

20.4.2011

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Original Application No. 86 of 2010

Court No. 1Presented by the 20.4.2011
the 20th day of April, 2011"Hon'ble Mr. Justice A.N. Varma, Member (J)
Hon'ble Lt. Gen. B.S. Sisodia, Member (A)"IC-37715N Colonel R.K. Chadha, S/o Late K.S. Chadha, Commanding Officer,
Headquarters Madhya Bharat Area, Provost (CMP) Unit, Jabalpur (Madhya
Pradesh).

Applicant

By Legal Practitioner Col. Ashok Kumar, Advocate.

Versus

1. Union of India through Secretary, Ministry of Defence, DHQ PO, New Delhi.
2. Chief of the Army Staff, South Block, DHQ PO, New Delhi 0-110 011.
3. Military Secretary, Army Headquarters, DHQ PO, New Delhi.
4. Headquarters, Sub Area, Danapur Cantt.

Respondents

By Legal Practitioner Shri K.D. Nag, Advocate, Central Government Counsel.

ORDER

"Hon'ble Mr. Justice A.N. Varma"

1. By means of the instant Original Application the applicant has assailed the correctness of the orders dated 14.05.2009, as contained in annexure No. A-1 and dated 08.02.2010, as contained in Annexure No. A-2, passed by opposite party No.

1 whereby the Statutory Complaint dated 18.08.2008 and dated 25.09.2009, preferred by the applicant, has been rejected.

2. According to the applicant the said orders are against all canons of principles of natural justice, fair play and equity. It is also alleged to be indicative of bias, prejudice and violative of principles of natural justice. As per the grounds taken in the Original Application, the action of the respondents is against the right of equality before Law and in gross violation of the settled principles of Law.

3. The factual matrix of the case are as follows :-

4. According to the applicant he was commissioned in the Indian Army in 1980 and was earmarked to Regiment of Artillery. He successfully commanded the Regiment during his tenure in Jammu and Kashmir including 13 months of active deployment of the Regiment in operational area and number of Counter Terrorism Operation of the Regiment. According to the applicant he had done all requisite courses of the Indian Army including prestigious courses like Long gunnery Senior Course (Field) and Defence Service Staff College. He also performed a large number of Instructional and staff appointments, where his performance had been 'Above Average/Outstanding'. The applicant was promoted to the rank of Lt. Colonel and Colonel and since then according to him he had done extremely well through out his career. Despite his outstanding performance, the applicant could not be empanelled for higher post owing to lower ranking in the comparative merit amongst the officers of his batch. According to him at no stage, he had been apprised of any shortcomings in his performance nor anything adverse against him was ever reported either verbally or in writing by his Initiating Officer, Reviewing

Officer, Senior Reviewing Officer, First Technical Officer or Higher Technical Officer. The applicant felt that he was victim of certain aberrations in the closed portion of his reports. It has further been averred in the Original Application that Colonel S.N. Bhaduri who had not been approved in the First Selection Board, got waiver of his box grading 7 of crucial ACR of Command report of the year 2001 by personal intervention of Lt. Gen. K.S. Jamwal. Thereafter he was promoted to the post of Brigadier.

5. Being aggrieved by his Non empanelment and promotion to the post of Brigadier on 18.08.2008 the applicant preferred a Statutory Complaint which was disposed of on 14.05.2009 (Annexure No. A-1).

6. As per the averments made in the Original Application the applicant had apprehension that he was not empanelled/promoted to the higher post on account of aberrant grading lower than the career average due to subjectivity in the closed portion of ACR/ACRs and/or negative recommendations by the Reporting Officer/Officers. He further apprehended that on account of such aberrations reported by the Reviewing Officer/Higher Technical Officer might have reported 7 grading in closed portion of his ACR which according to him went against him in the Selection Board. According to the applicant he has been penalized due to subjective perspective of Reporting Officer. Later in 2009 when the Selection Board was supposed to be held OAP (overall assessed performance), the applicant was quite sure that, he stood a fair chance of promotion as he had earned a number of outstanding reports during his Lt. Colonel/Colonel rank appointments. The applicant, was not empanelled in 2nd Selection Board (Review) in August, 2009.

7. Being aggrieved he preferred a Statutory Petition dated 25.09.2009 before the respondents. Since the same was not being dealt with, he approached the Principal Bench of the Armed Forces Tribunal at New Delhi in Original Application No. 118 of 2009 which was disposed of with the direction to a Government of India, Ministry of Defence, to dispose of the applicant's Statutory Complaint within the time stipulated in the said order. Finally the Statutory Complaint of the applicant was decided on 08.02.2010 (Annexure No. A-2).

8. Both the aforesaid orders dated 14.05.2009 and 08.02.2010 (Annexure Nos. A-1 and A-2) have been challenged on the ground that said orders are violative of principles of natural justice, fair play and equity. They are also indicative of bias and prejudice and the action of the respondents is against the right of equality before Law and in gross violation of the settled principles of Law.

9. Pleadings on both the sides have been exchanged. Since the applicant is due to retire on 31.07.2011 therefore we are disposing of the matter finally.

10. We have heard Colonel Ashok Kumar Learned Counsel for the applicant and Shri K.D. Nag Senior Central Government Counsel for respondents.

11. Learned Counsel for the applicant vehemently argued that the orders impugned in the Original Application are manifestly illegal, arbitrary and without application of mind. According to him the candidature of the applicant for higher post i.e. Brigadier has been ignored by the authorities despite the applicant throughout had outstanding career in Army Service. He further argued that principle of fair play and equity has not been observed while making consideration for promotion. He further argued that the action of the respondents is further

indicative of bias and prejudice which has resulted in negating the applicant's right for promotion to the higher post. He further submitted that in all the promotional exercises there were certain aberrations of reporting by the RO/STO which aberrant the applicant lower box grading resulting in non promotion of the applicant. Learned Counsel submitted that despite the applicant having outstanding career throughout he has been denied promotion on account of certain personal bias and prejudice as such the entire proceedings are liable to be struck down and they are required to be gone into denovo for consideration of the applicant's candidature as afresh.

12. Shri K.D. Nag learned Counsel for the respondents in opposition assisted by Lt. Col. Manish Kumar, JAG (MS Branch) refuted the claim of the applicant. He submitted that the process of selection has been carried out in a fair and just manner and there are no discrepancies as alleged by the applicant. As per his submission since the candidature of the applicant had been considered along with vis-a-vis his batch mates and after considering his overall profile the applicant could not be empanelled over his batch mates. It has further been pointed out that the applicant has challenged his Confidential Reports which were communicated to him by Initiating Officer against which he had no grievances, now he cannot turn around and raise any objection as the same suffer from delay and laches and are afterthought. It was further pointed out that the applicant has challenged the assessment of various officers without impleading them as respondents, even alleging personal bias and malice against them. Thus the Original Application is

bad for non-joinder/mis-joinder of proper parties. The application accordingly deserve to be dismissed on this ground alone.

13. Vide order dated 27.10.2010 the learned Central Government Counsel was directed to produce the relevant record along with Master Data Sheet on the date fixed. The said documents have been produced before us today during the course of arguments and we have perused and gone through them.

14. System of promotion in Army is pyramidal in nature i.e. as the rank increases, the number vacancies decrease. From the broad base of pyramid only those officers whose record of service merits promotion within a particular batch are selected to fill the vacancies available in higher ranks. Promotion upto the rank of Substantive Major was carried out, based upon length of service (now upto the rank of Lt. Colonel) provided the officer fulfills the mandatory requirements of such a promotion. Promotion above the rank of Major was done through process of Selection. All the Officers of a particular batch are considered together with cut of ACRs and inputs on the basis of individual career profile and batch merit and thereafter paneled or not paneled for promotion. Seniority in itself is no consideration before the Selection Board for empanelment or non empanelment. As per applicable policy an officer is entitled to three considerations for promotion to Selection Rank vis-à-vis fresh consideration, First Review and Final Review. In case an officer is not approved as a fresh case but approved as First Review or Final Review he loses seniority vis-à-vis his original batch. After three considerations, if an officer is not approved, he is deemed to finally superseded.

15. The Selection system has been devised to ensure objectivity and impartiality in selection process so as to give fair consideration to those who are found eligible for promotion and further to ensure selection of best officers who are considered to shoulder the responsibility of higher ranks.

16. Under the system of Special Army Order No. 3/S/89 and other relevant policy, at any given time the grading are numerical from 1 to 9 and in form of pen picture. The entire assessment of an officer in any ACR consists of assessment of various reporting officers whose assessment are independent of each other. The Selection Board takes into consideration number of factors such as war/operational reports, course reports, ACR performance in Command and Staff, honours and awards, disciplinary background. Selection or rejection is based on over all profile of an officer vis-à-vis comparative of his batch mate. It is the function of the Selection Board to assess relative merits of various officers.

17. In paragraph 3 of the Counter Affidavit the respondents have demonstrated the consideration given to the applicant for promotion of acting rank of Brigadier in Regiment of Artillery by the No. 2 Selection Board. The details given are reproduced herein under :-

Type of Consideration	No. 2 SB held	Grading
Fresh Case – 1980 Batch	26-27 Sep 2007 (Old System)	'Z' (Unfit)
First Review Case – 1980 Batch	20-22 Feb 2008 (Old System)	'W' (Withdrawn)
First Review	16-17 Apr 2009	'Z' (Unfit)

(Withdrawn) Case 1980 Batch	(Old System)	
Final Review Case – 1980 Batch	27-28 Oct 2009 (QSS)	'Z' (Unfit)

18. In the Counter Affidavit it has further been demonstrated by the respondents that the applicant was not approved for promotion to the rank of Brigadier on the basis of his over all profile and comparative batch merit within the batch. Since the applicant was lower in comparative merit vis-à-vis with over all profile with his batch mates, he was not found fit for promotion in No. 2 Selection Board.

19. It has further been pointed out that due to his overall profile vis-à-vis his course mates and lesser number of vacancies, the applicant has not been empanelled for promotion in Value in closed system of promotion in No. 2 Selective Board. It has further been indicated that the applicant was on study leave out of his own freewill which was sanctioned by the competent authority. He, however, was fully aware of the possible implication of availing the Study Leave and cannot blame the Organization with respect to earning of CR during the said period. Since the applicant has not been exercised during this period as he was on Study Leave with full pay and allowances he was not entitled for any CR for the said period.

20. Upon perusal of the Master Data Sheet (MDS) record produced before us we find that none of the five Members of the Selection Board, had approved the applicant for empanelment. We also find that S.N. Bhaduri, against whom

allegation of personal bias and prejudice have been made without impleading him as a party, was initially not empanelled but upon order on his Statutory Complaint, his case was again considered. Upon reconsideration, three Members of the Selection Board approved him for promotion while two did not. Since the majority Members had approved Bhaduri for promotion, therefore, he was empanelled and promoted as Brigadier. So far as Brigadier S.K. Sharma, against whom there is not a whisper in the Original Application but during the course of arguments Learned Counsel for the applicant vehemently alleged personal bias and prejudice, with regard to his case, we find that all the five Members of the Selection Board approved the case of S.K. Sharma for empanelment as such he was promoted. Even otherwise upon perusal of the record, we find that considering over all profile of S.N. Bhaduri and S.K. Sharma, the overall profile of the aforesaid two persons was above the applicant. They have secured more marks. We do not find any impartiality or prejudice of bias which is alleged to have resulted the applicant in non empanelment.

21. We also find from perusal of the Original application that no oblique motive, ill will or bias has been alleged or even suggested by the applicant against the Members of Selection Board. There is as such no reason or occasion to infer such motive against the Members of the Selection Board. Courts cannot encroach upon the powers and conclusion arrived at by the Selection Boards by substituting its own views. The decision of the Selection Board can be interfered with only when it is alleged irregularity in constitution of the Committee or its procedure, or the Selection are proved malafide affecting the selection.

22. In Air Vice marshal S.L. Chhabra, VSM (Retd.) Vs. Union of India and another reported in 1993 Supplementary (4) Supreme Court Cases 441. The Hon'ble Supreme Court while commenting upon the scope of judicial review in respect of decision taken by Selection Board held as follows:

"10. It is well known that a Selection Board, while considering the suitability of an officer for promotion to a higher post or rank, takes into consideration several factors and it is not solely based on the Appraisal Report of the controlling officer. The learned Additional Solicitor General produced the proceedings of the Selection Board of 1987 and pointed out that the Selection Board had postponed the promotion of the appellant on the ground, that only one report was available by that time and as such decision was taken to watch the performance of the appellant at least for a year more, to assess his potentiality and suitability for discharging the higher responsibility attached to the rank of Air Vice Marshal. The aforesaid fact has been mentioned in the proceedings of the Selection Board of the year 1987. In such a situation, it was neither possible for the High Court, nor is possible for this Court to act as a court of appeal against the decision of the Selection Board, which has been vested with the power of selection of an officer for being promote to the rank of Air Vice Marshal. No oblique motive has been suggested on behalf of the 673 appellant against any of the members of the Selection Board and there is no reason or occasion for us to infer such motive on the part of the members of the Selection Board for denying the promotion to the appellant with reference to the year 1987. Public interest should be the primary consideration of all Selection Boards, constituted for selecting candidates, for promotion to the higher posts, but it is all the more important in respect of Selection Boards, meant for selecting officers for higher posts in the Indian Air Force. The court cannot encroach over this power, by substituting its own view and opinion. According to us, there is no scope to interfere with the decision of the Selection Board of 1987, merely on the ground that adverse remarks, in the Appraisal Report of

1986, which were placed before the Selection Board in the year 1987, were later expunged.

23. In Dalpat Abasaheb Solunke and others Versus Dr. B.S. Mahajan and others reported in (1990) 1 Supreme Court Cases 305 the Apex Court again while considering the scope of judicial review held as follows :-

"12. It will thus appear that apart from the fact that the High Court has referred the cases of the two appointees in one, though their appointments are not assailable on the same grounds, the court has also found it necessary to sit in appeal over the decision of the Selection Committee and to embark upon deciding the relative merits of the candidates. It is needless to emphasise that it is not the function of the court to hear appeals over the decision of the Selection Committees and to scrutinize the relative merits of the candidates. Whether a candidate is fit for a particular post or not has to be decided by the duly constituted Selection Committee which has the expertise on the subject. The court has no such expertise. The decision of the Selection Committee can be interfered with only on limited grounds, such as illegality or patent material irregularity in the constitution of the Committee or its procedure vitiating the selection, or proved mala fides affecting the selection etc. it is not disputed that in the present case the University had constituted the Committee in due compliance with the relevant statutes. The Committee consisted of experts and it selected the candidates after going through all the relevant material before it. In sitting in appeal over the selection so made and in setting it aside on the ground of the so called comparative merits of the candidates as assessed by the court, the High Court went wrong and exceeded its jurisdiction."

24. In Union of India and others Versus Lt. Gen. Rajendra Singh Kadyan and another reported in 2000 (6) Supreme Court Cases 698 Apex Court while

considering the scope of judicial review in the matter of selection observed as follows :-

"29. The contention put forth before us is that there are factual inaccuracies in the statement recorded by the Cabinet Secretary in his note and, therefore, must be deemed to be vitiated so as to reach a conclusion that the decision of the Government in this regard is not based on proper material. The learned Attorney General, therefore, took great pains to bring the entire records relating to the relevant period which was considered by the Cabinet Secretary and sought to point out that there were notings available on those files which justify these remarks. Prima facie, we cannot say, having gone through those records, that these notings are baseless. Critical analysis or appraisal of the file by the Court may neither be conducive to the interests of the officers concerned or for the morale of the entire force. May be one may emphasize one aspect rather than the other but in the appraisal of the total profile, the entire service profile has been taken care of by the authorities concerned and we cannot substitute our view to that of the authorities. It is a well-known principle of administrative law that when relevant considerations have been taken note of and irrelevant aspects have been eschewed from consideration and that no relevant aspect has been ignored and the administrative decisions has nexus to the facts on record, the same cannot be attacked on merits. Judicial review is permissible only to the extent of finding whether process in reaching decision has been observed correctly and not the decision as such. In that view of the matter, we think there is no justification for the High Court to have interfered with the order made by the Government."

25. In *Amrik Singh Versus Union of India Versus Union of India and others* reported in (2001) 10 Supreme Court Cases 424 the Hon'ble Supreme Court

observed that Court cannot enter into correctness of the assessment made by the Selection Board. In paragraph 21 of the said judgment it observed as follows :-

"21. In the result, we are not inclined to grant any relief to the appellant in spite of the fact that his performance in the subsequent years has been shown to be very good and his rating were very high. Ultimately the single adverse remark of 1985-86 by the Reviewing Officer had stood in his way, not only at the time of original consideration but also when the matter was considered afresh pursuant to the directions of the High court. The result may be unfortunate. But the scope of the jurisdiction of the High Court being very limited, we cannot go into the correctness of the adverse remarks nor into the assessment made by the Selection Board on the two occasions."

26. In Major General I.P.S. Dewan Versus Union of India and others reported in (1995) 3 Supreme Court Cases 383 the Hon'ble Apex Court while considering the scope of judicial review in the decision taken by the Selection Committee/Selection Board observed that Selection Committee/Selection Board is not obliged to record reasons for its decision while they are not selecting a particular person. In paragraphs 17 and 18 of the said judgment it observed as follows :-

"17. Sri Ramaswamy relied upon the decision in Union of India v. H.P.Chothia & Ors. (1978 (2) S.C.C.586) in support of his yet another submission that where allegations of arbitrariness are made against a Selection Board/Selection Committee, one of the members of the Board/Committee should file a counter-affidavit explaining the circumstances in which the petitioner was not selected. We are unable to find any such proposition flowing from such decision. That was a case where neither the relevant record was produced nor did any responsible person swear to an affidavit with respect to reasons for which the petitioner therein was not included in the Select list. That is not the situation here,

apart from the fact that there is no specific allegation of arbitrary conduct on the part of the Selection Board. The respondents have also produced all the relevant records which we have Perused.

18. Sri Ramaswamy then relied upon the decision in *The Manager, Government Branch Press & Ann. v. D.B.Belliappa* (1979 (2) S.C.R.458) in support of his submission that administrative orders affecting the rights of citizens should contain reasons therefore. We are afraid, the said principle cannot be extended to matters of selection. Unless the rules so require, the Selection Committee/Selection Board is not obliged to record reasons why they are not selecting a particular person and/or why they are selecting a particular person, as the case may be. If the said decision is sought to be relied upon with respect to the adverse remarks made against the appellant, the attack should fail for the reason that the memo containing adverse remarks in this case does set out the particulars in support of the same. It is equally relevant to note that no allegation of malafides or arbitrariness has been levelled against the Chief of the Army Staff who made the said remarks."

27. The Selection Board is constituted by Senior Officer presided over by an Officer of the rank of Lt. General. The Selection Board is not even aware of the identity of the candidates to be considered by them because only in the members' data sheet all the information of the candidates required to be considered by the Selection Board are stated, but the identity of the officer is not disclosed. In such situation there cannot be even a single instance of bias, unfairness, impartiality or illegality.

28. In *Surinder Shukla Versus Union of India* reported in (2008) 2 Supreme Court Cases 649 Hon'ble Supreme Court observed as follows :-

"11. Considering the comparative batch merit, if the Selection Board did not recommend the name of the appellant for promotion to the rank of Colonel which appears to have been approved by the Chief of Army Staff, it is not for the court exercising power of judicial review to enter into the merit of the decision. The Selection Board was constituted by senior officers presided over by an officer of the rank of Lt. General. It has been contended before us that the Selection Board was not even aware of the identity of the candidates considered by them because only in the member data sheet all the information of the candidates required to be considered by the Selection Board are stated, but the identity of the officer is not disclosed. The appellant moreover did not allege any mala fide against the members of the Selection Board. What impelled the Selection Board not to recommend his case but the names of other two officers is not known.

12. The said Col. A.P.S. Panwar and Col. V.K. Sinha were furthermore not impleaded as parties in the writ petition. In their absence, the writ petition could not have been effectively adjudicated upon.

13. In *Union of India v. Lt. Gen. Rajendra Singh Kadyan* it was held (SCC p. 715, para 29)

"29. It is a well-known principle of administrative law that when relevant considerations have been taken note of and irrelevant aspects have been eschewed from consideration and that no relevant aspect has been ignored and the administrative decisions has nexus to the facts on record, the same cannot be attacked on merits. Judicial review is permissible only to the extent of finding whether process in reaching decision has been observed correctly and not the decision as such. In that view of the matter, we think there is no justification for the High Court to have interfered with the order made by the Government."

The said views have been reiterated in *Amrik Singh v. Union of India*.

14. The peculiarities of special requirements of defence services in a case of this nature must also be kept in view. The considerations which apply to

other government servants in the matter of promotion may not be held to be applicable in the Army services. (See Lt. Col. K.D. Gupta v. Union of India)."

29. As is clearly decipherable from the proposition laid down by the aforesaid decisions of the Apex Court, the Courts should not encroach upon the powers of the Selection Board by substituting its own findings. The Selection Board consists of very senior and high ranking officers and identity of individual who are participating in the Selection process are kept secret and the only qualitative material which is to be considered is placed before the Board, therefore, unless any oblique motive, ill will or bias has been alleged against the Members of the Selection Board, the proceedings cannot be interfered with merely on unfounded allegation made regarding the procedure. In the case at hand since we do not find any averment throughout the entire fabric of the petition regarding malice, ill will or oblique motive against the Members of the Selection Board, therefore, we are not inclined to interfere in the selection proceedings.

30. Upon perusal of the record we find that overall performance of the applicant was considered by the Selection Board vis-a-vis his batch mates and he having not been found fit for promotion, has rightly not been empanelled.

31. We also do not find any illegality in the orders deciding the Statutory Complaint of the applicant. The same has also been dealt with in accordance with law. Upon perusal of record no interference as such is warranted by this Tribunal.

32. We, thus, in the circumstances do not find any ground for interference in the orders impugned in the petition. The Original Application lacks merits and deserves to be dismissed.

33. The Original Application accordingly is dismissed.

34. No order however as to costs.

(Lt. Gen. B.S. Sisodia)
Member (A)

(Justice A.N. Varma)
Member (J)

Dwivedi