
(2010) 06 J&K CK 0011

In the Jammu And Kashmir High Court

Case No : LPA (SW) No. 112 of 2009 and CMP No. 156 of 2009

Union of India (UOI) and Others

APPELLANT

Vs

Rajan Bakshi (Col.)

RESPONDENT

Date of Decision : 02-06-2010

Acts Referred:

Special Army Order, 1989 — Para 33

Citation : (2010) 2 JKJ 669

Hon'ble Judges : Jai Pal Singh, J; Hakim Imtiyaz Hussain, J

Bench : Division Bench

Judgement

J.P. Singh, J.—Col. Rajan Bakshi-Respondent felt aggrieved by Reviewing Officer's assessment of his Confidential Report (CR, for short)

for March 1998 to June 1998. He preferred a Statutory Complaint against it, which was disposed of by the Central Government, allowing him

partial relief of expunction of the RO's assessment on twelve points. The order passed in this behalf by the Central Government was communicated

to him vide Military Secretary Branch's Communication No. 36501/9072/AOC/2005/MS-19 dated January 16, 2006.

2. He was later refused empanelment for Promotion to the rank of Brigadier.

3. Another Statutory Complaint was filed by him, questioning the Central Government's decision on his non- empanelment for Promotion to the

rank of Brigadier by No. 2 Selection Board held in January 2006 as also his CRs for March 98 to June 98 and September 2001 to June 2002.

4. This Complaint was rejected by the Central Government and information to this effect was conveyed to the Respondent vide Military

Secretary's Communication No. 36501/9072/AOC/05/MS-19 dated February 28, 2007.

5. He approached this Court by his Writ Petition SWP No. 625/2007 seeking, inter alia, quashing of the Orders of the Central Government dated

16.01.2006 and 22.02.2007 whereby his Statutory Complaints were rejected, besides a command to the Respondents to consider and promote

him as Brigadier from the date his juniors were so promoted.

6. The Central Government's decision on the Statutory Complaints were questioned as arbitrary and unsustainable, in that, the Central

Government, while disposing of the Complaints, had not considered the Respondent's service records and previous ACRs.

Seeking quashing of CRs for March 1998 to June 1998 and September 2001 to June 2002, the Petitioner had additionally urged that Major

General (Retired) G.S.Kohli-Respondent No. 3 to the Writ Petition had downgraded the Respondent while writing his CRs for his bias against him

because he was annoyed by the Petitioner's act of not obliging him in allotting heavy portion of sanctioned quantity of ANPRC batteries to M/f.

Geep India, New Delhi. Another reason projected to support his plea of bias against Respondent No. 3 was that Petitioner's suggestion to

Respondent No. 3 not to utilize RSI resources for the marriage function of his daughter fixed for April/May 2002, had not been liked by him and

for this he had downgraded his CR for September 2001 to June 2002.

The Respondent had pleaded violation of the procedure prescribed by the Army Act, 1950 and Rules framed thereunder for writing Confidential

Reports too, by the Appellants, in writing his CRS.

7. Controverting the plea of malafides projected by the Petitioner in the Writ Petition, Major General (Retired) G.S.Kohli, filed his Affidavits

saying, inter alia, that he had no malafide intention towards the Petitioner or that his CR for March 98 to June 98 had been initiated with malafide

intention. According to him, the CR represented the demonstrated performance and personal qualities of the Petitioner as exhibited during the

period covered by the CR. Referring to the prevalent procedure in detail, he emphatically denied having ever instructed the writ Petitioner to give

high quantity of supply order of batteries to M/s Geep India.

8. The Appellants, justified the orders passed by the Central Government urging that the Statutory Complaints filed by the Petitioner had been

rejected by reasoned orders and that rules on the subject had been followed

while completing the process of writing the CRs.

9. A learned Single Judge of this Court, allowed the Petitioner's Writ Petition issuing following directions:

1) That the down gradation of the CRs of the Petitioner for the period March 98 to June 98 having been done with extraneous consideration by

Respondent No. 3 in his capacity as RO, cannot be allowed to continue on record and is struck down. The resultant order dt. 16th of Jan'06,

passed by Respondent No. 4 while deciding the first statutory complaint of the Petitioner, whereby the said complaint was accepted partially can

also not be sustained and is accordingly quashed;

2. That the assessment made by the RO in the CRs of the Petitioner for the period Sept' 01 to June 02, is held to be in violation of the provisions

of Paras 150 and 151 of the Standing Instructions of Order of 1989, and thus cannot be taken into consideration by the authority concerned in

rejecting the claim of the Petitioner for further promotion;

3. That the CRs of the Petitioner for the period Sept' 01 to June' 02, can also not be allowed to be taken into consideration as the same have not

been assessed in terms of provision of Para 33 of Order of 1989, and therefore, order dt. 22nd of Feb' 07, passed by Respondent No. 4 in

rejecting the second statutory complaint is also held to be bad and is accordingly quashed;

4. That in case any Selection Board was held for considering the cases of the officers for promotion to the rank of Brigadier during the period

March' 98 to June' 02,, and any of the junior of the Petitioner was promoted, then, the case of the Petitioner shall also be considered for such

promotion keeping in view his CRs for the period prior to March' 98;

5. That so far as CRs of the Petitioner for the period Sept' 01 to June' 02, are concerned, these would be forwarded to SRO for re-assessment in

accordance with the relevant Rules governing the field and if on re-assessment by the SRO, in case, the Petitioner falls within the consideration

zone for promotion to the next higher rank, his case shall be considered accordingly;

6. The authority concerned shall pass appropriate orders within a period of three months from the date, a copy of this order is made available to it

by the Petitioner. Till this is done, the interim order dt. 29th of July' 08, so far as

it related to providing the official accommodation and transportation to the Petitioner is concerned, shall continue to operate.

These directions were issued after holding that:

(a) The Competent Authority of the Central Government had expunged twelve adverse remarks made by Respondent No. 3 i.e. the Reviewing

Officer in his CR for March 98 to June 98 on the ground of inconsistency but the plea of malafides, which was writ large on the face of it had not

been considered by the Government and the CR recorded by the RO for March 98 to June 98 was thus unsustainable;

(b) All the adverse entries made in the Petitioner's CR by Respondent No. 3 for March 98 to June 98 should have been expunged and not taken

into consideration by the Authorities in rejecting the Petitioner's claim to further Promotion;

(c) Petitioner's plea that Respondent No. 3 had influenced the Reviewing Officer to downgrade his CR was not sustainable, in that, the Reviewing

Officer had every right to make assessment taking into consideration the service profile of an officer working under him, which had to be believed

unless it was shown that it emanated from bias or vindictiveness, which was not the Petitioner's case, in that, he had not alleged any malafide on the

part of the Reviewing Officer; but the CR for September 01 to June 02 was violative of Paras 33, 150 & 151 of the Special Army Order, 1989

because the Petitioner had not been informed/advised to promote his professional development or any shortcomings, before downgrading his CRs.

10. Aggrieved by the directions issued by the Writ Court, Union of India and its functionaries have filed this Letters Patent Appeal seeking setting

aside of judgment dated 05.03.2009 of the learned Single Judge on various grounds.

11. During the pendency of the Appeal, the Appellant-Union of India was directed to bring on records, copies of the two ACRs, which were the

subject matter of the Statutory Complaints along with copies of such records which would demonstrate that the ACRs containing remarks of IO

and RO were sent to SRO and also to furnish copies of the ACRs after the expunction of the remarks, as enclosures to the Affidavit.

The Appellants were required to indicate in the Affidavit as to whether by reason of such expunction, the points earned stood altered and, if so to

what extent and if not, why?

12. Major Rakesh Kumar Singh, Administrative Officer of 26 Infantry Division has filed Affidavit in response to the directions of the Court.

13. Enclosing the ACRs pertaining to the period of March 98 to June 98 and September 2001 to June 2002 and MDS of the relevant Selection

Board, with the Affidavit, it is stated in the Affidavit that the Statutory Complaint dated 03.03.2004 was decided vide Order dated 16.01.2006

and thereafter the Respondent was considered by No. 2 Selection Board in January 2006 itself and that the expunged portion was blocked and

not put up before the Selection Board. It is further indicated that the Confidential Record Profile of the Respondent was altered and then

considered by No. 2 Selection Board without causing any prejudice to him.

Even after expunction, the Respondent was not found fit by the Selection Board, in value judgment based on over all profile of the Respondent vis-

-vis his Course mates.

Records too have been produced to indicate that the CRs had been forwarded to the Superior Reviewing Officer (SRO).

14. We have heard learned Counsel for the parties and perused the judgment rendered by the Writ Court.

15. Before considering the submissions of learned Counsel for the parties, we consider it appropriate to dwell on the issue as to whether the

directions of the learned Single Judge could be sustained in the absence of any finding on the Central Government's decision on the Writ

Petitioner's CRs.

16. To examine the issue, reference needs to be made to the decision of the Central Government which had been questioned by the Respondent in

his Writ Petition.

Decision of the Central Government on the first Statutory Complaint of the Respondent, reads thus:

Government of India

Ministry of Defence

New Delhi dated the 16th January 2006

ORDER

1. IC-36939F Col. Rajan Bakshi, AOC, has submitted a Statutory Complaint dated

03rd March 2004 against CR 03/98-06/98. The officer has based his complaint on a statement supposedly made by a retired officer who was his RO in the impugned CR. In his complaint, the officer states that he had served under the RO, Maj Gen GS Kohli, VSM (Retd) twice. He was his RO when the officer was posted as SPO, COD Agra and the second time was his IO when the officer was posted as Director, OS at HQ Southern Command from Apr 01 to July 02.

2. The officer states that he was posted as SPO, COD Agra in Oct 95, an appointment which is coveted and only high profile officers are posted

to. He earned five reports in the appointment out of which two were outstanding and balance above average. Having performed well as SPO and

unit commander where he was awarded Commendation Card in Op VIJAY by GoC-in-C, Northern Command, his name did not appear for

HC/LDMC courses, which surprised him.. Having spoken by RO later on, he could understand the reason for non-detailment and based on his

experience of service in Complaint Sec (MS 4A) as DAMS, he decided to file the complaint. The officer has attached a brief on working of COD

and Army HQ, allotment of budget and expenditure on batteries.

3. The officer alleges that the RO was interested in favouring a particular supplier of ANPRC battery. However, due to his forthright approach, the

RO could not succeed. In the Statutory Complaint, he has given detailed regarding the distribution of rate contract battery to various suppliers.

4. As per the officer, he resisted the move to work out the cost of battery on transportation model. As a result, the RO could not oblige the firm he

wanted to. He alleges that the RO was also interfering in orders of other items as well. The RO became more demanding as this was the time when

the impugned CR was initiated. The officer also states that the RO continued to ask favours after his departure from COD. The RO did not visit

the COD during his tenure and did not listen to briefing as well which SPO gives to all VIPs. He has interacted with him only on telephone and

never met him. The RO's knowledge about the performance of the officer was inadequate and he was never given any performance counseling.

5. The officer has requested that the assessment of the RO in ACR covering the period 03/98-06/98 be expunged being subjective and out of tune

with his overall performance.

6. The Statutory Complaint of the officer has been examined in the light of his career profile, relevant records and analysis/recommendations of the

Army HQs. It is observed that all the CRs in the reckonable profile are fair, objective, well corroborated and performance based except the

following assessment of RO in CR 03/98-06/98:

(a) Para 11(c) - Decisiveness.

(b) Para 11(d) - Dependability.

(c) Para 11(e) - Drive and Determination.

(d) Para 11(k) - Maturity.

(e) Para 11(1) - Stamina.

(f) Para 11(m) - Tenacity.

(g) Para 12 (a) - Knowledge of Own Arm/Service and its practical application on ground.

(h) Para 12(b) - Knowledge of other Arms and Services.

(i) Para 12(c) - Effectiveness in training of his Command.

(j) Para 12(e) - Effectiveness in carrying out administration of his Command.

(k) Para 12 (f) - Equipment management and ability to utilize resources economically.

(1) Box grading at Para 19.

7. The Central Government, therefore, orders expunction of above mentioned assessment of RO on grounds of inconsistency.

8. Subject to the partial relief ordered as above to IC-36393F Col. Rajan Bakshi, AOC, the Central Government, rejects his Statutory Complaint dated 03rd March 2004 submitted against CR 03/98-06/98. By order and in the name of the President

Sd/-

(S.D. Banga)

Under Secretary to the Government of India

The Chief of the Army Staff (in quadruplicate): For communication to the officer through the staff channel with the necessary administrative

instructions and for further action in accordance with the existing procedure.

Central Government's decision on the Second Statutory Complaint of the

Respondent, is reproduced hereunder, for reference:

Government of India

Ministry of Defence

New Delhi dated the 22nd February, 2007.

ORDER

IC-36939F Col. Rajan Bakshi, AOC has submitted a Statutory Complaint dated 08 May 2006 to the Central Government against non

empanelment for promotion to the rank of Brig by No. 2 Selection Board (Fresh) held in January 2006. The officer in his statutory complaint states

that he is of the opinion that the decision of the No. 2 Promotion Board held in Jan 2006 has not done justice to him considering the challenging

appointments held by him and in which he has been consistently graded outstanding by his IO. The officer has highlighted reasons for abrasions in

his CR profile. One of the incident pertains to his tenure as Dir (OS), HQ Southern Command, wherein, he served under the same officer (now his

IO) who was the RO of the CR 03/98-06/98 in which he was granted partial redress. The IO had initially tried to get his posting cancelled,

however the same was rejected by MS Branch.

2. The officer states that the IO as Chairman of the RSI, Pune, utilized the resources of the institute to conduct a number of functions associated

with the marriage of his daughter. As Vice Chairman, he in good faith apprised the IO of the loose talk going on in this connection. This was

followed by an anonymous complaint written to the Army Commander regarding the misuse of institute facilities and financial irregularities of the

IO. On being called to ascertain about the complaint, he told the IO that he had already warned him in this regard earlier. Though the matter was

closed, however, the attitude of the General Officer became curt with him. This also led to functional problems, whereby the IO dissuaded him

from meeting the RO, inspite of being called by the latter for professional work. Consequently, he was reminded a couple of times by the RO

about the information sought by him. Apparently, the RO was also being fed adverse feedback about him, by the IO. He did not clarify issues with

the RO then for fear of adding fuel to the fire, as there was already distrust prevailing in the environment. He is confident that this resulted in the RO

grading him low in his Early CR September 2001 to 30 June 2002. He did not represent against the ibid CR earlier as it was not permitted by rules

and he never thought that the RO would take cognizance of the inputs of the IO. He is surprised that after expunging the overall grading and

assessment in 11 qualities (more than 60%), the entire RO's assessment in CR 03/98-06/98 has not been expunged. He presumes that low

assessment of the RO in the ibid CR has been retained by corroborating it with the assessment of the RO in Early CR September 2001 to 30 June

2002. Hence, both CRs need to be examined together instead of pitting against each other.

3. The officer has requested for the following redress:

(a) ICR covering the period 01 March to 09 June 1998 and Early CR 01 September 2001 to 30 June 2002 be examined together with his overall

profile instead of pitting against each other as one reporting officer is common in both and found to be subjective/inconsistent.

(b) The assessment of the RO in delayed CR covering the period 01 March to 09 June 1998 in which partial redress has been granted, be

reviewed and expunged entirely since it has been written with extraneous considerations. Also, the RO's assessment in Early CR covering the

period 01 September 2001 to 30 June 2002 be compared with other CRs including the earlier CR reviewed by the same RO and if found

inconsistent in some of the qualities, the same be expunged.

(c) Review of the decision of the No. 2 Selection Board in view of the overall profile, experience in varied appointments in op areas vis-à-vis

selected officers with limited exposure due to sheltered/safer appointments.

(d) Grant fresh review (special) after granting redress.

4. The Statutory Complaint of the officer has been examined in detail along with all the relevant documents, his overall profile and

analysis/recommendations of Army Headquarters. After consideration of all the aspects of the complaint and viewing it against the redress sought,

it is observed that redress where due has already been granted to the officer while processing the earlier Statutory Complaint dated 3rd March

2004 against CR 03/98-06/98. After the grant of partial redress, all CRs in the reckonable profile including the impugned CRs 03/98-06/98 and

09/01-06/02 are objective, corroborated and performance based reports and in

tune with the officer's overall profile. There being no discernible signs of any bias/subjectivity/inconsistency, none of the CRs including the impugned CRs merit any interference by the Government.

5. The officer has highlighted the incident of April/May 2002, whereby the RO misused the facilities of RSI for daughter's wedding and

subsequently also fed adverse feedback to the RO. It is evident that this issue was also known to the complainant earlier but he did not bring out

the same in this previous complaint, to bolster his case against the then RO. Apparently, it has now been highlighted as an after thought.

6. The officer has not been approved to his next rank due to his overall profile and its comparative merit.

7. The Central Government, therefore, rejects the Statutory Complaint dated 08.05.2006 submitted by IC-36939F Col Rajan Bakshi, AOC,

against non-empanelment, being devoid of merit.

By order and in the name of the President.

Sd/-

(S.D. Banga)

Under Secretary to the Government of India

To

The COAS (in quadruplicate): For further communication to the officer through staff channels with the necessary administrative instructions and for

action in accordance with the existing procedure.

17. Perusal of the decision of the Central Government on Respondent's first Statutory Complaint indicates that the Central Government had passed

orders on the Complaint, in the light of the Petitioner's Career profile, relevant records and analysis/recommendations of Army Headquarters.

While disposing of the second Statutory Complaint, the Central Government had informed the Respondent that after examination of the Complaint

and viewing it against the redress sought, it had been found that all the CRs in the reckonable profile including the impugned CRs for March 98 to

June 98 and September 2001 to June 2002, were objective, corroborated and performance based reports, in tune with the officer's overall profile.

The Respondent had further been conveyed that there was no discernible sign of any bias/subjectivity/inconsistency in the CRs which may require

interference by the Government. Plea of malafides projected by the Respondent in regard to his CRs for September 2001 to June 2002 had been found to be afterthought.

18. The Writ Petitioner had questioned the Central Government's decision on his Statutory Complaints on grounds which appear in paragraph Nos. 22, 23, 24, 28, 30 and 31 of the Writ Petition.

19. Learned Single Judge, did not refer to the pleas projected by the Petitioner in various paragraphs of the Writ Petition, questioning the decision of the Central Government on his two Statutory Complaints and has instead proceeded to examine the Petitioner's grievance based on the plea of malafides projected against Respondent No. 3 in downgrading him while acting as Reviewing Officer and Initiating Officer in respect of CRs for March 98 to June 98 and September 2001 to June 2002 respectively and violation of the Statutory Rules in not forwarding the assessment of the IO and RO to the SRO (Superior Reviewing Officer).

20. While considering the Statutory Complaints of the Petitioner, his CRs for March 98 to June 98 and September 2001 to June 2002 had been re-examined by the Central Government in the light of all relevant documents, his overall service profile and analysis/recommendations of the Army Headquarters, for coming to their own independent decision. According to the decision of the Central Government, the Petitioner's CRs 03/98-06/98 and 09/01-06/02 were objective, corroborated and performance based reports in tune with the Petitioner's overall profile and no discernible sign of any bias/subjectivity/inconsistency had been found in the questioned CRs warranting interference by the Government.

The Respondent's rating recorded by Appellant No. 3 had thus merged in the decision of the Central Government which had found his CRs and rating not suffering from any bias, subjectivity or inconsistency warranting interference.

21. Plea of bias/malafides or violation of the provisions of the Special Army Order in not forwarding the CRs to the Superior Reviewing Officer had thus become irrelevant for consideration in the Petitioner's Writ Petition, in view of the decision of the Central Government finding the Petitioner's CRs based on objective, corroborated and performance based reports in tune with the Petitioner's overall profile.

22. In the above backdrop, the Petitioner's pleas appearing in various paragraphs of the Writ Petition, questioning the decision of the Central

Government on his two Statutory Complaints, were required to be examined for determination as to whether or not the decision taken by the

Central Government in affirming the CRs of the Petitioner, was sustainable.

23. The plea of bias and violation of the rules by the IO and RO in recording the ACRs has thus become insignificant in view of the Respondent's

evaluation afresh, by the Central Government, on the basis of his service profile, records and military instructions on the subject, confirming the

modified CR for March 98 to June 98 and Petitioner's rating by the Reviewing Officer in his CR for September 2001 to June 2002.

24. Coming to the findings recorded by the learned Single Judge on malafides, suffice it would be to say that the finding is unsustainable, in that,

while recording finding on malafides, learned Single Judge had neither referred to nor considered for evaluation and appreciation, the statement

made by Respondent No. 3, on Affidavit, controverting the plea of malafides.

That apart, the finding on malafides appears to have been recorded without reference to the records of the Central Government, on the basis

whereof, the plea of malafides raised by the Petitioner against Respondent No. 3 had been dealt with by the Government.

25. The premise on which the learned Single Judge had proceeded to determine the Respondent's Writ Petition and the manner in which the finding

has been recorded on the plea of malafides, may not thus be sustainable.

26. The Respondent-Writ Petitioner's case was required to be decided considering his challenge to the final assessment of the Petitioner, recorded

as such, by the Central Government while rendering decision on Petitioner's Statutory Complaints.

This having not happened, the decision rendered by the learned Single Judge on Respondent's Writ Petition and directions issued thereon against

the Appellants cannot thus be sustained.

27. The Respondent's Writ Petition, therefore, needs to be considered and determined afresh, in accordance with law, after dealing with the pleas

projected by him questioning the decision of the Central Government on his Statutory Complaints.

28. In view of the above discussion, we find the judgment impugned in the

Appeal unsustainable on the ground that the learned Single Judge had omitted to record any finding on the Central Government's decision on the Respondent's CRs, dealing with the Respondent's pleas raised in the Writ Petition urging that the decision of the Central Government on his Statutory Complaint was unsustainable.

29. In view of the course which we propose to adopt in disposing of the Appeal, discussion on other issues projected at the time of hearing of the Appeal becomes unnecessary.

30. For all what has been said above, we set aside the judgment dated 05.03.2009 of the learned Single Judge and send back the case to the

learned Single Judge with the request to consider and determine the Writ Petition in the light of Petitioner's challenge to the decision of the Central

Government on his Statutory Complaints after perusal of the records of the Appellants. We would, however, leave the Writ Petitioner free to

supplement his pleadings to project his grievance effectively before the Writ Court against his Confidential Reports and the decision of the Central

Government.

31. Registrar Judicial to post the Writ Petition for consideration before the appropriate Bench.