

SEE RULE 102 (1)

ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOLKATA

ORIGINAL APPLICATION : O.A. NO. - : 141/2017

DATED : THE Seventh DAY OF DECEMBER, 2018

CORAM

HON'BLE DR. (MRS.) JUSTICE INDIRA SHAH, MEMBER (JUDICIAL)

HON'BLE LT GEN GAUTAM MOORTHY, PVSM, AVSM, VSM, ADC,
MEMBER (ADMINISTRATIVE)

APPLICANT (S) : IC-42305F Brig Tushar Misra
S/o Late Shri P. K. Misra
Presently posted as DDG, NCC Dte,
Bihar & Jharkhand, Rajender Path
PATNA – 800 019 (BIHAR)

Versus

RESPONDENT (S) : (1) The Union of India, service through
The Defence Secretary
Ministry of Defence
South Block, DHQ, PO,
New Delhi – 110 011

(2) The Chief of the Army Staff
Army Headquarters
Integrated HQ of MoD (Army)
DHQ PO, New Delhi – 110 011

(3) Military Secretary
Integrated HQ of MoD (Army)
DHQ PO, New Delhi – 110 011

(4) Lt Gen PM Hariz, PVSM, AVSM, SM, VSM
GOC-in-C
Southern Command
PIN – 908 541
C/O 56 APO

Counsel for the applicant (s) : Mr. Rajiv Manglik, Ld. Advocate
Mr. Aniruddha Datta, Ld. Advocate

Counsel for the Respondent (s) : Mr. Ajay Chaubey, Ld. Advocate

Present (1) : Maj Vishal Kumar, OIC Legal Cell (Army)
HQ Bengal Sub Area, Alipore
Kolkata – 700 027

(2) : Maj Gaurav Verma
AMS (Legal)
Military Secretary's Branch
Integrated HQ of MoD (Army)
DHQ PO, New Delhi – 110 011

ORDER

**PER LT GEN GAUTAM MOORTHY, PVSM, AVSM, VSM, ADC,
MEMBER (ADMINISTRATIVE)**

1. This application has been filed U/S 14 of Armed Forces Tribunal Act, 2007 (In Short – The Act). The applicant is a serving Army Officer in the rank of Brigadier, has been aggrieved by his non-empanelment for promotion to the rank of Major General held by the No. 1 Selection Board in October, 2016 as also aggrieved by the rejection of his Statutory Complaint dated 10.01.2017 (Annexure A-1 of the OA) vide Govt. of India, Ministry of Defence (Army) letter No. A/45501/09/2017/SC/MS (X)/115/SC/2017 – D (MS) dated 18 May 2017 (Annexure A-2 of the OA).

2. At the outset, the Ld. Counsel for the applicant states that the applicant is a well qualified officer of the Artillery and had tenanted a number of important appointments in his service career and achieved the rank of Brigadier. He stated that he was surprised to learn that he was not approved for promotion to the rank of Major General. He said that he apprehends that the ACR for the period from Jan 2010 to Dec 2010, during his tenure at the HQ Bengal Area was spoiled because he had some differences with his then Initiating Officer (I.O.). He further stated that he did not appeal against his ACR as he had been promoted to

the rank of Brigadier, but now he felt that it has adversely affected him. He has also assailed two reports that he had earned while he was posted as Commander 36 Artillery Brigade covering the period from July, 2011 to January, 2012 and July, 2012 to December, 2012 on the grounds that these have been subjective.

3. Here too, he has stated that his relationship with his General Officer Commanding (GOC) got strained due to various reasons and hence, the GOC would not have graded him objectively. He has further stated that since the GOC was also a Member of No. 1 Selection Board (SB) for his selection to the rank of Major General in October, 2016, he would be influenced by the other Members of the Selection Board and reduced the marks of Value Judgements.

4. Ld. Counsel for the applicant has also stated that he filed an O.A. before the Hon'ble Bench of Armed Forces Tribunal, Chandigarh in 2017 being O.A. No. 503/2017 for early disposal of his Statutory Complaint which was disposed of vide the order of the Bench dated 21.03.2017. He further stated that the Statutory Complaint was disposed of without granting any relief to his applicant in spite of delay in initiation of his ACR which should have been held to be technically valid.

Thus he sought the following reliefs :-

- (a) To call for the records of all the selection boards held for consideration of the applicant for the rank of Maj Gen.
- (b) To declare the action of the respondents as unjust, arbitrary and illegal.

- (c) To quash and set aside the result of the selection board declared vide letter dated 29 Dec 2016 qua the applicant for the rank of Maj Gen.
 - (d) To quash and set aside the order dated 18 May 2017 rejecting the statutory complaint of the applicant against non-empanelment.
 - (e) To quash and set aside the assessment of the IO in the ACR for the period 7/11 – 6/12 and 7/12 – 12/12 being subjective and written with vindictiveness and also quash and set aside the assessment of RO and SRO being influenced by the assessment of IO.
 - (f) To quash and set aside the assessment of the IO in the ACR for the period 9/10 – 12/10 being subjective and biased.
 - (g) To direct the respondents to re-consider the applicant for promotion to the rank of Maj Gen by No 1 Special Review (Fresh) selections boards.
 - (h) To grant all consequential benefits for grant of rank of Maj Gen including pay and allowances and seniority w.e.f. the date the other course mate / immediate junior of the applicant has been granted.
 - (j) To award exemplary costs in favour of the applicant.
 - (k) To pass such other and further orders which their Lordships may deem fit and proper in the existing facts and circumstances of the case.
5. The Ld. Counsel Respondents on the other hand have stated that the ACRs were initiated and reviewed were in fair and just manner. The applicant was not

empanelled due to being low in overall merit. They have also pointed out that the applicant was silent for about 6 years and then he rushed to the Regional Bench, Chandigarh of the Armed Forces Tribunal in order to cover the delay and latches for over 7 years. The Respondents have stated that the delay was not condoned by the Armed Forces Tribunal, Regional Bench, Chandigarh, and that O.A. (O.A. No. - 503/2017) was dismissed on 21.03.2017.

6. Further, the Ld. Counsel for the respondents have also stated that the applicant has not impleaded certain other officers other than his I.O. (Respondent No. 4) against whom certain personal allegations have been made and the applicant had not mentioned in Para No. 7 of the present O.A. regarding the previous O.A. filed in the Armed Forces Tribunal, Regional Bench, Chandigarh and in the earlier O.A., the same issues and ground of prayer were raised.

7. In addition, the Ld. Counsel for the Respondents have stated that the applicant was considered for promotion in accordance with the rules and regulations in vogue and that the Courts cannot substitute the findings of the Selection Board. In this context, the Respondents have submitted the following judgements :-

- (a) UOI Vs Lt Gen RS Kadyan, (2000), 6 SCC 698.
- (b) Maj Gen IPS Dewan Vs UOI & Ors (1955), 3 SCC 383.
- (c) AVM SL Chhabra, VSM Vs UOI, 1993 (Supp. (4) SCC 441.
- (d) Dalpat Abasheb Solunke Vs BS Mahajan, (1990) 1 SCC, 305.
- (e) Lt Col Amrik Singh Vs UOI, (2001), 10 SCC 424.
- (f) Major Surinder Shukla Vs UOI & Ors, (2003) 2, SCC 649.
- (g) UOI and Others Vs SK Goel & Ors, 2007 (14) SCC 641.
- (h) UOI and Others Vs Samar Singh & Ors, 1966 (10) SCC 555.
- (i) RS Dass Vs UOI & Ors, 1986 (Supp.), SCC 617.

Assessment and Order

8. We have considered all the pleas of the applicant as well as the Respondents. At the outset, we tackle the objections raised by the Respondent about the earlier Original Applicant which was filed in the Chandigarh Bench of the Armed Forces Tribunal. The OA was simply related to the expeditious disposal of the Statutory Complaint and nothing else. The operative portion of the Order is reproduced below :-

“However, looking into the facts of the case and the limited prayer of the applicant, we direct that his statutory complaint be decided expeditiously.

With these directions, the case is disposed of.”

9. Hence, it is observed that the prayers in the O.A. filed in Chandigarh and here are completely different and that the order by the Chandigarh Bench has no bearing on this O.A.

10. In so far as the objection regarding the non-joinder is concerned, it is observed that no allegation is made out against Col AK Mehta and Lt Gen SK Singh (other officers not impleaded) as asserted by the respondents. However, it is seen that the applicant has made allegations against Lt Gen PM Hariz, PVSM, AVSM, SM, VSM who has was the I.O. of the appellant and he has been named as Respondent No. 4.

11. In so far as the delay in filing this O.A. is concerned, the appellant had submitted a statutory complaint on 10.01.2017. The said statutory complaint was rejected on 18.05.2017 and on 20.10.2017 the OA was filed in this Bench. Thus, there has been no delay or latches on the part of the appellant and all the objections raised by the Respondents are over ruled.

12. Thereafter, the Bench called for all the records, which were placed before us by Major Gaurav Verma, AMS (Legal), Integrated HQ of MoD (Army), MS Branch. The Bench has since perused all the relevant Confidential Reports (CRs), Member Data Sheets (MDS), Noting Sheets analyzing the Statutory Complaint and the Merit List of his Batch. With respect to the C.Rs, we observed that all the three impugned CRs are well corroborated, justified, objective and performance based. No aberrations are found.

13. We observe that there were 33 Brigadiers of the Artillery who were considered for promotion to the rank of Major General and out of which only 15 were approved. The appellant's rank in the merit list stands at 27 out of 33.

14. With respect to the issue of Value Judgement marks, we observe the Value Judgement marks given to the applicant are proportionate to his quantitative marks and in his ranking in merit is the same i.e., 27 out of 33 with, as well as without, Value Judgement marks.

15. Besides the above, on the technical issue of delay, on initiation/ endorsement of the C.Rs covering the period from July, 2012 to December, 2012, it is seen that the appellant submitted his C.R. on 04.12.2012. The I.O. endorsed the same C.R. on 08.02.13 after which the R.O. endorsed on 29.04.2013. Subsequently, the C.R. was endorsed by the F.T.O. on 04.06.2013 and thereafter by the Head of Arms on 21.06.2013 and by the S.R.O. on 29.07.2013. The C.R. followed the channel of initiation / endorsement as laid down in Para 99 to 101 of the Army Order 45/2001/MS.

16. The Ld. Counsel for the respondents have referred to the following judgements :-

(a) In G. Mohanasundaram Vs R. Nanthgopal & Ors (2014) (13) SCC 172, Paras 11, 23 & 24 in which it was held that the period specified for initiation of endorsement of C.Rs is directory in nature and not mandatory. Violation of the same does not render the C.R. invalid.

(b) In O.A. 134/2015, Col Dinesh Singh Vs UOI & Ors, the Regional Bench, Jaipur of Armed Forces Tribunal on 23.12.2015, in Para 46 & 47 ruled that provisions of Para 70 of the A.O. 45/2001/MS is merely directory in nature and therefore, merely because C.Rs were endorsed after considerable delay by R.O. and S.R.O., no presumption of bias or subjectivity can be raised.

17. Ld. Counsel for the appellant referred to a case of Maj Gen KK Sinha, SM, VSM Vs UOI and Ors, in O.A. No. 74/2015 in the Principal Bench of Armed Forces Tribunal, New Delhi decided on 29.04.2015 in which it is noted that the C.Rs were interfered on the ground of malice in law which should not have taken place.

18. Para 21 of the Judgement is set out as under :-

“Human nature being what it is, under the facts and circumstances of the case is not possible to rule out existence of any sort of prejudice/malice. In this view of the matter, we have no hesitation in holding that process of reviewing the petitioner’s CRs covering the period from 23 Oct 2012 to 30 Jun 2013 was vitiated by malice in law as the delay of more than 60 days, attributable to the RO in forwarding the same to the SRO had resulted in a situation wherein the SRO had the occasion to review all the three CRs earned by the petitioner in the rank of Major General within a period of 40 days just preceding consideration of his case by the SSB for promotion to the rank of Lt Gen and the process, in effect, had ultimately resulted in down-grading of an outstanding CR, recorded by the IO after closely assessing the performance of the petitioner, to an Above Average Report.”

19. The moot point in the Maj Gen KK Sinha judgment (supra) is that the delay resulted in a situation wherein the SRO reviewed 3 CRs of the officer within a period of 40 days preceding his Selection Board. Here, this is not the case and the delay in initiation of the C.R. by the I.O. and endorsement by the other Reporting Officers in the reporting chain is not a case of malice in law. Although delayed, the delay does not render the CR technically invalid. Hence, no malice in fact or bias can be attributed to the reporting officers.

20. Thus, it is seen that nothing survives in this O.A. (O.A. No. – 141/2017) and it is liable to be dismissed.

21. Hence, the O.A. (O.A. No. – 141/2017) is accordingly dismissed.

22. No order as to costs.

23. Original documents held (if any) to be returned to the Respondents by the Registry on proper receipt.

24. Let a plain copy of this order be supplied by the Tribunal Officer to both the parties after observing all usual formalities.

(LT GEN GAUTAM MOORTHY)
MEMBER (ADMINISTRATIVE)

(JUSTICE INDIRA SHAH)
MEMBER (JUDICIAL)