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ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

ORIGINAL APPLICATION No. 243 of 2010

Monday this the 7th day of March, 2011

“Hon’ble Mr. Justice Janardan Sahai, Member (J)
Hon’ble Lt. Gen. P.R. Gangadharan, Member (A)”

IC- 34496 M Brigadier Rajeev Kumar Bhutani
Aged about 55 years Son of Late Jati Bhushan Bhutani
Resident of P-04 Kanpur Road Flag Staff
House New Cantt. Allahabad,
Presently posted at Headquarters M.P.Chhatisgarh
& Allahabad Sub Area Allahabad

.....Applicant

By Legal Practitioner Shri S.D.Kautilya, Advocate.

Versus

- 1- Union of India, Through Ministry of Defence,
South Block, New Delhi
- 2- Chief of Army Staff (COAS)
Integrated Headquarters of Ministry of Defence
(Army) South Block New Delhi
- 3- Military Secretary
Military Secretary’s Branch
Integrated Headquarters of Ministry of Defence
(Army) South Block New Delhi

..... Respondents

By Legal Practitioner Sri K.D.Nag, Sr Standing
Counsel for the respondents

ORDER

“Hon’ble Mr. Justice Janardan Sahai”

The applicant a Brigadier in the Indian Army has filed this
Original Application against his non promotion to the rank of Major

General and against certain entries in his confidential reports and for quashing the order of the Central Government rejecting his statutory complaint. The prayer made in the O.A. is as follows:

- “(a) Carry out a judicial review of his reports in the rank of Brig. Aberrations/ inconsistencies not commensurate with over all career profile as pointed out be set aside and expunged.
- (b) RO & SRO portions of two CRs viz 1st July 2006 to 13th Jan.2007 and 14th Jan.2007 to 30th June 2007 being aberrations be set aside and expunged in totality. QAP portion of CR viz 1st July 2007 to 29th Feb.2008 be rendered technically invalid being violative of the provisions of AO 45/2001/MS.
- (c) ACRs in the rank of Brig., especially of the applicant’s command of Inf. Bde. May also be checked for compliance of AO 45/2001/ MS. Any deviation should render the affected portion of ACR technically invalid and its influence/ cascading effect on subsequent reporting be taken care off.
- (d) Applicant be considered afresh by No.1 SB for promotion with retrospective seniority and declare results before his impending retirement due on 28-2-1011, failing which the applicant be deemed to be continuing on active service till the same is done.
- (e) Pass any other appropriate order direction or instruction which this Hon’ble Tribunal may deem fit and proper in the facts and circumstances of the case.
- (f) Order dated 14-7-2010 passed by Government of India, Ministry of Defence Letter No.A/4550117/2010/SC/MS(x)-13-7-2010 may be quashed.”

02- According to the applicant he has always maintained above average to outstanding career profile in the reckonable period throughout his 33 years of service. He qualified in 13 Army courses including two foreign courses and topped in three Army courses i.e. Junior Staff course, Regiment Signal Officers Course (RSO) and Long Gunnery Staff Courses (LGSC) and was selected for LGSC course and the Defence Services Staff College (DSSC) course based on stiff competitive examination and over all profile (OAP). He was awarded

Gen. Lentaigne Memorial Medal on DSSC course. He was nominated based on over All Profile for the Asia Pacific Centre for Security Studies (APCSS) USA, in which his performance was highly appreciated. After command of the Regiment and completion of higher Command course he was posted in a prestigious staff appointment as Colonel General Staff in the Army Air Defence (AAD) Branch. The applicant was in the top bracket of the highest merit of his AAD batch and was selected for General Cadre by No.1 Selection Board which approves selection from Brig. To Maj. General”

03- The applicant filed a statutory complaint under section 27 of the Army Act to the Central Government. In the complaint he prayed that all his reports in the rank of Brig. Aberrations/ inconsistencies not commensurate with over all career profile be set aside and expunged. He also prayed that his ACR in the rank of Brig. may also be checked in compliance of Army Order no.45 of 2011. The statutory complaint of the applicant was decided by the Central Government by order dated 15-7-2010 in which he has been granted partial relief in respect of figurative assessment of the RO against two qualities on the ground of inconsistencies. The other prayers of the applicant have been rejected. Para 3 of the order of the Central Government which contains ~~whatever~~ reasons there are in the order for arriving at the conclusions is quoted

below:

“The Statutory Complaint of the order has been examined in the light of his career profile relevant records and analysis/recommendations of Army Hqrs. After consideration of all aspects of the complaint and viewing it against the redress sought, it has emerged that all CRs in the reckonable profile are fair, objective, performance based and technically valid except the following assessments of RO in CR 07/06-01/07, which merit interference on grounds of inconsistency:-

(i) Para 12 (b) - Motivation and creation of impact on his command in the face of adversities.

(ii) Para 12 (i) - Boldness and resoluteness in the execution of his duties in the face of odds and difficulties.”

04- We have heard Sri S.D.Kautilya and Col. A.K.Chauhan, learned counsel for the applicant and Sri R.K.Singh, Central Government Counsel and Col. Devendra Singh, Departmental Representative for the respondents.

05- The respondents have produced the CR dossier for the relevant period. The contention of learned counsel for the applicant is that although the Central Government has expunged the assessment of RO in respect of some of the figurative assessment in the aforesaid CRs but has not considered that the said expunction would also affect the pen picture recorded by the RO. We have considered the matter. The pen picture recorded by RO ^{the X} indicates that he found the assessment made by IO as ^A inflated and has reduced the figurative assessment made by the IO in

various qualities. The figurative rating given by the RO in respect of some of the qualities have however been expunged by the Central Government. From the MDS produced by the respondents it also appears that in one of the qualities the SRO has given eight points as against seven points given by the RO. In view of the fact that the RO's figurative assessment in respect of some of the qualities has been expunged by the Central Government and the SRO has given a higher rating than the RO in one quality, ^{§ 35} the submission of learned counsel for the applicant is that this would have impact upon the pen picture of the RO and his assessment of the IO's ratings as inflated itself becomes questionable and is a circumstance to indicate that the RO himself was a strict rater and his assessments have prejudiced the applicant.

06- The submission made by the learned counsel for the applicant is that RO Lt. Gen. N.S.Brar was a strict rater and the mere fact that his assessment may have been corroborated by the SRO was not a ground for acceptance of the rating given by the RO. In support of his contention learned counsel for the applicant has placed reliance upon policy letter no. 32301/34/P/MS/4 Gord dated 10-8-1989. Para 6 of the policy letter reads as under:

“6- The present system of internal assessment suffers from the following deficiencies:

- (a)-----
- (b)-----
- ©-----

(d) In case of corroborating assessment by two reporting officers the report is "Accepted as it is even if it is not in tune with the past profile of the officer

(e) No compensation for the Liberal or Strict rating tendencies of the reporting officer is made thus providing the ratee^r undue advantage or causing him harm."

Para 7 of the policy deals with the revised system. The relevant sub- paras are para 7 (a), (b) and (d) which are quoted below:

"(a) On receipt of a confidential report in the MS Branch it will straightway be updated on a computer check file in the form it is received

(b) The computer will identify and indicate any inconsistencies in the report by carrying out a comparison with the profile of the officer based on his CRs for previous five years. Details of aspects covered by the computerized check are given at Annex enclosed

(d) In the event of aberrations which are not adequately justified by the reporting officer an independent report in the form of a Special Report for internal Assessment" may be called for from the superior reporting officer in the chain to help MS Branch to resolve the observed discrepancy dispassionately"

07-. The contention of learned counsel for the applicant is that this

Policy requires that even in case of corroboration of the rating of the RO by the SRO the ratings had to be matched with the part^{of} profile of the

officer. He submits that the order of the Central Government does not indicate that term^s of the policy letter have been complied with and that the applicant has suffered on account of RO Lt. Gen. N.S.Brar being a strict rater.

08- Another contention advanced by learned counsel for the applicant is that there are cuttings in IO's assessment in some of the ACRs. We have considered this aspect and have perused the ACR's for the period

of ACRs of the applicant's tenure as a Brigadier. It appears that in the

CR of Jan. 2007 to June 2007 there is cutting in the figurative rating given by the initiating officer in one of the qualities. We also find that in the CR for the period July 2007 to Feb. 2008 there are cutting³ in three of the figurative ratings given by IO in the qualities to assess potential. We also find that although the cuttings bear the signature of the initiating officer but no date to indicate when the cutting was made has been given. Para 15 of the Army Order 45/2001 reads as under:

"Use of Whitener/ Erasures/ Overwriting:

15- Erasures, overwriting, use of whitener and paper slips pasted to remove/block the original assessment should be avoided. In case, it becomes absolutely essential to revise the assessment in unavoidable circumstances the following will be ensured

- (a) Both original and the revised assessment are legible. A line will, however, be drawn across the original assessment to indicate its invalidity.
- (b) Revised assessment will be authenticated with full signatures of the concerned reporting officers and will bear the date of amendment in case, the assessment is in the open portion to be communicated to the rate, the rate will also authenticate the amendments with full signature and date.
- (c) Violation of above provisions may render a complete CR or a part technically invalid.
- (d) The authority for setting aside CR on technical ground, in accordance with the existing internal assessment procedures, rests only with the MS Branch at Army Headquarters. It is therefore important that a CR once initiated must reach the MS Branch and no intervening headquarter has the authority to render a CR technically invalid on account of erasures, over- writings and cuttings and order its re- initiation."

It appears from the Army Order that the initiating officer is required to make amendment only in unavoidable circumstances and the amendment should bear signature and date on which it is made and that non compliance with the provision may render the CR technically

invalid. There appears to be a clear non compliance with these instructions as no date of the amendment has been given by the IO in the ACR's above referred to. Moreover although the Army Order provides that revision should be made in the assessment only when it is unavoidable there are revisions in 3 of the 5 qualities in the not to be shown portion in one of the ACR's referred to above.

09- Learned counsel for the applicant also drew our attention to **Para 136** of Army Order which is as follows:

“136- CRs with technical defects may be placed under observation to seek clarification of the rate and/ or of the reporting officers. In case, no satisfactory replies are forthcoming from the concerned officers such technically invalid CRs may be set aside as per the prescribed procedures. In such a situation, a re-initiation may be sought only when considered essential by the MS Branch.”

10- Reliance was placed by learned counsel for the applicant upon a decision of the Delhi High Court in Lt. Col. **Sukhvinder Singh Vs.**

Union of India and others reported in Mil.L.J.2003 Delhi Page-28.

This case has been relied upon in support of the applicant's contention that the order of the Central Government is not a reasoned one. To appreciate the contention we shall refer to Para- 4 of the said decision where the Central Government has dealt with statutory complaint in Lt. Col. Sukhvinder Singh's case:

“4-By an order dated 30-3-2001, the said statutory complaint has been rejected stating-

“2- The statutory complaint of the officer has been examined in the light of his career profile relevant records and analysis/ recommendations of AHQ. It is seen that the impugned CRs 6/89-12/89 and 06/93-03/94 are well corroborated, moderated and consistent reports. As assessment by the reporting officers in these CRs is fair, objective and performance based. Redress where due, consequent to his non- statutory complaint dated 17th April 1999

has already been granted to the officer in CR 6/93-06/94. These CRs do not merit any further interference. All other CRs in the reckonable CR profile are also well corroborated reports.”

In Para 8 of the decision the Delhi High Court found that the impugned order does not contain reasons. In the present case too, the statutory complaint of the applicant has been dealt with in a similar manner. Learned Central Government counsel and the Departmental Representative on the other hand submit that the entire complaint processing file with all materials had been forwarded to the Central Government. Be that as it may the order of the Central Government is not a speaking order. We are thus of the opinion that the order of the Central Government does not contain reasons.

11- The decision of Delhi High Court has also been relied upon by learned counsel on the point that change in the assessment may affect pen picture also.

12- On the other hand reliance has been placed by learned Central Government counsel upon the decision of Union of India Vs. E.G. Nambudri 1991 (3) SCC P- 38_ also reported in AIR 1991 SC 1216. In our opinion the decision cited by learned Standing counsel is not applicable to the facts of the present case. It has been observed by the Apex Court in that case in context of a decision on a representation against adverse entries that no reasons are required to be given. It has also been held therein that duty to give reasons is not a rule of administrative law. The decision was not rendered in the context of a

statutory complaint under section 27 of the Army Act. The decision of the Apex Court in E.G.Nambudri's case (supra) was considered by a Division Bench of the Allahabad High Court in K.Ramesh Singh Rathore Vs. Union of India and another 1996 (3) ESC 493 (Alld). In that case reliance was placed by the Division Bench upon a decision of the Apex Court in the case of S.N.Mukherjee Vs. Union of India AIR 1990 SC 1984. The Learned Judges quoted the following passage from the judgment of the Apex Court:

“Reasons when recorded by an administrative authority in an order passed by it while exercising quasi judicial functions would no doubt facilitate the exercise of its jurisdiction by the appellate or supervisory authority. But the other considerations referred to above which have also weighed with this Court in holding that an administrative authority must record reasons for its decision are of no less significance. These considerations show that the recording of reasons by an administrative authority serves salutary purpose namely it excludes chances of arbitrariness and ensures a degree of fairness in the process of decision^o making. The said purpose would apply equally to all decisions and its application cannot be confined to decisions which are subject to appeal, revision or judicial review. In our opinion, therefore the requirement that reasons be recorded should ^{be} given, the decisions of an administrative authority exercising quasi judicial functions irrespective of the fact whether the decisions is subject to appeal, revision or judicial review. It may, however, be added that it is not required that the reasons should be as elaborate as in the decision of a Court of law. The extent and nature of the reasons would depend on particular facts and circumstances. What is necessary is that the reasons are clear and explicit so as to indicate that the authority has given the consideration to the points in controversy. The need for recording of reasons is greater in a case where the order is passed at the original stage. The appellate or

revisional authority if it affirms such an order need not give separate reasons if the appellate or revisional authority agrees with the reasons contained in the order under challenge.”

The decision in the case of **E.G.Nambudri** (supra) has been distinguished by the Division Bench in **K. Ramesh Singh Rathor** (Supra) on the ground that the Apex Court in that case was dealing with a non-statutory representation of a Central Government employee against an adverse entry. The Division Bench held as under:

“ The decision of Hon’ble Supreme Court in the case of Union of India Vs. **E.G.Nambudiri** (supra) in the opinion of the Court, does not hold the respondents, obviously for the reasons that in this case the controversy pertained to the disposal of a representation not contemplated by way of Statute, while in the case at hand the court is concerned with the disposal of a complaint provided by the Statute, namely, Section 27 of the Act. Statutory representations and complaints stand ~~and~~ on different footing. Such representations and complaints cannot be rejected without disclosing reasons.”

13- The Calcutta High Court in **Gurinder Jit Singh Vs. Union of India and others** 1998 LAB I.C. 2058 has followed the decision of the Allahabad High Court in **K.Ramesh Singh Rathore** (supra). Learned counsel for the applicant has also placed reliance in the case of **P.R.Prasanan Vs. Union of India and others**, (O.A.No.280 of 1989) of the Principal Bench ,Delhi. Having considered the matter we are of the opinion that the Central Government has not given reasons in its order and therefore the order passed by it cannot be sustained.

14- In the result we allow the Original Application, set aside the impugned order dated 14-7-2010 to the extent it rejects the statutory complaint and direct the Central Government to pass a fresh order on the

statutory complaint dated 26-2-2010 in the light of observations made by us in this order. In case the Central Government passes any order in favour of the applicant the matter regarding promotion of the applicant shall be re- considered by the Selection Board.

(Lt. Gen. P.R. Gangadharan)
Member (A)

(Justice Janardan Sahai)
Member (J)

IA/-