

**ARMED FORCES TRIBUNAL CHANDIGARH REGIONAL BENCH
AT CHANDIMANDIR**

T.A No.159 of 2010
(Arising out of CS No.140 of 2005)

Jit Ram	...	Petitioner
v.		
Union of India and others	...	Respondents

ORDER
23.09.2010

Coram : Justice N. P. Gupta, Judicial Member

Lt Gen. N. S. Brar (Retd), Administrative Member

For the Petitioner ... Brig. Rajinder Kumar, Advocate

For the Respondents ... Mr. Brijeshwar Singh, CGC

Per Justice N.P.Gupta

This is a transferred matter, being Civil Suit having been filed in the Court of Civil Judge, Senior Division, Ambala on 15.04.2005, praying for declaration that ACR for the year 2002-2003 initiated by Major Pankaj Devgan is liable to be expunged and after expunging the said report, the plaintiff is entitled to next promotion as Subedar Major from the date, his juniors were promoted, with consequential reliefs.

The suit was transferred at the stage when evidence of the parties was over and the case was fixed for final arguments.

The material averments of the plaint are that the plaintiff, in Para 3 alleged to have done five courses mentioned therein with the performance out put as mentioned therein. Then, in Para 8, it

was pleaded that the ACR for the year 2002-2003 was initiated by Major Pankaj Devgan, who had nothing to do with the plaintiff's functioning and was illegally initiated by him. Then, in Para 9 it is pleaded that the plaintiff's next promotion board was held in September, 2003 wherein he was rejected and he strongly feels that because of ACR for the year 2002-2003 initiated by Major Pankaj Devgan and lack of JMT/JLT course, the plaintiff was placed low in merit. It was also pleaded that the plaintiff was not allowed to undergo the above course, though his name was supposed to be sent by ASC South Records for which the plaintiff requested for a number of times well in advance. It is also pleaded that the DPC was just in the sake of name and since the plaintiff was not allowed to undergo the said courses, overall figurative grading became low. Thus, the whole thrust of the suit is that the plaintiff did not come to be selected, firstly on account of illegal initiation of ACR by Major Pankaj Devgan, and secondly, as being not detailed for JMG/JLT course, despite request, and on that basis, the above reliefs have been claimed. To repeat, rather stress, no averment is made in the plaint about the plaintiff's entitlement to any merit on the basis of courses said to have been done, as mentioned in Para 3 of the plaint.

The suit was contested by filing reply wherein in Para 7, it was shown that ACR of the plaintiff was above average as he had earned 8.5 marks and was not superseded on account of ACR. Rather, the reason of supersession was his low merit as he could not find place in the Select Panel drawn as per the vacancies available due to his low overall merit. In Para 9, it was pleaded that DPC was held on 13th to 15th of November, 2000 wherein the plaintiff's name

was considered and he scored 83.6035 marks, while only 16 vacancies were there and cut of marks were 86.7293 upto which the persons were promoted. Then, in September, 2003, second chance was given by the DPC which was held for 30 vacancies and therein the petitioner scored only 83.6621 points, while those who secured 86.3651 and above, only could get selected. In the first DPC, the plaintiff stood at 40th position, while vacancies were 16, and in the second DPC, he stood at 56th position, while vacancies were only 30. Thus, non-selection of the plaintiff was sought to be supported.

Significantly, rejoinder has been filed by the plaintiff on 11.10.2006 merely denying the averments of the written statement and reiterating the corresponding paras of the plaint, but significantly nothing has been explained regarding the merit position scored by the plaintiff in the two DPCs nor any issue was joined by method of assessment of merit awarded on points/marks or the correctness of the points/marks, scored by the plaintiff nor any thing was pleaded about the plaintiff's entitlement to any particular extent of points or marks for the courses said to have been done by him, as detailed in Para 3 of the Plaint.

Of course, on 20.01.2006, the plaintiff filed an application for production of documents and interrogatories, but then as we get from order sheet of the Trial Court dated 11.02.2006, that reply to the interrogators along with requisite documents has been filed and the application was held to have become infructuous.

Then, when the matter came before this Tribunal on 21.07.2010, both the learned counsel gave out to be one to the effect that no more documents are required to be filed and the case is ripe

for arguments. Accordingly, the matter was heard finally on 10.10.1997.

Arguing the matter, learned counsel for the petitioner straightway invited our attention to Army Instructions dated 18.01.1993 and passed on copy thereof by submitting that the instructions are already there on record, but the copy on record may not be legible. We conveyed to the learned counsel that the instructions are available at page 635 of the file. The learned counsel then referred to the Appendix appended to said instructions dated 10.10.1997, but no such appendix is produced as may be appended to instructions dated 10.10.1997. However, the same is appended in the copy handed over by the learned counsel.

Learned counsel referred to Para 4(c) of Appendix to Army Instructions dated 10.10.1997 and submitted as to how many points are to be admissible for the courses mentioned therein. What we find therein is that in Para 4(c), the points available have been mentioned on the basis of the grading obtained in the course and does not prescribe any marks for any particular course to be admissible for judging the merit. We may gainfully quote the provisions of Para 4(c) which read as under:-

“Performance on courses attended by an individual in any rank during his career will carry maximum 5 points. Heads of Arms/Services will nominate courses (and points to be awarded to them) as per the requirements of each Arm/Service. Points on Course may be awarded as under:-

(a) Distinction/AXI/AI/QFI – 1.00 point

(b) AX/A/BXI – 0.75 point

(c) B X/ B – 0.50 point ”

This is one aspect of the matter.

The other submission made, according to the learned counsel, was that according to the marks admissible on the basis of grading as mentioned in Para 4(c) above, , the plaintiff earned 3.4 marks, which, if added to the marks shown to have been earned in the DPC, the plaintiff stands to score in merit promotion.

We may stress here that obviously and rightly no submissions were made by learned counsel on the anvil of ACR for the year 2002-2003. Nevertheless, the ACR was initiated after due authentication by the petitioner with regard to its technical correctness as accepted by him and signed as such on his ACR at Page 233 and admitted in his evidence at Page 609.

Learned counsel for the respondents on the other side, invited our attention to the pleadings of the plaint, and Paras 7 and 9 of the written statement, and submitted that the whole thrust of the suit was on the basis of assumption of ACR of 2002-2003 to be adverse while, as a matter of fact, it is above average and the grounds, which are urged during the course of arguments, were never made the basis of claim by the plaintiff and thus, the plaintiff is not entitled to any relief.

In rejoinder, learned counsel for the petitioner submitted that the merit was not prepared by DPC separately and defendants have not filed any affidavit to the effect that the courses done by the

plaintiff as per Para 3 of the plaint, did not count for merit for the purpose of promotion in question.

We have considered the submissions of learned counsel for the parties and have also gone through the record.

At the outset, we are constrained to observe that since the matter has come to us as original suit after completion of pleadings, the parties are bound by their pleadings and it is established principle propounded by Hon'ble the Supreme Court of India way back in the year 1953 in the case of **Trojan and Company versus RMN Nagapaachettiar**, reported in AIR 1953 SC 235 that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. The law regarding variance between the pleadings and proof is so well established starting from the judgment in firm **Siriniwas Ram Kumar versus Mahabir Prasad**, reported in AIR 1951 SC 177 onwards, till date including that in **Savitri Pandey versus Prem Chander Pandey**, reported in AIR 2002 SC 591.

Considering the matter from the above stand point, it is more than clear that this has never been the ground of plaintiff that the DPC was required to consider the plaintiff to have done the courses mentioned in Para 3 of the plaint or to have awarded any mileage to the plaintiff, while considering his merit for promotion. Rather, when in Paras 7, 8 and 9, the precise ground on which the plaintiff felt to have been superseded, were pleaded and in written statement, a clean breast of the things was made by clearly giving out the merit position of the plaintiff, even then in the rejoinder the plaintiff did not base his claim to any merit for the courses said to have been

done, as detailed in Para 3 of the plaint. It is a different story that even otherwise under the Army Instructions, the plaintiff has not been able to show or satisfy us that these courses did entitle him to any credit of merit for the promotion in question. Asking for and expecting affidavit from the defendants in this regard, was uncalled for in absence of any claim being based by the plaintiff on that basis.

Thus, in our view, no fault can be found with the assessment of merit as made by the DPC on both the occasions. Obviously since the plaintiff stood much too low in merit, looking to the number of vacancies, the plaintiff could not be promoted. Simply because he stood low in seniority, no grievance can be maintained.

Thus, we do not find any force in the claim of the plaintiff. The suit of the plaintiff is, therefore, dismissed.

The parties are left to bear their own costs.

[Justice N. P. Gupta]

[Lt Gen N. S. Brar (Retd)]

September 23, 2010
RS