

**RESERVED**

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

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**O.A. No. 255 of 2012**  
**Tuesday, this the 30<sup>th</sup> day of October, 2012**

**“Hon’ble Mr. Justice B. N. Shukla, Member (J)**  
**Hon’ble Lt. Gen. R.K. Chhabra, Member (A)”**

**1. Brig. N.K. Mehta, VSM (IC-38397F)**

S/o (Late) Shri G.K. Mehta

Aged about 54 years

R/o 3 Swarg Marg

Mathura Cantt. (U.P.)

.....Applicant

By Legal Practitioner – **Shri K.C. Ghildiyal** and **Shri R. Chandra**,  
Advocates

Versus

1. Union of India, Through the Secretary, Ministry of Defence, Government of India, New Delhi 110 011.
2. Chief of the Army Staff, Integrated Headquarters of Ministry of Defence (Army), South Block, DHQ Post Office, New Delhi.
3. The Military Secretary, Military Secretary’s Branch, Integrated Headquarters of Ministry of Defence (Army), South Block, DHQ Post Office, New Delhi.
4. Major General P.V.K. Menon, VSM (Retired), Bungalow No. 86, K.K. Birla Lane, Lodhi Estate, Lodhi Road, New Delhi 110 003.

....Respondents

By Legal Practitioner - **Shri A.K. Singh**, Central Government Counsel  
and Col. Veerendra Mohan, Departmental Representative.

**ORDER**

**“Hon’ble Mr. Justice B.N. Shukla, Member (J)”**

01. This Original Application is filed by Brig. N.K. Mehta (hereinafter to be referred as the applicant) mainly for the following reliefs :

*“(i) To quash the impugned Confidential Report covering period from 01.07.2009 to 22.06.2012, the proceedings of No. 1 Selection Board held on 25 April, 2012 Qua related to the applicant for promotion to the rank of Major General and the letter dated 20 June, 2012 issued by respondent No. 3 (Annexure – A-1) ;*

*(ii) To Issue direction to the respondents to consider the case of the applicant for promotion to the rank of Major General afresh without taking into consideration the impugned Confidential Report as a fresh case of 1979 batch without any bench-mark and thereafter to promote him to the rank of Major General w.e.f. 2011 with all consequential benefits including arrears of salary and seniority etc.”*

02. **Resume of the O.A. :** The applicant was commissioned as Second Lieutenant in 1979 in Rajputana Rifles and he was permanently transferred to Army Ordnance Corps in 1984. He rose to the rank of Brigadier in 2008 and was conferred with the distinguished service award of Vishist Seva Medal (V.S.M.) in 2010. On 13-14 October, 2011, he was considered by No.1 Selection Board alongwith batch-mates of 1979 seniority for promotion to the rank of Major General but withdrawn from the said Board. He was again considered for promotion by No.1 Selection Board on 25 April, 2012 as a Fresh (Withdrawn) case but he was not approved for promotion to the rank of

Major General. It is the case of the applicant that due to impugned Confidential Report, which is totally invalid on grounds mentioned in the O.A., No.1 Selection Board proceedings was influenced which affected the suitability of the applicant for promotion.

03. In short reply and reply statement filed on behalf of the respondents, it is pleaded that for promotion to the rank of Major General individual profile of the officer and the comparative batch merit with same cut-off ACR are considered. It is further pleaded that assessment of the officer in ACR is regulated by SAO 03/05/1989 (now replaced by Army Order 45/2001/MS) and other relevant policies applicable at any given time and the impugned Confidential Report is not invalid and two columns 12 (b) and 12 (d) which were left blank by the Initiating Officer (I.O.) was corrected and the MoD directed that I.O.'s portion in the impugned CR be held technically invalid and case of the applicant was revised from 'Z' (Unfit) to 'W' (Withdrawn). His case was considered afresh by No.1 Selection Board convened in the month of April 2012 as Fresh (Withdrawn) case of 1979 batch of AOC with the cut-off CR 06/11 in compliance of the MoD's direction but the total mark obtained by the applicant were less than the marks that had been obtained by Brig. R.S. Rathore who had been earlier recommended for promotion for the lone vacancy for 1979 in October 2011 and the applicant was graded 'Z' (Unfit) by the No.1 Selection Board held in April 2012.

04. In Rejoinder Affidavit the impugned Confidential report has been assailed again for being declared invalid and it has been pleaded that no bench-mark was available to compare the case of the applicant with 1979 batch.

05. We have gone through the entire record of the case which were placed before us and having heard Shri G.C. Ghildiyal, Ld. Counsel for the applicant and Shri A.K. Singh, Ld. Counsel for the respondents with Departmental Representative Col. Veerendra Mohan.

06. **Core Issues** to be decided by us :

**No.1** – Whether the impugned Confidential Report covering the period from 01.07.2009 to 22.06.2010 is totally invalid on the grounds pleaded on behalf of the applicant in O.A. and rejoinder affidavit. If so, its impact qua promotional avenue of the applicant to the rank of Major General ?

**No.2** - Whether there was any bench-mark available to compare the case of the applicant with 1979 batch viz-a-viz Brigadier R.S. Rathore recommendation by No.1 Selection Board held on 13-14 October, 2011 ?

07. **Issue No. 1** : It is undisputed fact that two columns Para 12 (b) and Para 12 (d) on page 3 of the impugned Annual Confidential Report were left blank by respondent No. 4 who was the Initiating Officer (I.O.) then. Para 12 (b) relates to “Motivation and Creation of impact on his command in the face of adversities” and Para 12 (d) deals with “Emotional stability under stress and strain”. Why these two columns were unfilled by the I.O. ? Was it an intentional act or sheer omission ? It is the case of the applicant that this Confidential Report was received by him from respondent No. 4 vide his letter dated 20 July, 2010 (Annexure A/3 to the O.A.) and he found that apart from Paras 12 (b) and 12 (d), note at the bottom of page of 3 of the Confidential Report which contains details pertaining to communication of extracts to the Rates was also left blank. It was returned by the applicant to the M.S.

Branch vide his letter dated 28.09.2010 highlighting the fact of leaving column no. 12 (b) and 12 (d) blank by the Initiating Officer (I.O.) with copy to the I.O. (Annexure A4). Applicant approached respondent No. 3 with the same grievance and it is pleaded in O.A. that he specifically brought to notice of respondent No.3 that omission on the part of the Initiating Officer was a deliberate attempt to bring down the overall profile of the applicant viz-a-viz his batch-mates. He has also requested that down moderation of Review Officer (R.O.) and Senior Reviewing Officer (SRO) in the impugned Confidential Report be viewed in the light of the fact of his previous service record and profile. It appears from the record that on 23 January, 2012, the applicant received an extract of the Annual Confidential Report covering the period from 01 July 2009 to 22 June 2010 from the M.S. Branch vide letter dated 13 October 2012 wherein it was stated that the extract is being sent against after endorsement by the Initiating Officer at Paras 12 (b) and 12 (d) of the Annual Confidential Report with his signature and date but the same did not bear any authentication by the Initiating Officer with his signature and date. The following discrepancies have been pointed out on behalf of the applicant in order to assail the authenticity of the impugned C.R. :

- (i) *The addition/insertion in the impugned C.R. was done without any communication to the applicant ;*
- (ii) *In the original extract forwarded by the I.O. vide letter dated 20.07.2010 note at the bottom of page 3 of the Annual Confidential report was left blank but now in the extract forwarded by Initiating Officer and received by the applicant, the fact that the assessment was communicated to the applicant vide letter dated 20.07.2010 was mentioned which clearly pointed towards back date amendments and amount to tampering with the Annual*

*Confidential Report after having been received by Superior Officer.*

- (iii) After amendment/addition in the impugned Confidential Report, the applicant was asked to sign the extract after one and half year of initiation of the original Annual Confidential Report.*
- (iv) The signature of the applicant was also not obtained on the said part of the Annual Confidential Report even though, it was the open portion of the report.*

*Alongwith an affidavit the applicant has filed photocopies of initial Confidential report and amended/ added Confidential Report for comparison and to substantiate the above allegations.*

- (v) Provisions of the Army Order 45/2001/MS which regulates assessment of Officer in ACR is as under :*

*Relevant Para 15 (a) to (c) – Any revised or changed assessment by the reporting officer must be **authenticated with his full signature and should bear the date of amendment**, the assessment must be **communicated to Ratee**, who is also required to authenticate the amendment **with full signature and date**. Any infraction or violation of these provisions render the **ACR technically invalid**.*

- (vi) In his letter dated 02 February 2012 (Annexure A8 to the O.A.) the applicant has pointed out above anomalies. He had again sent representation on 26 March 2012 with a request to set aside the impugned ACR (Annexure 9 to the O.A.) but no decision of Military Secretary has been communicated to the applicant. In his letters the applicant had shown apprehension that deliberate attempt has been made to downgrade overall profile of the applicant viz-a-viz his batch-mates. He had also pointed out that there was no inadvertent omission in keeping two columns of the impugned ACR blank and it was deliberate attempt to bring down his overall profile.*

In detailed counter reply, it is admitted in Para 15 that the applicant wrote to Military Secretary's Branch and made

representation claiming that impugned C.R. is technically invalid. It is also admitted that the applicant had sought interview with the Military Secretary (M.S.) on 23 March 2012 as well. Annexure R-3 is copy of MoD ID No. 9 (20/2011 – D (MS) dated 24.04.2012 relevant portion of which is reproduced as under :

*“2(b) revision of grading in respect of Agenda No. 3 Brig. N.K. Mehta from ‘Z’ (Unfit) to “Withdrawn” and to consider his case afresh **after setting aside the assessment of I.O. in ACR 09/09-06/10 on technical grounds** and after restoration of moderated ACR’s”.*

Above shows that impugned ACR was not declared “technically invalid”, which is not in compliance with Army Order 45/2001/MS. The impugned ACR ought to have been expunged being “technically invalid”. The decision regarding setting aside of the I.O.’s portion from the impugned ACR was taken much later.

(vii) In Para 6 of detailed counter reply, it is pleaded that no prejudice was caused to the applicant by the I.O. in leaving two columns in the beginning unfilled and subsequently filling the same with the gradings of “Outstanding” (9). We are of firm view that subsequent filling of column by the I.O. would not justify the harm already done to the applicant earlier as all other Reviewing Officer did not have any knowledge of the applicant being graded “Outstanding” (9) in these two important personal qualities. Applicant has given his overall service profile (Annexure A2). He was considered for promotion to the rank of Major General by No.1 Selection Board held on 13-14 October 2011. His Annual Confidential Report commencing from

01.07.2009 to 22.06.2010 was not complete till then due to unfilled columns 12 (b) and 12 (d) and this was reason that the applicant was directed to be considered for promotion as Fresh (Withdrawn) case. 'Prejudice' to the applicant was caused and we dispel this plea in counter reply that no prejudice was caused to the applicant. Omission to fill two columns in the impugned ACR is not inadvertent but appears to have been intentional otherwise there was no occasion to leave two columns blank which were clearly visible to the I.O. and to the Reviewing Officer and Head of Service and it certainly affected the promotional avenue of the applicant. Issue No.1 is decided accordingly.

08. **Issue No.2** : Applicant was considered for promotion to the post of Major General in 1 Selection Board held on 13-14 October 2011 alongwith other Officers of his 1979 batch but he was recommended 'Z' (Unfit) by the No.1 Promotion Board. The Selection Board recommended Brig R.S. Rathore by awarding the grading of 'B' (Fit). In para 2 of counter reply, it is pleaded that MoD in the capacity as the Competent Authority was of the opinion that the non-authentication of the subsequent filling of the two columns in the ACR by the I.O. is a technical violation and case of Brig. N.K. Mehta be revised from 'Z' (Unfit) to 'W' (Withdrawn). Applicant's case was considered afresh and he was placed before the Board convened in the month of April 2012 as a Fresh (Withdrawn) case of 1979 batch but **with cut-off CR 06/11**. Number of vacancy was one. It is submitted on behalf of the respondents that the marks obtained by the applicant was less than the marks that had been obtained by Brig.



R.S. Rathore who had been earlier recommended for the lone vacancy of 1979 batch in October 2011 and the applicant was graded 'Z' (Unfit) by the No.1 Selection Board held on **25.04.2012**. It is admitted fact that Brig. R.S. Rathore was the only Officer who was recommended 'B' (Fit) for promotion by No. 1 Selection Board held in October 2012 but the main issue is that No. 1 Selection Board is a Recommendatory Authority and MoD is the Competent Sanctioning Authority and **approval** for his promotion has only been given on 23.08.2012 by the MoD (vide Annexure A/8 filed on behalf of the applicant with an affidavit). On direction by MoD, case of Brig. R.S. Rathore could not be considered due to D.V. Ban (Para 9). Brig Rathore filed O.A. No. 88/2012 before the Principal Bench, Armed Forces Tribunal, New Delhi assailing the validity of Court of Inquiry proceeding against him and vide Tribunal's order dated 29 May 2012 Court of Inquiry proceedings convened against him on 23.10.2010 and finalized on 06.01.2012 alongwith attachment order dated 02.03.2012 were set aside. This fact is pleaded in counter reply but no such order has been produced before us. In rejoinder affidavit, it is pleaded that Court of Inquiry against Brig. Rathore was quashed on technical ground and the allegation against him are still intact. Be that as it may, but it is clear that on 25.04.2012 there was D.V. Ban against Brig. Rathore. Applicant was considered for promotion to the rank of Major General as Fresh (Withdrawn) case on 25.04.2012 for the lone vacancy of 1979 batch. Till then Brig. Rathore was **not approved** for promotion. His case was kept pending for long and it is submitted on behalf of the applicant that Brig. Rathore was involved in a disciplinary case even then respondents awaited for his exoneration

as if the vacancy was reserved for him and that such type of averments from the departmental authorities are unfortunate.

09. Rival submission is that number of vacancies in higher ranks are limited and promotion in Army from Major to Lt. Colonel and above rank are decided through Selection Board (policy contained in Para 108 of the Regulations for the Army, 1987 (Revised Edition) alongwith Army HQ letters as shown in para 1 of the short counter reply. It is upto the Selection Board to assess the suitability for promotion and **this assessment is recommendatory in nature and not binding until approved by the Competent Authority.** In Para 108 of Regulation of the Army, 1987 (Revised Edition), Constitution and Duties of Selection Board have been defined. It is submitted that the Hon'ble Supreme Court has held that the Courts should not substitute the findings of the Selection Board by its own Judgments. He has cited the following Judgments :

**“1. Sureinder Shukla versus Union of India and Others (2008) 2 Supreme Court cases 649,** wherein it has been held that while considering an Officer for promotion to a selection rank, the Selection Board takes into consideration a number of factors such as war/operational reports, course reports, ACR, performance in Command and staff appointments, honours and awards, disciplinary background and selection/rejection is based upon the overall profile of an Officer and comparative merit within the batch as evaluated by the Selection Board and it is not for the court exercising power of judicial review to enter into merit of the decision unless malafide is alleged.

2. **Maj. Gen. S.P. Sinha versus Union of India and Others** W.P. (c) 4411/2012 pronounced on 06.08.2012 by Hon'ble Delhi High Court. In this judgment Hon'ble court has also considered ratio of Surinder Shukla's (Supra) case.

3. **Maj.Gen. Sp. Sinha versus Union of India and Others** decided by Court No.2 of Armed Forces Tribunal, Principal Bench, New Delhi in O.A. No. 511 of 2011 delivered on 30.03.2012. In this case, Selection Board's opinion was not disturbed which was based on prevailing practice of comparing officers profile.

4. **Lakhvinder Singh versus Union of India and Others (2008)** S.C.C. 648 Supreme Court. In this case it was held by the Hon'ble Apex Court in absence of prejudice and malafide, the Selection Board proceedings should not be interfered with.

Ld. Counsel for the applicant has cited judgment of Delhi High Court given in case of Col. Prem Sagar versus Union of India and Others W.P. Civil No. 5288/2008 and submitted that in identical case complete ACR was expunged.

10. There are no two opinions that ordinarily Selection Board's recommendation should not be disturbed but if prejudice, bias or malafide is shown then it would require interference. In the present case, we have found that impugned Annual Confidential Report of the applicant was technically invalid, even then it was considered by the Selection Board held on 13-14 October, 2011 and 25 April 2012. 'Prejudice' has been caused to the applicant due to invalid impugned ACR. He was deprived of his legitimate due. Here we are not considering overall profile and merit of the applicant viz-a-viz other 1979

batch-mates and it is left to be decided by the No. 1 Selection Board. There is no case for the applicant's case to be bench-marked to that of Brig. Rathore and as such suitability of promotion of the applicant to the rank of Major General requires to be decided without taking into the impugned Confidential Report and without any bench-mark.

11. Ld. Counsel for the respondents has raised this point that applicant instead of availing remedy under section 27 Army Act has directly approached this Tribunal. It is submitted on behalf of the applicant that he has mentioned this fact in Para 6 of the O.A. giving reasons for not availing the remedy. Language of Section 27 Army Act shows that it is not mandatory in nature. Relevant portion is referred here as under :

***“27. Remedy of aggrieved officers – Any officer who deems himself wronged by his commanding officer or any superior officer and who on due application made to his commanding officer does not receive the redress to which he considers himself entitled, may complain to the Central Government in such manner as may from time to time be specified by the proper authority”.***

12. Accordingly, we quash the impugned Confidential Report covering the period from 01.07.2009 to 22.06.2010, the proceedings of No.1 Selection Board held on 25 April 2012 so far as it relates to the consideration of the applicant for promotion to the rank of Major General. We direct the respondents to consider the case of the applicant for promotion to the rank of Major General as a Fresh case of 1979 batch of Army Ordnance Corps independently without any bench-mark. Entire drill requires to be considered as early as possible preferably within three months from the date certified copy of order is

made available to Ld. Counsel for the respondents, till then one vacancy shall be kept vacant. With this direction the Original Application is disposed of.

13. No order as to costs.

**(Lt. Gen. R.K. Chhabra)**  
**Member (A)**

**(Justice B.N. Shukla)**  
**Member (J)**

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