

A.F.R.
Court No.2
Reserved Judgment

ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW

Original Application No. 18 of 2012

Thursday this the 31st day of March, 2016

Hon'ble Mr. Justice D.P. Singh, Member (J)
Hon'ble Air Marshal Anil Chopra, Member (A)

IC-34496 M Brigadier Rajeev Kumar Bhutani
S/o Late Sri Jati Bhushan Bhutani

..... Applicant

By Legal Practitioner Shri R.C. Dixit, Advocate

Versus

1. Union of India, through Defence Secretary Ministry of Defence, South Block, New Delhi.
2. Chief of the 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 Shri D.K. Pandey, Learned Counsel for the Central Government assisted by Col N.K. Ohri, Representative from M.S. Branch Army Headquarters and Lt Col Subodh Verma, OIC Legal Cell.

(Per Justice D.P Singh)

ORDER

1. This application under Section 14 of the Armed Forces Tribunal Act, 2007 (in short “the Act”) has been filed by the applicant being aggrieved with the ACR entry of five years from 1999, 2002, 2003, 2004 and 2005 with emphasis on ACR entries for the years 2007 and 2008.
2. We have heard Shri R.C. Dixit, learned counsel for the applicant, Shri D.K. Pandey, learned counsel for the respondents, assisted by assisted by Col N.K. Ohri, Representative from M.S. Branch Army Headquarters and Lt Col Subodh Verma, OIC Legal Cell and perused the record.
3. Admittedly, the applicant was commissioned in the Air Defence Regiment on 11.06.1977. He completed a number courses required to discharge as Commissioned Officer of the Army and later on posted as Battery Second-in-Command in 19 Air Defence Regiment on 07.12.1985. On 04.06.1989, the applicant was promoted to the rank of Major and appointed as Battery Commander and Adjutant. He attended a number of courses like Junior Commander and Armament Technology Orientation Course and also attended 45th Staff Course at DSSC, Wellington on 05.05.1990, where he was awarded General Lentaigne Memorial Medal and thereafter posted as Brigade Major in Headquarters 311 Mountain Brigade with dual operation roll in High Altitude and Counter Insurgency Environment and took part in Operation FALCON Operation BAJRANG and Operation RHINO. On 30.07.1992, the applicant was posted as Battery Commander in 323 Air Defence Regiment. Later on, he was empanelled for promotion to the post of Lieutenant Colonel (Selection Grade).

On 17.02.1998, the applicant was posted in prestigious General Staff Officer Grade I Operations in Headquarters 21 Corps. He was promoted to the post of Commanding Officer, 19 Air Defence Regiment. The applicant was posted as Commanding Officer in support of strike Corps for role in deserts and later taken over to the Unit to Rajouri (J & K) and took part in Operation RAKSHAK. He was the only officer, who was selected and nominated for Higher Command Course at Army War College from Army Air Defence and later on posted as Colonel General Staff (Planning) and subsequently, sent to Executive's Course at Hawaii, USA and on 24.08.2003, the applicant was posted as Director Military Operations, Directorate General of Military Operations, Army Headquarters. It is stated that because of bright service record, the applicant was offered conversion to General Cadre (GC). The applicant worked as Commander 67 Infantry Brigade and Commander of Madhya Pradesh, Chhattisgarh and Allahabad Sub Area, Allahabad. However, Selection Board held on 07.12.2009 did not empanel the applicant for promotion to the post of Major General. The statutory complaint dated 26.02.2010 submitted by the applicant was rejected with partial relief vide order dated 14.07.2010. Being aggrieved, the applicant had filed O.A. No.243 of 2010, which was allowed vide order dated 14.07.2010 directing to decide the statutory complaint afresh. Again by means of the impugned order dated 04.08.2011 the statutory complaint has been rejected and hence the present O.A.

4. Attention has been invited by the learned counsel for the applicant to the ACR profile. A perusal of the ACR profile Part IV shows that cutting has been made over (b), (c)

& (e) by the Initiating Officer and the outstanding entry on 9 has been changed to Above Average 8. It would be appropriate to excerpt the relevant portion of Part-IV-Potential for Promotion, wherein cutting has been made:

“PART-IV-POTENTIAL FOR PROMOTION

(NOT TO BE SHOWN TO THE OFFICER REPORTED UPON)

19. *Qualities to Assess Potential (QAP). (Mark each quality out of 9 as follows :-*

Outstanding 9, Above Average 8 or 7, High Average 6 or 5, Average, Low Average 3 or 2, Below Average 1. (DO NOT USE FRACTIONS IN YOUR MARKING).

	IO	RO	SRO
(a) <i>Professional Competence to Handle Higher Appointments</i>			
(b) <i>Vision and Conceptual Ability (Creativity, Clarity of Thought, Analysis and Decisive Approach to Arrive at Definite Course of Action. Understanding the Broader Picture and Grasp of Macro Issues).</i>			
(c) <i>Exhibition of Foresight, Depth of Understanding and Breadth of Perspective Beyond his Limit of Responsibilities.</i>			
(d) <i>Judicious Delegation of Responsibilities, Balanced Guidance and Supervision.</i>			
(e) <i>Tolerance for Ambiguity. (Ability to take Decision in the Absence of Clear Cut Mandate and in an Environment of Uncertainty).”</i>			

5. A plain reading of the above quoted format indicates that every perspectives of Part-IV Potential for Promotion are based on outstanding entries, but by cutting in columns (b), (c) and (d) alteration has been done without pointing out the date of cutting. Column (b) refers to Vision and Conceptual Ability, (c) refers to Exhibition of Foresight, Depth of Understanding and Breadth of Perspective and (e) refers to Tolerance for Ambiguity.

6. Submission of the applicant is that had the cuttings not been made, he would have been given outstanding entries

and selected for the post of Major General. However, learned counsel for the respondents submits that even if outstanding entry is granted with 9 points, the applicant may not have been empanelled on account of competitive merits and periodical performance in the Army. We are not concerned with the outcome, but to procedural compliance.

7. The question is as to whether the cutting and over-writing made by the Initiating Officer without putting his full signature along with date on over-writing is a fatal or not? Attention has been invited to Army Order 45/2001/MS. Paragraph 15 deals with use of *whitener, erasures and over-writing*, paragraph 16 deals with *Criteria for Initiation of CRs*, paragraph 17 deals with *Period Covered by the Report*, paragraph 18 deals with *Counting of Physical Service* and paragraphs 19 and 20 deal with *Initiation of CRs*. Paragraphs 15 to 20 being relevant are excerpted below :-

“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 officer (s) and will bear the date of amendment. In case, the assessment is in the open potion, 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-writing and cuttings, and order its re-initiation.*

Criteria for Initiation of CRS

16. *CRs will be initiated and endorsed in accordance with the provision of this AO. The following mandatory provisions will be applicable without which the CR will be technically invalid :-*

(a) *The completion of 90 days physical service between the rate and officer initiating the report. The same can however be waived in exceptional circumstances, in organisational interest, for initiation of Adverse CR as specific at Paragraph 111 (e).*

(b) *Report is initiated and reviewed as per the laid down channel of reporting.*

(c) *Officer is posted to the appointment for which report is being initiated and the same matches with the Directory of appointments and IAFF – 3008.*

17. **Period Covered by the Report.** *The ‘period Covered by the Report’ is the period within the reporting year, which the rate has actually served under the IO (or RO when initiating CR under provision of the AO) Any period of the reporting year which is 90 days or more in duration and for which no CR or NIR has been initiated, constitutes a gap in reporting. The examples of period by CR and occurrence of gaps are at Appendix C.*

18. **Counting of Physical Service.** *The physical service of 90 days need not be continuous within the reporting year. Any temporary absence due to leave or*

temporary duty up to a maximum of ten days at a time, either of the IO or of the officer reported upon, will reckon towards physical service. Details of the period to be counted / discounted towards physical service are at Appendix D.

Initiation of CRs

19. *CRs will normally be initiated by an officer's immediate superior officer, not below the rank of a Lt Col or equivalent. However, a Maj if commanding an independent unit (on separate PE or WE), may initiate reports on officers of his unit holding lower ranks.*

20. *CRs on officers will be initiated by designated IO, holding at least on rank higher than the officer reported upon, subject to the following exceptions :-*

(a) *For officers of the rank of Lt Gen, Cr will be initiated in the channels of reporting, specified from time to time.*

(b) *Lt Col (Selection Grade) may initiate reports on officers of the rank of Lt Col (Time Scale), service under him in appointments tenable by Maj.*

(c) *When an officer is holding a rank equivalent to, or the same as that of his immediate superior officer, his report will be initiated by an officer who would have initiated report on his immediate superior. Such CR will be enfacd as 'Initiated by RO under provisions of paragraph 20 (c) of the AO'.*

(d) *Officer of the same basic rank as that of rate, but holding higher local rank, is entitled to initiate report of such rate provided the rate is junior in service for promotion (on the basis of grant of substantive seniority).*

(e) *Provision of Paragraph 20 (c) above would not be applicabl to cases covered at paragraphs 21 and 22 below."*

8. A plain reading of paragraph 15 (supra) shows that revised assessment will be authenticated with full signatures of the concerned reporting officer and will bear the date of amendment. Clause (b) of paragraph 15 further provides that in case assessment is in the open position to be communicated to the ratee, the ratee will also authenticate the amendments with full signature and date. Clause (c) stipulates that violation of above provisions may render a complete CR or a part, technically invalid. Clause (d) provides that a CR may render technically invalid on account of erasures, over-writing and cuttings, and order its re-initiation. It means non-compliance of the aforesaid provisions may render the CR invalid.

9. While rejecting the applicant's statutory complaint by means of the impugned order dated 04.08.2011, the Government itself noticed the cuttings and directed the MS Branch to issue instructions to ensure strict compliance of the provisions. For convenience clause (c) of the impugned order dated 04.08.2011 is reproduced as under :

“(c) The cuttings in the IO's assessment in CRs 01/07-06/07 and 07/07-02/08 have been authenticated by the reporting officer with full signature. However, the date of amendments has not been mentioned. While such CRs have been accepted by the MS Branch, necessary instructions to ensure strict compliance of the provisions of sub-para 15 (d) of AO 45/2001/MS in the future are in the process of being issued. The assessment was “Above Average” amply supported by pen picture and recommendations for promotion. No prejudice was caused to the complainant by not putting the date under signature as it is not established that amendment was carried out subsequently.”

10. Though, a finding has been recorded that no prejudice was caused to the complainant by not putting the date under signature as it is not established that amendment was carried

out subsequently, but neither evidence has been discussed nor has any comment been received from the Initiating Officer as to when over-writing was done, whether the same was based on any evidence or material on record. In such situation, possibility of subsequent over-writing and abuse of power may not be ruled out.

11. In the ACR for the period 01.07.2007 to 29.02.2008, very good remarks have been sent with regard to the applicant's career in the pen picture. In the ACR for the period 14.01.2007 to 30.01.2007 over-writing has been done in clause (c) of Part –IV-Potential for Promotion, wherein apparently, the outstanding entry 9 has been changed to Above Average 8, but neither date has been indicated nor has full signature been put in terms of Para 15 of the Army Order (supra).

12. The question cropped up as to whether the provision contained in the Army Order is mandatory or directory. In catena of Judgments, their Lordships of Hon'ble Supreme Court have held that if a provision is mandatory, any breach thereof will be invalid, but if it is directory, the act will be valid although non-compliance may give rise to some other penalty if provided by the statute (Vide *Drigraj Kuer (Rani) vs. Amar Krishna Narain Singh (Raja)*, AIR 1960 SC 444, pp 449, 451, *Bhikraj Jaipuria vs. Union of India*, AIR 1962 SC 113, p.119, *Union of India vs. Tulsiram Patel*, (1985) 3 SCC 398, p 484, *Rubber House vs. Excelsior Industries Pvt Ltd*, AIR 1989 SC 1160, p. 1165 and *Ram Deen Maurya vs. State of U.P.*, (2009) 6 SCC 735).

13. Hon'ble Supreme Court in the case of *M.Y. Ghorpade vs. Shivaji Rao M. Poal*, AIR 2002 SC 3105 held that a directory provision may be distinguished from a discretionary

power. The former gives no discretion and is intended to be obeyed, but a failure to obey it does not render a thing duly done in disobedience of it is a nullity. The latter, i.e. a discretionary power leaves the donee of the power free to use or not to use it as his discretion. The two exceptions to the mandatory requirement is held by Hon'ble Supreme Court as; firstly, when performance of requirement is impossible, then performance is excused (Vide *London and Clydeside Estates Ltd vs. Aberdeen District Council*, (1979) 3 All ER 876) and, secondly; the second exception is of waiver, If certain requirement or conditions are provided by a statute in the interest of a particular person, the requirement or conditions although mandatory, may be waived by the person who is affected by it if no public interest is involved, and in such case the act done will be valid one even if requirement or condition has not been performed (Vide *Dhirendra Nath Ghorai vs. Sudhir Chandra Ghosh*, AIR 1964 SC 1300). Hon'ble Supreme Court further held that while considering non-compliance with the procedure required, it is to be kept in view that such a requirement is designed to facilitate justice and further its ends and, therefore, if it causes no injustice it may be directory, but incase it originates injustice, then it may be mandatory, each depending on the facts of the case.

14. Hon'ble Supreme Court in the case of *Indian Administrative Service (SCS) Ass, U.P vs. Union of India*, 1993 Supp (1) SCC 730 has culled down six propositions with regard to mandatory and directory nature of an order, which may be reproduced as under:-

“(1) Consultation is a process which requires meeting of minds between the parties involved in the process of

consultation on the material facts and points involved to evolve a correct or at least satisfactory solution. There should be meeting of minds between the proposer and the persons to be consulted on the subject of consultation. There must be definite facts which constitute the foundation and source for final decision. The object of the consultation is to render consultation meaningful to serve the intended purpose. Prior consultation in that behalf is mandatory.

*(2) When the offending action affects fundamental rights or to effectuate built-in insulation, as fair procedure, consultation is mandatory and non-consultation renders the action **ultra vires** or void.*

(3) When the opinion or advice binds the proposer, consultation is mandatory and its infraction renders the action or order illegal.

(4) When the opinion or advice or view does not bind the person or authority, any action or decision taken contrary to the advice is not illegal, nor becomes void.

(5) When the object of the consultation is only to apprise of the proposed action and when the opinion or advice is not binding on the authorities or person and is not bound to be accepted, the prior consultation is only directory. The authority proposing to take action should make known the general scheme or outlines of the actions proposed to be taken be put to notice of the authority or the persons to be consulted; have the views or objections, take them into consideration, and thereafter, the authority or person would be entitled or has/have authority to pass appropriate orders or take decision thereon. In such circumstances it amounts to an action 'after consultation'.

(6) *No hard-and-fast rule could be laid, no useful purpose would be served by formulating words or definitions nor would it be appropriate to lay down the manner in which consultation must take place. It is for the court to determine in each case in the light of facts and circumstances whether the action is 'after consultation'; 'was in fact consulted' or was it a 'sufficient consultation'.*

15. It is well settled proposition of law that a thing should be done in the manner provided by the Act or the statute and not otherwise vide *Nazir Ahmed vs. King Emperor*, AIR 1936 PC 253; *Deep Chand vs. State of Rajasthan*, AIR 1961 SC 1527, *Patna Improvement Trust vs. Smt. Lakshmi Devi and ors*, AIR 1963 SC 1077; *State of U.P. vs. Singhara Singh and others*, AIR 1964 SC 358; *Barium Chemicals Ltd vs. Company Law Board*, AIR 1967 SC 295; *Chandra Kishore Jha vs. Mahavir Prasad and others*, 1999 (8) SCC 266; *Delhi Administration vs. Gurdip Singh Uban and others*, 2000 (7) SCC 296; *Dhananjay Reddy vs. State of Karnataka*, AIR 2001 SC 1512; *Commissioner of Income Tax, Mumbai vs. Anjum M.H. Ghaswala and others*, 2002 (1) SCC 633; *Prabha Shankar Dubey vs. State of M.P.*, AIR 2004 SC 486 and *Ramphal Kundu vs. Kamal Sharma*, AIR 2004 SC 1657.

16. In case reported in *State of West Bengal vs. Anwar Ali Sarkar*, 1952 SCR, 284 their Lordships of Hon'ble Supreme Court have deprecated the exercise of discretionary power without following reasonable and proper standards and limits; unguided and uncontrolled. To quote the relevant paras :-

“24. Hon’ble Supreme Court in the case of **State of U.P. vs. Mohd Nooh**, reported in 1958 SC 86, **Pratap Singh vs. State of Punjab**, reported in AIR 1964 SC 72, **Fasih Chaudhary vs. D.G. Doordarshan**, reported in 1989 (1) SCC 189 held that if the act complained of is without jurisdiction or is in excess of authority conferred by statute or there is abuse or misuse of power, a Court can interfere. In such an eventuality, mere fact that there is denial of allegation of malafide or oblique motive or of its having taken into consideration improper or irrelevant matter does not preclude the Court from enquiring into the truth of allegations leveled against the authority and granting appropriate relief to the aggrieved party.

25. In number of cases of Apex Court ruled that any arbitrary action, whether in the nature of legislative or administrative or quasi-judicial exercise of power, is liable to attract the prohibition of Article 14 of the Constitution of India vide AIR 1974 SC 555; **E.P. Royappa vs. State of Tamil Nadu**, 1979 (3) SCC 489; **R.D. Shetty vs. International Airport Authority**, 1978 (1) SCC 248; **Maneka Gandhi vs. Union of India**, 1981 (1) SCC 722; **Ajay Hasia vs. Khalid Mujib**, 1990 (3) SCC 223; **Shri Sitaram Sugar Co. Ltd. Vs. Union of India**.

29. In **M.I. Builders Pvt Ltd vs. Radhey Shyam**, reported in (1999) 6 SCC 464, the Apex Court ruled that the decision is unlawful if it is one to which no reasonable authority could have come.

38. In **Om Kumar vs. Union of India**, reported in 2001 (2) SCC 368, Hon’ble Supreme Court reiterated the applicability of Wednesbury’s principle to decide whether an administrative order is arbitrary and rational, To quote:-

67. But where an administrative action is challenged as “arbitrary” under Article 14 on the

basis of *Royappa* (as in cases where punishments in disciplinary cases are challenged), the question will be whether the administrative order is “rational” or “reasonable” and the test then is the *Wednesbury* test. The court would then be confined only to a secondary role and will only have to see whether the administrator has done well in his primary role, whether he has acted illegally or has omitted relevant factors from consideration or has taken irrelevant factors into consideration or whether his view is one which no reasonable person could have taken. If his action does not satisfy these rules, it is to be treated as arbitrary. (In **G.B. Mahajan vs. Jalgaon Municipal Council** SCC at p.111) **Venkatachaliah, J.** (as he then was) pointed out that “reasonableness” of the administrator under Article 14 in the context of administrative law has to be judged from the stand point of *Wednesbury* Rules. In **Tata Cellular vs. Union of India** (SCC at pp. 679-80), **Indian Express Newspapers Bombay (P) Ltd vs. Union of India** (SCC at p. 691), Supreme Court **Employees’ Welfare Assn. vs. Union of India** (SCC at P. 241) and **U.P. Financial Corpn. Vs. Gem Cap (India) (P) Ltd** (SCC at p. 307) while judging whether the administrative action is “arbitrary” under Article 14 (i.e. otherwise than being discriminatory), this Court has confined itself to a *Wednesbury* review always.

39. The Supreme Court in 2005 (5) SCC 181; **State of NCT of Delhi and Anr vs. Sanjeev alias Bittoo**, upheld the right of judicial review under Article 226 on the basis of illegality in decision making process coupled with irrationally and perversity. While holding that decision is irrational

and Court may look into the material on record. (Paragraphs 16, 17 and 21).

*Hon'ble Supreme Court further held in the case of **Sanjeev** (supra) that if the administrative or judicial power has been exercised on non-consideration or non-application of mind to relevant factors, such exercise shall stand vitiated. Relevant portion from the judgment of **Sanjeev** (supra) is reproduced as under :-*

“If the power has been exercised on a non-consideration or non-application of mind to relevant factors, the exercise of power will be regarded as manifestly erroneous. If a power (whether legislative or administrative) is exercised on the basis of facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated”.

*40. In **Centre for Public Interest Litigation and Anr vs. Union of India**, reported in 2005 (8) SCC 202, the Hon'ble Supreme Court reiterated the settled proposition of law that every administrative action should be reasonable and fair. Hon'ble Supreme Court further held that the procedure adopted by the Administrative body should not be only fair but also seems to be just, fair and proper.”*

17. The Hon'ble Supreme Court in the case reported in **S.T. Ramesh vs. State of Karnataka and Anr.** (2007) 9 SCC 436 by expressing its opinion observed that confidential report is an important document as it provides the basic and vital inputs for assessing the performance of an officer and further achievements in his career. The performance appraisal through CRs should be used as a tool for human resource development and should not be used as a fault-finding process but a developmental one.

18. Keeping in view the letter and spirit of the law laid down by Hon'ble Apex Court and the duty assigned to higher profile to initiate denovo process in cases where over-writing has been done without date and full signature, shows that the provision of Para 15 of the Army Order is mandatory and its non-compliance would vitiate the entry made by the Initiating Officer.

19. It is well settled that assessment of overall service of an officer is to be assessed strictly objectively, fairly and dispassionately, keeping in view the service rendered by such officer, his/her commitment to the duty assigned to him/her. It is not mechanical process whereby cutting or over-writing is done without any reasonable cause. That is why Para 15 of the Army Order (supra) mandates for full signature indicating the date, so that in the event of any controversy or during the course of judicial review of the action, the Initiating Officer or others may be called upon to explain their conduct, keeping in view over all profile contained in the pen picture of the officer concerned.

20. Full Bench of the Armed Forces Tribunal, Principal Bench, New Delhi while deciding *T.A. No.42 of 2010, Ranjit Singh vs. Union of India and others*, has held as under:

“27. We are of the considered opinion that for assessment of overall service working of an officer is required to be assessed strictly objectively, fairly and dispassionately as has been held in the case of S. Ramachandra Raju vs. State of Orissa (1994) Supp 3 SCC 424 and reiterated in the case of Yamuna Shankar Mishra (supra). Writing Confidential Report puts onerous responsibility on the Reporting Officer to eschew his subjectivity and personal prejudices and proclivity or predilections and to make objective assessment. Hon'ble

*Supreme Court in Yamuna Shanker Mishra's case, held that, in estimating or assessing the character, ability, integrity and responsibility displayed by the officer/employee concerned during the relevant period for the above objectives, if not strictly adhered to, in making an honest assessment, the purpose and career of the officer will be put to great jeopardy. **Hon'ble Supreme Court in the case of State Bank of India vs. Kashinath Kher (1996) 8 SCC 762** held that, object of writing the Confidential Report is two-fold, i.e. to give an opportunity to the officer to remove deficiency and to inculcate discipline. Secondly, it seeks to serve improvement of quality and excellence and efficiency of public service. The case of Kashinath Kher was also considered by the Hon'ble Supreme Court in the case of Yamuna Shanker Mishra.*

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31.We are of the considered opinion that the parameters given in Forms for evolution of Basic Qualities of an officer Part-II of Form Basic Assessment subsequently covers the various aspects of one officer which individually is different subject for overall assessment of personality of the officer which depends upon the combination of or independent assessment value and thereafter assessment of "potential value" of the officer and other facets to be judged at the different level. An officer can be judged on the basis of initially, by addressing to the various gamut of the person's personality and then by drawing objectively inference about his overall personality. This cannot be done mechanically or numerically and therefore, it is specifically provided in the instruction No.117 of the instructions of 1989 that, reporting officers are required to give overall figurative assessment of the officers in the box which is a box for grading Clause 117 reads as under:

“The reporting officers are required to give overall figurative assessment of the officers in the box provided for this purpose: commonly known as box grading. This assessment is NOT numerical average of the assessment made in other parts of the report but overall assessment which includes potential of the officer as well. Following need to be ensured by the reporting officers with regard to the box grading.”

32. The Clause 117 clearly says that ‘assessment is not a numerical average of the assessment made in other parts of the report but overall assessment which includes potential of the officer as well. The ‘potential of an officer’ is not any of the attributes mentioned in Form Part-II of Basic Assessment of the officer nor in Clause 12, 14 and 16 whereunder officers “regimental and command assignments” are assessed. Further more, we are of the considered opinion that any objective assessment of an officer guidelines gives them guidance to examine the officer and while doing so, the initiating officer is required to look into the aspects mentioned in the above Form and that Form alone is not the totality of the objective assessment and therefore, numerical calculation has not been made the criteria for objective assessment of the officer in “Box Grading” and for “potential assessment” of an officer is also required to be assessed though it is not mentioned in Part-II of the Form whereunder personal qualities are assessed by the Initiating Officer.’

21. With regard to Box Grading, Full Bench has observed as under :

“18. Learned counsel for UOI then relied upon the judgment of Hon’ble Supreme Court AVM SL Chabra (VSM) (Retd) vs. UOI reported in (1993) Supp 4 SCC 441 wherein Hon’ble Supreme Court held that, when argument was advanced that when adverse remarks in the ACR for the year 1986 have been expunged then the

*consequential moderating is required to be done in grading for the year 1987. Hon'ble Supreme Court held that neither the High Court nor the Supreme Court can moderate the appraisal grading of the officer for a particular year. The Hon'ble Supreme Court declared that, while exercising the power of judicial review, the Court shall not venture to assess and appraise the merit or grading of an officer. The Hon'ble Supreme Court, then maintained the grading of the appellant of that case and declared that appellant, in view of the grading 5 3 could not have been considered for extension. Learned counsel for UOI also elide upon the judgment of **Hon'ble Supreme Court delivered in the case of Sunil Shukla vs. UOI (2008) SCC 2 649**. One judgment of **Delhi High Court delivered in the WPC No.6575/2002 Lt Col (Time Scale) D.S. Pandey vs. UOI and others decided on 31.05.2005**. Another judgment of the **Delhi High Court delivered in writ petition (Civil) No.7074 of 2008 dated 17.07.2009 in the case of Major General V. S. Grewal vs. UOI & others**. Then relied upon the Bench judgment of the Principal Bench of the Tribunal delivered in **OA 217/2009 Brig. Rakesh Sharma vs. UOI dated 08.04.2010** and few other judgments. Reference of them may not be necessary because that will be multiplying the judgments on the same issue and the issue for consideration in the judgments was with respect to the award of the box mark for assessment of an officer.*

19. *Learned counsel for UOI vehemently submitted that admittedly as well as, as per the instructions of 1989, the "Box Grading" is not a numerical calculation of the marks given in various columns of attributes mentioned in (Part-II) of the Basic Assessment of ACR. The average of the marks given in the Part-II in Basic Assessment Form and marks given in "Box Grading" are*

independent assessment of the ratee officers. If the arguments advanced by the learned counsel for the petitioner is accepted, then it will result in holding that the "Box Grading" which was not a result of numerical calculation of the marks given in (Part-II) of the ACR Form for basic assessment will become numerically affected because of deletion of some of the lower marks in the columns of Form of Basic Assessment (Part-II) and in that situation, it will be self contradictory. Learned counsel for UOI fairly submitted that there may be possibility that the adverse entries in the ACR may be set aside on the ground of bias and malafides of the reporting officer, which may have direct connection with objectivity of the rating officer, but this situation depends on the facts of each individual case. Even a pen picture which is the soul of the skeleton of assessment as per Clause 113 of the instructions 1989 also may be affected in different fact situation, but there cannot be a straightjacket formula to declare that in which act situation pen-picture can change."

22. In view of above safe-guard provided in the provisions of Para 15 of the Army Order 45/2001/MS are not meant for mechanical use. Its strict compliance is a must. Its non-compliance shall invalidate the opinion of the Initiating Officer.

23. In the result the Original Application succeeds and is allowed to the extent that aforesaid two years' entries, i.e. for the period January 2007 to February 2008 are expunged and the impugned order dated 04.08.2011 to this extent is set aside. Respondents are further directed to hold special Review Board to judge the applicant's candidature for future promotion in accordance with rules, expeditiously, say within three months from the date a certified copy of

this order is served upon them. The respondents shall be at liberty to proceed in terms of clause (d) of Para 15 of the Army Order 45/2001/MS. The original record, which was summoned for our perusal shall be handed over to the OIC Legal Cell of the Indian Army at Lucknow.

24. No order as to cost.

(Air Marshal Anil Chopra)
Member (A)

(Justice D.P. Singh)
Member (J)

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Dated : March. 2016