's case was considered under the policy dated 04.01.2011. It was also stated that the assessment of officers in ACR was regulated by SAO

3/S/89 and other relevant policies at any given time. The gradings are numerical from 1 to 9 (overall as well as in personal qualities and performance

variables in different qualities) and in the form of pen picture also. The entire assessment of an officer in any ACR consists of assessment by three

different reporting officers. Initiating Officer (10), Reviewing Officer (RO) and

Senior Reviewing Officer (SRO). whose assessments are independent of each other. The aim of a CR is to have an objective assessment of an officer's competence. Employability and potential as observed during the period covered by the report. Primarily for organisational report. ACR form is well laid out comprising of 22 qualities/attributes in three parts viz. Personal Qualities (PQs). Demonstrated Performance Variables (DPVs) and Qualities to Assess Potential (QsAP) and recommendation for promotion. career courses and foreign assignments and in addition, there are different attributes in technical reporting. Each of the ROs assess the rate independently in various qualities and box grading and pen picture and they also comment on the reporting by the lower ROs as 'liberal/strict/justified as applicable. The various qualities/attributes in various columns in CR form specify to predicate the assessing officers in the chain to make comprehensive analysis of the ratee 's qualities with reference to the assessment scale. The various qualities listed out in detail in CR form preclude an assessing officer from being biased. It was also stated in the counter affidavit that no assessment of higher reporting officers is communicated to the ratee except for the cases provided in Para 127 of AO 45/2001/MS Neither the High Court nor the Supreme Court, in exercise of the power of judicial review, can moderate the appraisal and grading of the officer in the CR. In this regard, the respondents have placed reliance on the following decisions of the Hon'ble Supreme Court:

- (i) AVM S.L. Chabbra v. Union of India and others (1993 Supp (4) SCC 441); and
- (ii) Lt Col/ Amrik Singh v. Union of India and others (2001) 10 SCC 424.

6. As regards the allegation levelled by the applicant against the fourth respondent (his ex-Commanding Officer) is concerned, it was stated in the counter affidavit that after a gap of 7-8 years, for the first time, only in July 2014, the applicant has assailed the impugned CRs of 2006 and 2007 and raised the issue of so called ill-treatment to him. It was stated that temporary duties are routine part of service applicable for all officers of the Army and in no way is indicative of any bias or mala fide. Further, it was also stated in the counter affidavit that no correspondence regarding permission sought for GOC's interview are held on record with the unit and seeking of interview on 18.02.2008 fell beyond the period covered by the impugned CRs. In the impugned CRs, since the applicant was assessed by different

reviewing officers and different higher technical officers, hence this counteracts the possibility of the fourth respondent assessing the applicant contrary to the demonstrated performance as 10 and FTO. The assessment in the main line of reporting as well as the technical reporting in the impugned CRs was not only mutually corroborated and consistent, but consistent with the overall profile also. The respondents also denied that the applicant had no interaction with the RO. His performance was appreciated by all in the chain of command. It was also stated that the applicant was not empanelled based on his overall profile and comparative merit as assessed by the Selection Board and no right of the applicant was infringed by the action of the respondents.

7. The fourth respondent contested the case by filing a separate counter affidavit, in which he has denied the contentions raised by the applicant. It was stated that the ACRs involved were of 2006 and 2007 and that the allegations made in the O.A are baseless and irrelevant since the officer had earned 'above average' ACR by the 10, which could be verified from the records. As regards temporary detailment of duties, it was brought out that the 621 EME Bn had four field workshops out of five spread over in Assam and Meghalaya. Only one officer per workshop was posted. Whenever these officers moved on leave/courses, an officer from the Bn HQ is sent on temporary duty to officiate. The officers are sent on such duties in rotation on availability. The applicant was also on such duty on one or two occasions throughout his tenure of nearly two years. He had once requested for this duty for a particular workshop near Shillong and his family joined him during his stay at that hill station. He also denied having refused leave to the applicant. He has stated that the applicant had asked for total of three months' leave to prepare for M Tech. i.e. two months furlough leave combined with one month annual leave. The battalion was deployed in counter insurgency operation and due to paucity of officers, the applicant was asked to re-adjust his leave because organisational requirements take priority over personal requests. The GOC directed that with some restrictions, leave be given in parts to the officer and accordingly the officer's interest was taken care of. It was also stated in his counter affidavit that the applicant had served under him only for 18 months earning two non-criteria CRs. The applicant's service at that time was 8-9 years. A young

officer earning an 'above average' ACR in his formative years cannot be rated as biased ACR. Normally an officer is screened for the rank of

Colonel at 16 or more years of service and therefore, there is no basis in the contentions of the applicant.

8. Having heard the learned counsel for the parties and perused the records, including the relevant CRs, Selection Board proceedings and the records

relating to disposal of statutory complaint, we have observed the following flow of events and facts about this case:

(a) The applicant submitted a statutory complaint, for the first time, on 24.07.2014 against his two CRs of 2006 and 2007 apprehending subjectivity by

JO and noncorroboration of his CRs to his performance and requested for expunction of both the CRs in toto.

(b) The Ministry of Defence, in reply to his statutory complaint, vide its letter dated 22.12.2015, informed the applicant that the impugned CRs are well

corroborated, performance based and technically valid. Hence they merit no interference.

(c) Thereafter, the applicant was considered for promotion in No. 3 Selection Board (Fresh), but not empanelled.

(d) After non-empanelment, the applicant submitted a non-statutory complaint dated 11.06.2016, in which he again highlighted the apprehended

lukewarm reports by his JO for the CRs of 2006 and 2007 and feared that these two CRs have resulted in his non-empanelment. He again requested

for removal of inconsistency and subjectivity from these two CRs.

(e) The applicant's non-statutory complaint was replied by MS Branch IHQ of MoD (Army), vide their letter dated 25.01.2017 and he was informed

that his nonempanelment was on account of his overall profile, relative merit and comparative evaluation as assessed by No. 3 Selection Board.

Hence his complaint was rejected.

(f) After rejection of his non-statutory complaint in 2017 the applicant filed this O.A in 2017.

(h) Subsequently, after declassification of the first Review Promotion Board results held in December 2016, it was learnt that the applicant has again

not been empanelled. Similarly, the applicant was again not empanelled in the final Review Promotion Board held in September 2017.

In the above-mentioned scenario, we are of the view that this case can be

decided based on the answer to the two basic questions related with this case i.e:

- (a) Whether the two CRs of the applicant for the period 07/06-12/06 and 01/07-12/07, initiated by the fourth respondent were as per the mandated procedure? Is there any evidence of subjectivity and bias against the applicant by the fourth respondent i.e his exCommanding officer?
- (b) Whether the Promotion Boards of the applicant were as per the mandated procedure and whether any injustice had been done to the applicant in these promotion Boards?

9. As far as the first question relating to his two impugned CRs is concerned, we have examined these two CRS in detail. We have also examined a few preceding CRs by different IOs and a few succeeding CRs by subsequent IOs. We were surprised by the findings i.e:

- (a) The 10, in these two impugned CRs, has given one of the best reports that the applicant has got around that seniority.
- (b) When compared with the reports of other IOs of the applicant around that seniority, the impugned reports are a shade better.
- (c) There is no trace of subjectivity or bias by JO as alleged by applicant in these two impugned reports.
- (d) In view of the kind of report which has been given to the applicant by the JO, in these impugned reports, it stands to logic that the statutory and non-statutory complaint of the applicant was rejected by the respondents.

Thus, as far as first question is concerned, we are clear that the impugned CRs of the applicant were raised as per mandated procedure by the JO and that there is no evidence of subjectivity or bias by the JO, as alleged.

10. Now coming to the second question, as to whether the Promotion Board of the applicant was fair to him, we have scrutinised all the three

Promotion Board proceedings of the applicant. We have noted that unfortunately, the promotion of officers in the Armed Forces is pyramid based and

linked to comparative merit. With each promotion, majority is left behind and only a few move up. In the case of the applicant, we have noted that

despite being good as claimed by him, he has lost out in 'overall profile' and the 'comparative merit'. The following are the broad details of his

Promotion Board results, based on comparative merit:

(a) April 2016 - (Fresh Promotion Board): There are about 24 officers who are higher than the applicant in comparative merit, but could not be empanelled due to limited vacancies.

(b) December 2016 - (First Review): There are again over 20 officers who are higher than the applicant in comparative merit, but could not be empanelled due to limited vacancies.

(c) September 2017 - (Final Review): There are 11 officers who are higher than the applicant in comparative merit, but could not be empanelled due to limited vacancies.

11. In the above factual situation, we are of the opinion that the Promotion Boards of the applicant had been conducted as per the mandated procedure. There is no evidence of subjectivity or bias against the applicant in the Promotion Boards. However, the very pyramidal design of Armed Forces, coupled with comparative merit based promotion, invariably results in only a few officers moving up the ladder.

12. In the result, the O.A fails and is dismissed. No order as to costs.
Pronounced in open Court on this the day 24th of August, 2020.