

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW**

Original Application No. 403 of 2017

Friday, this the 24th day of August, 2018

Hon'ble Mr. Justice SVS Rathore, Member (J)
Hon'ble Air Marshal BBP Sinha, Member (A)

IC-48732N, Colonel Harish Khangarot, HQ 1 Corps, Provost Unit,
son of Shri Bhanwar Singh Khangarot, Mathura, PIN-281001.

.....Applicant

Counsel for the Applicant: **Col Y.R. Sharma (Retd)**

Versus

1. Union of India, Through Secretary, Ministry of Defence,
South Block, New Delhi-110011
2. Chief of the Army Staff, IHQ of MoD (Army), Army
Headquarters, South Block, New Delhi-110011
3. Military Secretary, Military Secretary's Branch, IHQ of MoD
(Army), Army Headquarters, New Delhi-110011
4. Brig S.S.Jakhar, Ex Commander, 322 Infantry Brigade,
Military Secretary, Military Secretary's Branch, IHQ of MoD
(Army), Army Headquarters, New Delhi-110011.

.....Respondents

Ld. Counsel for the Respondents: **Shri G.S. Sikarwar**

Addl. Central Govt. Counsel

ORDER

“Per Hon’ble Air Marshal BBP Sinha, Member (A)”

1. This application under Section 14 of the Armed Forces Tribunal Act, 2007 has been filed by the applicant for the following prayers;-

“(a) Hon’ble Tribunal may kindly be pleased to quash/set aside the result of No.2 Selection Board (Serial-166) communicated vide Military Secretary’s Branch/MS 6, IHQ of MoD (Army), Room No. 89B, South Block New Delhi-110011 letter No. A/21501/2SB/Result/Inf/MS-5 dated 17 May 2017, not empanelling the applicant to the rank of Brigadier filed as Annexure A-1.

(b) Honourable Tribunal may kindly be pleased to quash/set aside the orders of Government of India Ministry of Defence, New Delhi passed vide their letter No. PC- 36501/ 9533/ Inf/ 2006/ MS19/ 156/ SC/2016/D (MS) dated 08 Nov 2016,forwarded by MS Branch letter No. Rejecting the Statutory Complaint for non empanelment by No. 2 Selection Board, forwarded by MS Branch, Army HQ letter No. 36501/9533/ Inf/2006/MS19 dated 15 Nov 2016 filed as Annexure A-2.

(c) Honourable Tribunal kindly be pleased to quash/set aside the orders of Military Secretary Branch, Army Headquarters passed vide letter No. 36501/9533/ Inf/2006/MS19/ dated 23 Jan 2015 rejecting the Non Statutory Complaint for non empanelment by No. 2 Selection Board filed as Annexure A-3.

(d) Honourable Tribunal may kindly be pleased to quash/set aside the orders of Military Secretary Branch, Army Headquarters passed vide letter No. 36501/ 9533/ Inf/06/MS19 dated 22 Sep 2006 granting partial redress in the Confidential Report and directing to hold fresh Selection Board, but refusing to set aside complete Confidential Report filed as Annexure A-4.

(e) Honourable Tribunal may kindly be pleased to direct the Respondents/authorities to set aside/quash following ACRs in respect of the applicant.

(i) 10 January 2007 – 31 August 2007. The Confidential Report be suitable moderated positively as the grading was strict due to the environment prevailing only in Northern Command due to the policies initiated and implemented by Lt Gen HS Panag, GOC-in-C Northern Command. Rating tendency of Lt Gen HS Panag be corroborated at MS Branch as mentioned in para 40(e) of “Guideline for Rendering CRs” issued by Military Secretary and the applicant be suitably compensated in value judgment.

(ii) 30 September 2008 to 30 April 2009.The entire ACR be set aside/expunged due to being technically invalid.

(iii) 10 May 2009 – 31 Aug 2009 The applicant entered the new location "Banwat" as ordered by SD-4 IHQ of MoD on 04 Jun 2009 and took over responsibility of new appointment ie. Banwat Battalion on 20 Jun 2009. Hence the ACR is not due for applicant under provision of Para 77 of AO 45/2001/MS. The ACR be expunged from the records of applicant.

(iv) 28 Oct 1998 – 31 May 1999. The COAS has granted partial redress by expunging seven PQs/DPVs of CR 09/98-05/99. The entire CR be expunged from the records of the applicant in the light of judgment of Colonel Mahesh Kumar Singh vs. UOI and others OA No. 264 of 2014. The date of Judgment is 29 Jun 2017.

(f) Honourable Tribunal may kindly be pleased to issue/Pass an Order or direction to the Respondent No-3 to produce all Confidential Reports in reckonable period in Original for the perusal of the Honourable Court.

(g) The Honourable Court may graciously be pleased to scrutinize the complete ACR in reckonable period for the rank of Brigadier and set aside the aberrations and affected Confidential Reports.

(h) The Honourable Tribunal may graciously be pleased to issue direction/orders in appropriate form to forthwith consider the applicant for promotion to the rank of Brigadier by No. 2 Selection Board after quashing/setting aside the impugned Confidential Reports with the bench mark of batch mates of the applicant.

(i) Issue/Pass an order or direction as the Honourable Tribunal may deem fit in the circumstances of the case.

(j) Allow this Original Application with costs."

2. Brief facts of the case are that the applicant was commissioned in the Indian Army in the Infantry (The Grenadiers Regiment) with seniority of 10.06.1989. He continued in the Battalion in different assignments. The applicant while serving in the Battalion (15 Grenadiers) was awarded Commendation by the Chief of the Army Staff on 15.01.1993 and Commendation Card of GOC in C of Northern Command on 15.01.1994 for acts of bravery during Op RAKSHAK in Jammu & Kashmir. During the period 28.07.1996 to 14.10.1998 the applicant was posted as General Staff Officer (Intelligence) with HQ 64 Mountain Brigade in Operation ORCHID in

field area and thereafter, during 15.10.1998 to 05.09.2002 he remained posted in the Battalion in different appointments. During 30.06.2003 to 29.06.2004 the applicant was posted on United Nations Mission in Ethiopia and Eritrea as Chief of Information Analysis Cell.

3. The applicant attended Defence Services Staff College and obtained Instructor Grading in Junior Command Course with general profile 'Predominantly High Average'. The applicant was granted staff appointment of Colonel Q (Works) 2 in Head Quarter Southern Command. Under his Managership during the 32nd National Games, Hyderabad, the Archers of ASI represented the Service Team and won Gold Medal in Team Event.

4. In the month of April 2003, the No. 3 Selection Board for promotion to the rank of Colonel in respect of the applicant was held and the applicant was not empanelled for the rank of Colonel. Aggrieved, the applicant filed Non Statutory Complaint against non empanelment and also against Confidential Report of period 28 October 1998 to 28 February 1999 praying that the entire Confidential Report (CR) be expunged and the applicant be considered for promotion as a fresh case. On 22.09.2006, the Chief of the Army Staff granted partial redress to the applicant and ordered expunction of Review Officers (RO's) awards in PQs/DPVs of CR 9/98-5/99. The applicant was considered afresh and was empanelled for the rank of Colonel in October 2006. On approval, the applicant's posting order was issued for taking over as Commanding Officer of 19 Grenadiers.

The applicant was to assume charge of 19 Grenadiers on 05.02.2007. However, before the applicant could assume this appointment, Col G.S. Sarna, Commanding Officer of 29 RR (Grenadiers) was martyred in anti terrorist operations on 23.12.2006. The applicant was thereafter ordered to take over the command of 29 RR (Grenadiers) instead of 19 Grenadiers, which he took over and commanded it from 10.01.2007 to 11.04.2008. The applicant did well as a Commanding Officer. However, on 07.12.2007 he was operated for 'Prolapsed Intravertibral Disc' on 07.12.2007 in Research and Referral Hospital, Delhi. Based on employability restrictions the applicant was relieved of command of the 29 Rastriya Rifle (Grenadiers) on medical grounds and posted as Staff Officer to Master General of Ordinance. Applicant's Medical re-categorization Board was held on 18.06.2008 and he was upgraded to SHAPE-1. A decision was taken in consultation with various Commanders in chain of 12 Grenadiers to relieve Col SS Thakur, CO 12 Grenadiers forthwith and the applicant was earmarked to take over said 12 Grenadiers. The applicant's case is that he took over command of 12 Grenadiers on 30.09.2008 in a challenging situation as there were major disciplinary and man management issues in the Unit and because of this unprecedented situation and the urgency to take over command, he joined the Battalion without availing joining period. The applicant as Commanding Officer of a Unit in bad shape and having negative atmosphere worked very hard to improve inter-personal relations in the Unit and change the negative atmosphere into a

positive one. He also helped the Unit to work as a team and achieve its optimum operational potential.

5. The main grievance of the applicant is that he was specially selected to take over two Commands as Colonel in adverse situation. In his first Command (10.01.2007 to 11.04.2008), he was diverted from his earmarked Command of 19 Grenadiers to 29 Rashtriya Rifles when the Commanding Officer of 29 Rashtriya Rifles was killed in anti terrorist operation. In the second instance, the Commanding Officer of 12 Grenadiers was virtually removed for mishandling the Unit and he was sent to set things right as a Commanding Officer (03.09.2008 to 30.05.2009) in a Unit which was not doing well. The applicant claims that he has done well in both the appointments as a Commanding Officer but justice has not been done to his four ACRs he has earned during these two commands. He also claims that he has been unduly harmed in three of the ACRs. He also has certain grievances about his old ACR as Company Commander 15 Grenadiers which was partially redressed by the Chief of the Army Staff and his non-empanelment in Brigadier Promotion Board. His representation on these matters have been rejected by the respondents, hence this O.A.

6. The learned counsel for the applicant submitted that the applicant has grievance on four ACRs out of which three ACRs are as Commanding Officer of 29 Rashtriya Rifles (Grenadiers) and 12 Grenadiers, i.e. as Colonel and one relates to his Lt Colonel days' as

Company Commander of 15 Grenadiers. In his ACR of Company Commander, the Chief of the Army Staff had given partial relief. Grievances of the applicant with regard to four ACRs are enumerated as under:-

Ser No.	Period	Appointment/Location	Ramarks
1	30 Sep 2008 to 30 May 2009	CO. 12 Grenadiers/ Jaipur (Peace)	Cutting, Overwriting and Violations of Army Order AO/452001/MS
2	20 Jun 2009 to 31 Aug 2009	CO. 12 Grenadiers/ Banwat (Line of Control)	Non completion of 90 days physical service under Initiating Officer
3	28 Oct 1998 to 31 May 1999	Company Commander 15 Grenadiers/Nathua Tibba (Line of Control)	Partial relief. The ACR still remains low key and does not correspond to profile of the applicant
4	10 Jan 2007 to 31 Aug 2007	CO,29RR(Grenadiers)/Pattan (J&K)	ACR initiated in strict and biased environment and does not correspond to the performance

7. Learned counsel for the respondents submitted that so far as prayer (3) made by the applicant is concerned, if said prayer is to be granted it would not only amount to grant of partial expunction in the CR restoring the CR but would also result recalling of the order to consider the applicant by a fresh No. 3 Selection Board, thereby relegating the applicant to the position as existing on 22.09.2006 and the applicant would stand reverted from the present rank of Colonel to which he was approved consequent to No. 3 SB (Special Review) (Fresh) to the substantive rank of Lt Colonel. He also questioned the rational of learned counsel for the applicant raising the issue of Serial No. 4 ACR not corresponding to applicant's performance and the basis of such an assumption.

8. At this stage, learned counsel for the applicant made a statement at Bar that the applicant does not press for relief for all ACRs, i.e. he will not press for the reliefs (d) and (e) (i) and (iv), prayed for by him. Thus, he concluded that as far as ACR is concerned, he will restrict himself to relief against two ACRs only i.e. Serial Nos 1 and 2 above. Thus, we are left to deal and adjudicate upon prayers (a) which relate to setting aside the proceedings of No. 2 Selection Board not empanelling the applicant for promotion to the rank of Brigadier and prayers (b) and (c) for setting aside the letters of the MS Branch and Military Secretary Branch, Army Headquarters rejecting the statutory complaint filed by the applicant and prayer (e) (ii) and (iii) relating to setting aside of ACR for period as Commanding Officer i.e. 30 Sep 2008 to 30 April 2009 and 26 May 2009 to 31 Aug 2009.

9. Learned counsel for the applicant continued with his pleadings and summed up his grievance with respect the two ACRs. Regarding the first ACR in question i.e. 30 Sep 2008 to 30 April 2009, he submitted that the AR Scheme in Army is important for the growth of the organization as well as the individual. Therefore, it must be fair, transparent and as the guidelines given on the subject. He further added that in the Scheme of AR, the Initiating Officer (IO), Reviewing Officer (RO) and Senior Reviewing Officer (SRO) are independent in their assessment. However, in his AR as Commanding Officer of 12 Grenadiers (30 Sep 2009 to 30 April 2009) the IO having been impressed by the performance of the applicant decided to give him

outstanding report, but having written a report and having done all the formalities required for outstanding report, the IO under pressure from RO changed his assessment through over-writing and against the spirit of independent assessment by IO, RO and SRO. He drew attention to following evidence to substantiate his point:-

(a) The applicant was asked to fill the performa, 'Advance intimation of Outstanding' by the RO indicating his intention to give an outstanding report. A copy of the signed performa is at Annexure A-11 of the O.A.

(b) The RO has rated the applicant as '9' in Box Grading but has subsequently changed it to '8' without following the due mandatory procedure of transparency in violation of provisions of AO/45/2001/MS (Para-15) inasmuch as he has tried to change Box Grading '9' to Box Grading '8', then scored off the same multiple times and put a new '8'. While he has signed for the change, he has not put the date of change which is mandatory.

(c) The pen picture for outstanding assessment matches with original assessment of '9'

(d) The applicant's signature has not been taken on the changes.

(e) The IO avoided face to face contact with the applicant and did not obtain his signature on the Box Grading page. He had filled the ACR on 02 May 2009 and had 10 days' time as per rules to retain the ACR with him and obtain applicant's signature. Even though the RO was on extended joining time and was available at Jaipur, he avoided taking signature from the applicant. Sending assessment to ratee for signature by post is to be done as an exception and not the rule. On the date the RO has sent the AR to SRO, i.e. 06.05.2009 the applicant and the RO were both at Jaipur, but the RO avoided facing the applicant and taking his signature. Thus, the RO has violated the provisions of the Army Order (supra) by not taking applicant's signature on the changed AR.

(f) Acknowledgment Card after initiation of ACR was dispatched to ratee by Brig SS Jakhar on 02 May 2009. However, extract of ACR have been dispatched on 06 May 2009. Both these documents reflect completion of AR by RO and should have been dispatched on the same date. Difference in dispatch dates of both these documents suggests Change of mind/Afterthought in assessment and also in terms of avoiding ratee face to face.

(g) The applicant claims to have met RO in person who confided to having changed the assessment under pressure from Maj Gen Y.S. Rawat (RO).

10. Continuing with the grievance on the second AR for period 21 May 2009 to 31 Aug 2009, the learned counsel for the applicant pleaded that this ACR has been initiated in gross violation of paras 16 and 17 of the mandatory provisions of AO 45/2001/MS in that the applicant has not completed 90 days under IO, hence the ACR cannot be raised. He justified it on the grounds that applicant as Commanding Officer, 12 Grenadiers at Jaipur was ordered to move with his Unit to 93 INF BDE. The movement and routing of applicant is as follows:-

Ser No	Details	Date	Remarks
(i)	Move from Jaipur	17 May 2009	By Road
(ii)	Arrive at Corps Battle School (CBS) Sarol (J&K)	20 May 2009	For 14 days pre Induction Training
(iii)	Administrative Day	21 May 2009	
(iv)	Pre Induction Training at CBS, Sarol	22 May 2009 to 03 June 2009	14 days training
(v)	Move to Banwat from CBS Sarol	04 June 2009	Arrived at Banwat the same day at 1600 hrs
(vi)	Handing Taking over of 12 Grenadiers and 1 Assam	05 Jun to 19 Jun 2009	14 days of on the Job Training
(vii)	12 Grenadiers took over operational responsibility and applicant took over as CO, Banwat Battalion	20 June 2009	Relieved 1 ASSAM

11. Continuing with his submissions, learned counsel thus contended that the applicant had physically reached Banwat on 04.06.2009 at 1600 hrs and his Unit had assumed duties on 05 June 2009, hence he did not complete 90 days under the IO between 05 June 2009 and 31 Aug 2009 and therefore, this report of 21 May 2009

to 31 Aug 2009 should not have been raised. In any case, as per mandatory provision of the AO on the subject, 90 days physical service is a must for raising report. However, since he reached physically at Banwat on 04 June and assumed duties on 05 Jun, the whole concept of raising AR from 21 Sep 2009 to 31Aug 2009 is at fault and in violation of mandatory 90 days physical service provision under IO. This period spent in Training at CBS, Sarol, i.e. 20 May to 04 June 2009 does not qualify as physical service. He further emphasized that the applicant's service in chain of command with IO will only commence after he has physically reached Banwat as per orders of Army HQ and, therefore, the intervening period of travel and pre-induction training does not qualify as "Actually served under the RO". He has, therefore, concluded that this AR be set aside as it has been raised in violation of mandatory provisions of the Army Order (supra) on the subject.

12. Learned counsel for the respondents pleaded for the Original Application filed by the applicant to be dismissed on similar grounds as have already been put forth in the counter affidavit. He particularly argued that for the AR 30 Sep 2008 to 30 April 2009, the RO had never instructed the IO to change the Box Assessment from '9' to '8' and that it is a figment of imagination of the applicant. He also re-emphasised that the change of grading from '9' to '8' was done by the IO as per his own will and as per laid down rules on the subject and the IO has signed for this

change. On the second AR of 21 May 2009 to 31 Aug 2009, the learned counsel justified that the AR by the IO can be initiated including the training period. He further added that the applicant has himself signed and handed over the AR for this period and, therefore, he has no right to object for the same at this stage. At this point, learned counsel for the applicant interjected and clarified that the applicant submitted the AR because he was asked to submit the same by his IO. He has not submitted the same on his own free will. Learned counsel for the respondents concluded his arguments stating that Army is a pyramidal structure and only the best go up. The applicant has been considered in a very transparent and fair manner for promotion to the rank of Brigadier and he has been superseded in all the three Boards. He has no real grounds to challenge his being superseded, therefore, he is picking holes in his ARs and the system of assessment in Army. He pleaded for the Original Application to be rejected.

13. We have heard Colonel (Retd) Y.R. Sharma, learned counsel appearing for the applicant and Shri G.S. Sikarwar, learned counsel for the respondents at length and perused the records.

14. Based on the pleadings from the both sides, it is clear that the whole issue revolves around the non-empanelment of the applicant for promotion to the rank of Brigadier and his prayer to set aside other two ARs where, as per his claim the respondents have not been fair with him. We have given our anxious thoughts on this matter and we have

come to the conclusion that we have to primarily answer only one question i.e. is the AR of 30 Sep 2008 to 30 April 2009 and the AR of 10 May 2001 to 31 Aug 2009 in order and does it reflect the spirit of AO/45/2001/MS.

15. Thus, first we address the AR of 30 Sep 2008 to 30 April 2009. In this AR it is clear that the Initiating Officer SS Jakhar has graded the applicant as Outstanding and awarded him '9' in the box grading. However, subsequently there is clear evidence of attempt to change the box grading '9' to '8' by initially overwriting the box grading '9' and thereafter by scoring it off and replacing it with box grading '8' with a signature. In nutshell, issue to be decided is as to whether this over-writing and correction of box grading has been done in the spirit of and as per the mandatory provisions of para 15 of AO 45/2001/MS.

16. Additionally, in light of allegations of applicant, the question which gains importance to be adjudicated upon is whether the cutting and over-writing made by the Initiating Officer without endorsing the date below his signatures is fatal or not? The relevant provision of AO 45/2001/MS on use of Whitener, Erasures and Over-writing as given in para-15, being relevant, is reproduced 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 officer(s) and will bear the date of amendment. In case, the assessment is in the open portion, to be communicated to the ratee, the ratee will also authenticate the amendments with full signature and date.

(c) Violation of above provisions may render complete CR or a part, technically invalid.

(d) The authority for setting aside CR on technical ground, in accordance with the existing internal assessment procedure, 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.

17. Bare reading of para-15 reproduced hereinabove shows that revised assessment has to be authenticated with full signatures of the concerned Initiating Officer/Reporting Officer and will bear the date of the amendment. Clause (c) implicitly provides that a CR may be rendered technically invalid on account of use of erasers, over-writing and non-compliance of the aforesaid provision.

18. The respondents have produced before us the Original ACR dossier of the applicant. We have carefully gone through the same. On perusal of original AR it is clear that the provision of Para 15 (a) and (b) of the Army Order (supra) have been violated by the I.O. It is also clear that the IO being in the same station has avoided the applicant and not taken his signature on the open portion of the AR. Thus, considering all these issues and the fact that the IO has not put the date along with his signature, we conclude that there is a transgression of the mandatory provisions of AO 45/2001/MS.

19. The matter of correction and over-writing in AR is no more RES INTRIGA. In O.A. No. 18 of 2012 **Brigadier Rajeev Kumar Bhutani** dated 31st March 2016, this Tribunal has held as under:

“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. Excellsior 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 IO 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 Dharendra 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 11 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".

20. The next issue which needs to be adjudicated is the second AR under question for the period 21 May 2009 to 31 Aug 2009. The

contention of applicant is that this AR has been raised by IO without his completing 90 days of physical service under the IO. In this context, the next limb of submission of learned counsel for the applicant is that paras 16 and 17 of the AO 45/2001/MS are the mandatory provisions and non-compliance of the same could render the ACR invalid. Paras 16 and 17, being relevant, are reproduced as under:

“Criteria for initiation of CR”

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

(a) **The completion of 90 days physical service between then ratee and officer initiating the report.** The same can however be waived in exceptional circumstances, in organizational interest, for initiating of Adverse CR as specified 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 the 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 ratee 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, constituted a gap in reporting. The examples of period covered by CR and occurrence of gaps are at Appendix ‘C’.

21. It is contended by learned counsel for the applicant that para 77(c) read in conjunction with para 91 and Appendix ‘N’ of AO/45/2001 states that an officer of the rank of Colonel should reach the new location by 03 Jun 2009 to earn another ACR for that year. Applicant’s service of the Initiating Officer would commence only after he has physically reached and reported at the place of posting. It is submitted that the Unit was ordered to move to Banwat (Line of

control) to form part of 93 Infantry Brigade located in Poonch. The Unit departed from Jaipur on 17 May 2009 as per schedule mentioned below:

Ser No	Details	Date	Remarks
(i)	Move from Jaipur	17 May 2009	By Road
(ii)	Arrive at Corps Battle School (CBS) Sarol (J&K)	20 May 2009	For 14 days pre Induction Training
(iii)	Administrative Day	21 May 2009	
(iv)	Pre Induction Training at CBS, Sarol	22 May 2009 to 03 June 2009	14 days training
(v)	Move to Banwat from CBS Sarol	04 June 2009	Arrived at Banwat the same day
(vi)	Handing Taking over of 12 Grenadiers and 1 Assam	05 Jun to 19 Jun 2009	14 days of on the Job Training
(vii)	12 Grenadiers took over operational responsibility and applicant took over as CO, Banwat Battalion	20 June 2009	Relieved 1 ASSAM

22. Applicant on arrival to Banwat on 04 June 2009 at 1600 hrs, took over his new responsibilities at Banwant with effect from 05 June 2009. Thus, the period spent by the applicant undergoing pre-induction training at CBS, Sarol along with his unit from 20 May 2009 to 04 Jun 2009 (14 days) would not qualify as physical service under the new IO particularly so because CBS, Sarol was under the direct Command of 16 Corps and not 93 Infantry Brigade. Thus, with effect from 04 June to 31 Aug 2009, the applicant has not completed 90 days physical service between the ratee and the officer initiating the report. The period covered by the said report, i.e. 21 May to 31 Aug 2009 is not a true reflection of the physical service of the applicant under the I.O. Since, the applicant did not complete the minimum required mandatory physical service under the Initiating Officer, as such, since

the applicant had already earned his ACR for the period 30 Sep 2008 to 30 May 2009 in the same reporting year, therefore, the period from 31 May to 31 Aug 2009 should be treated as NIR by the MS Branch.

23. Thus, after considering all the issues in this matter, we are of the considered opinion that the applicant reached Banwat at 1600 hrs on 04 June 2009 and took over his duties and responsibility from 05 June, 2009. Thus, the period between his last report i.e. 31 May 2009 to 31 Aug 2009 should be treated as NIR. We therefore, set aside the AR of 21 May 2009 to 31 August 2009.

24. Submission of the applicant is that but for these two violated ACRs , he would have been given outstanding entries and would have been selected for the post of Brigadier. However, learned counsel for the respondents submits that even if outstanding entry is presumed for the applicant, with '9' box grading, even then the applicant may not have been empanelled on account of competitive merits and periodical performance in the Army. Be that as it may, so far as the facts of the present case are concerned, we are of the opinion that the procedural compliance of the mandatory provisions has predominance on the final outcome on validity of an AR. In the case of **Rajiv Kumar Bhutani** (supra), the co-ordinate Bench of this Tribunal has further held, to quote:-

“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 signatures, 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.”

25. In view of the above, the O.A. is accordingly **partly allowed**. Result of No. 2 Selection Board (Serial-166) contained in Annexure A-1 to the O.A., so far as it relates to the applicant is set aside. The two ACRs for the period 30 Sep 2008 to 30 April 2009 and 21 May 2009 to 31 August 2009 are expunged. Orders dated 23.01.2015 and 08.11.2016 (Annexures A-3 and A-2 respectively) are set aside to the extent it provides that all the Confidential Reports in the reckonable profile of the applicant are well corroborated, performance based and technically valid. Let a Special Selection Board be constituted within three months to consider the applicant for promotion to the rank of Brigadier with bench mark of immediate junior batch mates to the applicant in view of his changed profile. Since the applicant is retiring in January 2019, this entire exercise shall be completed within a period of three months from the date of this order.

No order as to costs.

(Air Marshal BBP Sinha)
Member (A)

(Justice SVS Rathore)
Member (J)

Dated: 24th August, 2018
anb