

ARMED FORCES TRIBUNAL, REGIONAL BENCH, CHENNAI

O.A.No.32 of 2013

Thursday, the 24th day of October 2013

THE HONOURABLE JUSTICE V. PERIYA KARUPPIAH
(MEMBER-JUDICIAL)

AND

THE HONOURABLE LT GEN ANAND MOHAN VERMA
(MEMBER – ADMINISTRATIVE)

IC-54859-M, Lt. Col. Rajesh Maliwal
S/o Mr. M.S. Maliwal
aged about 45 years
Of-Head Quarter, RTG Zone
Chennai-600 009.

.. Applicant

By Legal Practitioners:
M/s. M.K. Sikdar, S.Biju
and V.Balakrishnan

vs.

1. Union of India
through The Under Secretary
Government of India
Ministry of Defence
New Delhi-110 011.

2. The Chief of the Army Staff
Army Head Quarters
DHQ – PO, New Delhi-110 011.

3. Military Secretary's Branch
Integrated Head Quarter of MOD (Army)
DHQ PO, New Delhi-110 011.

.. Respondents

By Mr. B.Shanthakumar, SPC

O R D E R

(Order of the Tribunal made by
Hon'ble Lt Gen Anand Mohan Verma,
Member-Administrative)

1. The petitioner was commissioned in the Indian Army (ASC) on 22nd August 1992 his date of seniority being 21st April 1993. He was considered for promotion to the rank of Colonel by No.3 Selection Board held on 3rd May 2011 in which he was not found fit for promotion. His Statutory Complaint against non-empanelment was rejected. Thereafter, he filed this O.A. seeking relief of setting aside/expunging five (5) impugned CRs and grant of other reliefs as prayed for in the Statutory Complaint and be considered for promotion to the rank of Colonel at par with his batch mates as a fresh case, be promoted notionally with seniority and consequential benefits and pass further or other orders as deemed fit. The impugned CRs are for the periods from 1st June 2001 to 31st January 2002, assessment of RO & SRO & HTO in the CRs from 1st June 2006 to 31st May 2007, from 1st June 2007 to 14th April 2008, from 1st June 2008 to 31st December 2008 and from 1st June 2009 to 8th April 2010.

2. The petitioner through this application, rejoinder and written arguments by his counsel Mr. S.K. Sikdar would state that he has an unblemished service record during which he has had a varied exposure to all types of terrain and environment in the country. He would provide a list of his postings which he claims indicates that the ratio of his Field to Peace profile is 70:30. Though the petitioner in his relief seeks setting aside his ACR for the period from 1st June 2001 to 31st January 2002, on learning from the respondents that this ACR has been set aside by the respondents, he would not further press this point. He would reproduce in the application pen pictures of 10 of his CRs covering the period from 1st January 2000 to 21st January 2009 claiming that in all these he was praised for his initiative, professional competence and managerial skills. He would claim that he stands at a very high position in merit among all officers of Arms and Service of 1993 batch based on the demonstrated performance. When he was found not fit for promotion by No.3 Selection Board held on 3rd May 2011, he filed a Non-Statutory Complaint dated 5th July 2011 which was returned by the respondents on 19th August 2011 citing the reason that the same was voluminous. The petitioner resubmitted the Non-Statutory Complaint dated 12th September 2011, but again it was returned being time-barred. The petitioner submitted a Statutory Complaint thereafter

vide his letter dated 30th March 2012 requesting the said Non-Statutory complaint be considered as Statutory Complaint, but this too was not accepted by the respondents and thereafter, he filed Statutory Complaint dated 16th April 2012 in which the reliefs sought for were as mentioned in this O.A.. In the Statutory Complaint, he also mentioned that during the period 01st June 2008 to 31st December 2008 and 01st June 2009 to 08th April 2010, he spent almost five months on Line of Control in Tangdhar Sector and Machhal Sector completing the Annual Winter Stocking(AWS) ahead of time. He would submit that based on this performance an Appreciation Report was required to be initiated as per the existing provision which was not done. He would claim that non-initiation of Appreciation Report is not only discriminatory against him, but has also put him at a disadvantageous vis-a-vis his counterparts and harmed his career. The next issue that he mentioned in the Statutory Complaint relates to marks awarded for Staff College and Non-Mandatory Courses while preparing merit list for ASC officers of 1993 batch wherein the petitioner would plead that since he had not been given an opportunity to attend Staff College, the merit list be abrogated and a fresh merit list be prepared for 1993 batch officers. In the Statutory Complaint, the petitioner raised the issue of alleged disparity in approval percentage for promotion of officers of the same

batch but of different regiments and would plead that he should not be penalised for being commissioned in ASC as all officers of the army are recruited through the same intensive training at the academy and were allotted various Arms and Services on completion of training. The petitioner would plead that A.V. Singh Committee recommendation provides for improving age profile of commanding officers and vertical mobility for all officers of the Army including ASC officers, but in ASC no improvement in age, rank and profile has occurred. Comparing the approval percentage, he would plead that the approval percentages of the other Arms and Services were higher than that of ASC which stood only at 25%. He would in his Statutory Complaint also requests that his outstanding achievement and contribution be considered by No.3 Selection Board for allocation of marks under Value Based Judgment. The petitioner would submit that the service conditions advertised by Army does not indicate that opportunities for selection to the rank of Col will be different for Arms and Services and that officers of ASC will be discriminated in opportunities for promotion. On the issue of moderation of CRs the petitioner would claim that the MS Branch carries out internal assessment of all reports and marks reports as inflated deflated as the case may be which is against the Principles of Natural Justice.

3. During the hearings, the petitioner's counsel would submit that the assessment of RO, SRO and HTO in the impugned CRs be set aside being biased. He would plead that the entire board proceedings of the No 3 SB held on 03 May 2011 be scrutinised to compare the merit of the petitioner before allotment of VJ marks and after allotment of the said marks. On the issue of approval percentage of officers, the learned counsel would say that out of 99 fresh cases considered by the Selection Board on 3rd May 2011, only 30 were found fit for promotion which is a low approval percentage compared to Arms and other Services. On the A.V. Singh Committee Report-II, the learned counsel would state that ASC had been allotted only 10 vacancies in Phase II which is discriminatory for officers of ASC. On the issue of moderation of CRs, the learned counsel would say that in case an ACR has been moderated, the officer must be informed. On the issue of extra marks for Staff College Course, the learned counsel would state that officers who have attended Staff Course are allotted extra marks and thereafter in the quantification method are again benefited by award of additional marks during Value Judgment which is tantamount to double jeopardy for the petitioner since he has not attended Staff College Course. The learned counsel would state that the policy of quantification of courses was adopted on 4th January 2011, but the petitioner was not given an opportunity to attend the

Staff College Course before adoption of this policy. He should have been given an opportunity to attend the Course before such a policy of quantification was adopted. In the light of this argument, the learned counsel for the petitioner would plead that the assessments in the impugned CRs be removed being inconsistent with the profile of the officer. He would also plead that the disparity in the approval percentages be removed, additional vacancies be allotted to ASC Batch of 1993 as part of implementation of A.V. Singh Committee Report-II and the petitioner be considered for promotion as a fresh case. He would cite several judgments in support of his case.

4. The respondents through their reply-statement and pleadings by Major Nitish Passi would provide some essential background facts to the effect that the Army due to its pyramidal rank structure, has limited number of vacancies in higher ranks. All officers of a particular batch are considered together and 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, honours and awards, discipline etc. The respondents would also submit that it has been held by the Hon'ble Supreme Court that the Courts should not substitute the findings of Selection Board by their own judgments and would cite several judgments to support their case, viz., **2000 AIR SCW 2692;**

JT 1995 (II), Part 15, SC 654; JT 1993 (3) SC 359; JT 1989 (4) 487; (2001) 10 SCC 424 and (2008) 2 SCC 649. The respondents would say that the application is barred by delay and laches and the petitioner cannot ask for setting aside CRs after a delay of 11 years. On the issue of pen pictures, respondents would submit that the CRs are confidential documents and petitioner is not entitled to retain copies of the same. Respondents would want the petitioner to explain how copies have been retained. As regards the impugned CRs wherein he has asked for setting aside of assessments by ROs, SROs and HTOs, the respondents would submit that in these CRs three different ROs, two different SROs and four different HTOs reported on the petitioner. In case, as the petitioner claims, there are any inconsistencies in the impugned CRs during this period, these cannot be inconsistencies, but will be consistencies since so many different officers have reported. The respondents would produce the CRD of the petitioner and would plead that all assessments in the CRs are well corroborated and in keeping with overall profile of the petitioner. As regards Appreciation Report, the respondents would submit that there is no provision for any Appreciation Report. The petitioner's performance in Advanced Winter Stocking (AWS) would have been noted by his superiors which would be reflected in the CRs by the reporting officers, if found noteworthy by them. On the

contention of the petitioner that RO, SRO and HTO were not co-located and were not in a position to assess him, the respondents would submit that on account of organizational structure and functional requirements, units and formation Headquarters are not co-located. However, the superior officers do closely monitor and assess their subordinate units and officers. Reporting officers need not be co-located with the officer to be reported upon. On the issue of Value Judgment, the respondents would say that 'Quantified System of Selection' was adopted with effect from 1st January 2009. This was further refined and adopted on 04 January 2011. All quantifiable parameters have been allocated marks. Maximum of 95 marks have been allocated for quantified parameters which include CRs and courses including Staff College Course. The respondents would plead that shift from the Value Judgment to Quantified System of Selection has been upheld by the Hon'ble Supreme Court in the case of **Maj Gen Hardev Singh** and by the Hon'ble Principal Bench, AFT in the case of **Lt Col Shobit Rai**. Staff College Course is a competitive course for which an entrance examination is conducted by the army and those who pass and are found to be in merit attend this course. Every officer is allowed three opportunities to pass this entrance examination. The petitioner had ample opportunity to pass the entrance examination which he did not. On the issue of

A.V.Singh Committee Report, the respondents would submit that this Committee was constituted after the Kargil War with a view to bring down the age profile of Commanding Officers. Based on this Report, the Government of India approved upgrading of 1484 posts of Lieutenant Colonels to Colonels in two phases. In Phase-I, 750 vacancies were released in 2004 in which ASC was allotted 33 vacancies based on their requirement at that time. In Phase-II, vacancies were distributed based on the parameters laid down by in the report and approved by Government of India. While allocating vacancies for Phase-II, 7% vacancies of Infantry and Artillery in the rank of Colonel were taken out and allotted to other Arms and Services. In the rank of Colonel, ASC gained additional 10 vacancies. Therefore, the respondents would submit, that it is not factually correct to say that ASC has been discriminated while allocating vacancies. On the issue of impugned CRs, the respondents would submit that the petitioner has raised this issue now, after his non-empanelment by the Selection Board whereas at the time of initiation of such CRs, he had not raised any objection and in fact he had signed the Physical Services Certificate in each case. The respondents would say that the application deserves to be dismissed with costs.

5. On 26th September 2013, the case was heard and posted to 8th October 2013 for passing orders. However, on 1st October 2013, the learned counsel for the petitioner in the presence of the learned Senior Panel Counsel pleaded that he be given another opportunity for further arguing the case. Accordingly, the case was re-opened on 3rd October 2013 and the learned counsel for the petitioner put forth his further arguments in which he repeated some of the earlier pleadings. The learned counsel pleaded that comparison of marks obtained by the officer who was last in the list of selected officers from 1993 ASC Batch and the marks obtained by the petitioner would not reveal the correct picture. Scrutiny of the entire merit list of officers of 1993 ASC Batch would provide a perspective of allotment of Value Judgement marks by the Selection Board.

6. On 07 October, the learned counsel for the petitioner filed Brief Written Arguments on Behalf of the Applicant according to which the case of the petitioner rests on seven main issues requiring adjudication by this Tribunal. They are:

- (1) Non-application of mind while passing the impugned order dated 26th November 2012 rejecting the petitioner's Statutory Complaint,
- (2) Arbitrary allocation of marks for Staff College, JC and other non-mandatory courses while preparing merit list for selection of officers to the rank of Colonel,

- (3) Discrimination in allocation of vacancies to 1993 ASC batch against the spirit of directive issued by the Government of India Letter No.18(3)/2004-D (GS-1), dated 21st December 2004,
- (4) Rejection of request to set aside the CR for the periods stated in his application due to likely subjectivity or inconsistency,
- (5) Any expunction and moderation to lower value,
- (6) Allocation of marks for value based judgment ignoring outstanding achievements, and
- (7) Aberrations, if any in reckonable CR profile.

The petitioner would state that Army should be free from all evils of regimental parochialism, favouritism and reservation of any kind and performance and merit alone should be the deciding factor for promotion and accordingly rules and policies framed should be simple, transparent, and free from bias and must be applicable to a batch and cadre alike. He would cite a judgment to support his case reported in **(2006) 7 SCC 161** (Mehtar Chand Polytechnic & Anr. vs. Anu Lambu & Ors.) wherein the Supreme Court observed that public employment is a facet of right to equality and that the recruitment rules are framed for recruitment with a view to give equal opportunity to all the citizens of India. He would cite **(1984) 3 All ER 935** wherein Lord Diplock would state that the three grounds upon which an administrative action is subject to control by judicial

review, viz., (i) illegality (ii) irrationality and (iii) procedural impropriety. Learned counsel for the petitioner would submit that the aim of selection system prevalent in Army is to serve the best interests of the service by selecting only those officers who are considered competent to shoulder the responsibility of higher rank and to ensure objectivity and impartiality in selection. The petitioner would summarise the directives approved by the COAS for selection to the next rank.

7. Thereafter, the petitioner would go on to elaborate each of the seven points mentioned by him in this Brief Written Arguments. In the case of Point No.1, he would cite judgement rendered by Delhi High Court in the case of **Lt Col N K Ghai vs. UOI** in which the Court held that an appraisal of various orders clearly show that there has been non-application of mind and stereotyped orders are being passed. The petitioner would claim that in his case too, a routine order was passed with no application of mind on a Statutory Complaint. For Point No.2, the petitioner would state that the Government has a right to formulate policy keeping the interest of the organisation in mind, but this right cannot be challenged except if suggest(sic) of illegality, bias, mala fide, irrationality, impropriety on the part of policy makers. The petitioner would claim that changes in the selection system are arbitrary, discriminatory and violative of

principles of natural justice for 1993 batch to which the petitioner belongs. He would claim that the policy was implemented with effect from 4th January 2011 but its effect was retrospective and in particular he would mention the marks allotted for courses. For Point No.3, the petitioner would reiterate the arguments put forth by him earlier. He would produce tabulated data to show that while approval of percentages for Infantry, Artillery and Armoured Corps officers were above 50%, that of the ASC was 25%, the approval percentages of the other Services too were higher than ASC. For Point No.4, he would elaborate the rule position and provide details of his achievements when he was at Supply Depot Bhuj to support his claim that the impugned CRs be set aside. To elaborate Point No.5 which is about arbitrary expunction and moderation, if any, the petitioner would submit that the respondents have not intimated in reply statement if any enfacement, moderation or expunction has been carried out by them. Any moderation of CRs of candidates of 1993 batch has its effect on position of the petitioner merit. Quoting MS Branch News Letter, he would submit that from 01 January to 30 June 2011, 997 CRs were expunged, moderated or enfaced as Inflated or Deflated. He would call this action as arbitrary which is suggestive of the fact that assessments of the reporting officers are not sacrosanct. Since the respondents have not intimated about any

moderation carried out in respect of the petitioner's profile, it leads him to believe that some moderation/expunction/enfacement has been carried out which is subject to judicial intervention as held by the Hon'ble Principal Bench, AFT in the case of **Brig V.G Gole** in the order passed on 15 December 2011 in O.A. No 377 of 2011 in which the enfacement by the MS Branch was expunged and the ACR restored back. In support of Point No.6 which is about award of marks in Value Judgement(VJ) the petitioner would reiterate his point stated by the learned counsel for the petitioner earlier. To elaborate Point No.7, he would submit that inconsistency and aberration, if any, be set aside.

8. In the Brief Written Arguments, the petitioner would submit a set of reliefs which include some new reliefs. The list is, (a) quashing the order rejecting the Statutory Complaint, (b) setting aside the Selection Board proceedings held on 2nd and 3rd May 2011, (c) directing the respondents to allocate 95% weightage to CR and full marks for value based judgments to him, (d) setting aside the impugned CR, expunction and moderation to lower value, (e) direct respondents to allocate additional vacancies to 1993 batch, (f) exemplary costs in favour of the petitioner, and (g) the petitioner may be considered for promotion to the rank of Colonel on merits at

par with batch mates as a fresh case and may be promoted notionally with seniority and consequential monetary benefits.

9. The respondents filed Brief Written Arguments in reply to the petitioner's Brief Written Argument in which they have reiterated the pleadings made earlier. They have not responded to the fresh reliefs asked for by the petitioner.

10. Before we embark upon the analysis of the case put forth by both sides, we wish to observe that the petitioner appears to be in the habit of copying and maintaining records of his CRs. In his application, he has re-produced pen pictures of 10 CRs starting from the CR for the period 1st January 2000 to 31 December 2000, when he had less than 10 years of service. We have compared the pen pictures reproduced by the petitioner with the actual pen pictures in the CRD and find that in a few CRs the period covered by the CR is slightly different from what has been stated by the petitioner. As far as pen pictures go, they match word for word. The petitioner has mentioned a CR for period 01 June 2002 to 21 January 2003 whereas the actual CR period is 07 June 2002 to 19 January 2003. The period covered by the next CR is 20 January 2003 to 31 May 2003, whereas the petitioner has mentioned 21 January 2003 to 31 May 2003. In this case the petitioner has reproduced the pen picture given by the

FTO which matches the pen picture in the CRD. The next CR is from 01 June 2003 whereas the petitioner has mentioned 21 June 2003. In the next CR the petitioner has reproduced the pen picture given by the FTO which again matches with the CRD. FTO's pen pictures have been reproduced in the two more CRs and both match word for word. In the pen picture for the CR 01 June 2005 to 25 May 2006 the petitioner has added two sentences from his own side which are not part of the pen picture. Barring these minor differences the pen pictures match word for word. It is obvious that the petitioner has been maintaining a record of his CRs at least since 2001 when he had less than 10 years of commissioned service and was at a stage when officers need to put in their best performance without worrying about selection to the next rank. Yet the petitioner kept copies of the CRs that were shown to him. How did he manage to make copies is not known to us. It is, however, quite clear that such a practice is not only wholly illegal and is tantamount to breach of security, but is also highly unethical. We strongly disapprove of this practice and are inclined to impose a nominal cost on the petitioner.

11. We will examine the issues on which, according to the petitioner, his case rests.

12. **Point No 1** is non-application of mind while passing the impugned order dated 26th November 2012 rejecting the petitioner's Statutory Complaint. The impugned order is as follows:

*" No.PC-36501/13906/ASC/2011/MS-19/275/SC/2012-D (MS)
Government of India
Ministry of Defence*

New Delhi, dated 26th Nov 2012

ORDER

Ic-54859 Lt Col Rajesh Mahiwal, ASC has submitted a Statutory Complaint dated 16 Apr 2012 against non empanelment for promotion by No 3 Selection Board (FRESH) held in May 2011. Main points of the complaint are –

(a) The officer has summarised his service profile and highlighted his contributions to organisation.

(b) The officer has impugned CR 06/01-01/02 for subjective reporting by reporting officers, CR 06/08-12/08 and CR 06/09-04/10, apprehending that his achievements were probably ignored by reporting officers (RO, SRO and HTO) due to lack of appre report in Op location and CR 06/06-05/07 and CR 06/076-04/08 for subjectivity in assessment by RO, SRO, FTO and HTO.

(c) The officer has also raised issues related to recent changes in promotion policy viz. award of extra marks for Staff College and non mandatory courses on merit by No 3 Selection Board

and disparity in approval percentage for promotion of officers of same batch and cadre (1993 Batch).

2. The officer has sought the following redress:-

(a) CR for the period 06/01-01/02 be expunged in totality.

(b) Assessment in CR for the period 06/06-05/07 and 06/07-04/08 by RO, HTO and SRO due to likely subjectivity be expunged.

(c) CR 06/08-12/08 and 06/09-04/10 be given weightage as applicable to Op reports applicable to other officers in similar conditions during AWS Ops.

(d) Marks awarded for Staff College and grading in non mandatory courses (Course other than YO's and JC/CC) in merit prepared for ASC officers of 1993 batch be abrogated and fresh merit be prepared for 1993 batch officers of ASC.

(e) Disparity in approval percentage of officers of 1993 batch ASC and cadre be removed by giving equal opportunity (allocation of additional vacancies) to 1993 batch.

(f) Entire reckonable profile be scrutinised and any inconsistency/subjectivity where observed, be expunged.

(g) His outstanding achievement and contribution to organisation be considered by No 3 Selection Board for value judgment as these cases had far reaching benefit to organisation but remain unnoticed due to their transgressing beyond the period of normal tenure and cannot be assessed by assessing officer as results are only available after a long period.

(h) He be considered by No 3 Selection Board as a special/fresh case.

3. The Statutory Complaint of the officer has been examined in the light of his career profile, relevant records and analysis/recommendations of Army Headquarters. After consideration of all aspects of the complaint and viewing it against the redress sought, it emerges that all CRs in the reckonable profile including the impugned CRs are well corroborated, moderated and performance based. There being no evidence of any bias or subjectivity, none of the CRs merit any interference.

4. No provision of Appre report for CR 06/08-01/09 & CR 06/09-04/10 as claimed by the officer exists. These have been earned by the officer in Op RAKSHAK and the same exist in officer's profile.

5. Issue raised by the officer relating to recent changes in promotion policy as also consideration of his outstanding achievements and contribution to organisation for award of Value Judgment are devoid of merit as all these are matters of policy, uniformly applicable to all similarly placed officers.

6. The officer has not been empanelled for promotion to the rank of Col on account of his overall profile and comparative merit.

7. The Central Government rejects the Statutory Complaint dated 16 Apr 2012 submitted by IC-54859M Lt Col Rajesh Maliwal, ASC against non empanelment for promotion, being devoid of merit.

By order and in the name of the President
Sd/
(R.Sunder)
Under Secretary to the Government of India"

We have carefully examined the processing of petitioner's Statutory Complaint by the respondents. The respondents did not seek comments from the Reporting Officers as the Statutory Complaint was against non-empanelment. The detailed analysis carried out by the respondents takes into account relevant facets of the officer's career profile. The analysis shows that in the impugned CRs, the assessments by IOs, ROs, HTOs and SROs are appropriately corroborated without any 'inconsistency' and no CR merits interference. The analysis of the Complaint scrutinised all the issues raised in the Statutory Complaint, viz., Promotion Policy, marks for Staff College, Disparity in Approval Percentages etc., and found the objections raised by the petitioner to be devoid of merit and concluded that the petitioner had not been found fit for promotion to the next rank on account of relative merit. The analysis also noted that there is no provision for an Appreciation Report. The learned counsel for the petitioner would plead that the rejection order did not give detailed reasons as noted by Delhi High Court in its order dated 20 February 2006 in the case of Lt Col NK Ghai. Here we turn to **UOI & Ors. vs. E.G. Nambudiri reported in (1991) 3 SCC 38**, which reads,

"duty to give reasons by administrative authority not a rule of natural justice where orders do not effect any vested right or involve civil consequences. Administrative authority is not required to record his reasons in absence of any statutory provision requiring communication of reasons but reasons must exist with the authority on file which can be shown to the Court in case of judicial review. "

We find that detailed reasons exist in the files of the respondents to reject the Complaint. The allegation of non-application of mind while passing the rejection order is not sustainable.

13. **Point No 2** is about allocation of marks for courses. The petitioner has not challenged the policy of promotion, yet the arguments put forth by the learned counsel would be tantamount to challenging the promotion policy. On matters of Policy with regard to promotion, the Hon'ble Supreme Court in the case **K.Jagadeesan and UOI & Others** reported in **(1990) 2 Supreme Court Cases 228**, held as follows:

"that mere chances of promotion are not conditions of service and the fact that there was reduction in the chances of promotion did not tantamount to a change in the condition of service. A right to be considered for

promotion is a term of service, but mere chances of promotion are not. It was also held there that mere passing of the departmental examination conferred no right on the concerned S.T. Inspectors of Bombay, to promotion. "

.....

" It is for the government to decide what qualification was required for the promotion to the post of Director (ME) and, unless that requirement was totally irrelevant or unreasonable, it could not be said to be bad in law. In this regard, we agree with the reasoning and conclusions of the Tribunal. "

The Hon'ble Supreme Court in the case **Hardev Singh and UOI & Others reported in (2011) 10 SCC 121**, held as follows:

" 25. In our opinion, it is always open to an employer to change its policy in relation to giving promotion to the employees. This Court would normally not interfere in such policy decisions. We would like to quote the decision of this Court in Virender S. Hooda v. State of Haryana where this Court had held in para 4 of the judgment that: (SCC p.699)

'4. ... When a policy has been declared by the State as to manner of filling up the post and that policy is declared in terms of rules and instructions issued to the Public Service Commission from time to time and so long as these instructions are not contrary to the rules, the respondents ought to follow the same. '

26. Similarly, in Balco Employees' Union v. Union of India it has been held that a court cannot strike down a policy decision taken by the Government merely because it feels that another policy would have been fairer or wiser or more scientific or logical. It is not within the domain of the Court to weigh the pros and cons of the policy or to test the degree of its beneficial or equitable disposition. "

The above judgments clearly establish that it is up to the respondents to formulate policies for promotion of their employees.

14. Prior to 2009, the Army followed the system of Value Judgment system of selection for promotion. After an extensive study and interaction at various levels within the Army and with the MoD, the quantification system was adopted in 2009 which was further refined and implemented with effect from 4th January 2011. The policy has been universally applied to all officers who came up for promotion after the date of implementation of this Policy. Therefore, it cannot

be the case of the petitioner that the Quantification System was implemented without giving him an opportunity to attend Staff College Course. Considering that the petitioner is extremely conscious of his career advancement which is evident from the fact that he has been maintaining record of his CRs, he would be knowing that attending a course such as Staff College Course would lend his career a boost. Attending Staff College Course does not provide any additional weightage to a person as the assessments are based entirely on performance during the period covered by the report. However, at the time of selection, marks for courses including Staff College Course may make an impact. The petitioner had ample opportunity to take the Staff College entrance examination, pass it and then attend the said course which would have given him the marks that are earmarked for Staff College Course. The petitioner failed to do so. We are of the view that the Quantification System of Promotion has been implemented after due deliberation and has been universally applied throughout the Army and merits no interference. Also the respondents are well within their powers to frame promotion rules as they deem fit and such a Policy is not open to challenge unless it infringes on the fundamental rights of a person. The policy of allocation of marks for Staff College Course has been applied universally and therefore, the petitioner's contention that the

allocation of marks for Staff College Course for 1993 ASC Batch be abrogated fails. Point No.2 is accordingly answered against the petitioner.

15. **Point No.3.** After the Kargil war, a Committee was constituted known as A.V.Singh Committee which inter alia looked at the methods to reduce the age of Commanders at all levels. The Committee identified number of additional vacancies in each rank which were accepted by the Government with some modifications. The vacancies as applicable to the Army were communicated vide letter No.08176/Est/Policy/MP-2, dated 21st January 2009, a copy of which has been produced by the respondents. According to this letter, command tenures in the case of Infantry is to be 2.5 years, in case of Armoured Corps, Mechanised Infantry and Artillery, it is to be 3 years and for ASC to which the petitioner belongs, it is to be 5 years with the possibility of second command. The detailed method of allocation of vacancies for various ranks has been laid down and for Colonels, one of the inputs is the total number of command appointments divided by command tenures to arrive at annual requirement. Further inputs were added to it and then the vacancies were allotted. This letter also provides guidelines and gives a model for working out the vacancies. The calculations have been done in detail taking into account empirical data, cadre strength of each

regiment/corps and wastage rates and accordingly vacancies for A.V. Singh Committee Report Phase-I and II were allotted. As stated by the respondents, in Phase-I, ASC was allotted 33 vacancies out of 750 and in Phase-II after the allocations had been done in accordance with the parameters laid down by the Government of India, 7% vacancies of Infantry and Artillery were taken and allotted to other Arms and Services on pro rata basis whereby ASC gained 10 additional vacancies in the rank of Colonel. Therefore, it is evident that not only was there no discrimination among Arms and Services while allocating A.V. Singh Committee Phase-II vacancies, but on the contrary, ASC did gain additional vacancies in Phase-II. The contention of the petitioner with regard to additional AVSC Phase II vacancies therefore fails. He has stated that no improvement consequent to implementation of the A.V.S.C. report has been seen in ASC. However, he has not corroborated this statement by producing any evidence. Point No.3 is answered accordingly against the petitioner.

16. Point No.4: We perused the CRD of the petitioner and found that the impugned CRs are all appropriately corroborative and no assessment merits interference. We note that in the impugned CRs, there were three different ROs and four different HTOs. Two of the impugned CRs were not endorsed by the SRO and the other two CRs

had been endorsed by two different SROs. Assessments by so many different officers cannot be inconsistencies by any stretch of imagination. If indeed there are remarks or endorsements which are common to more than one CR, such remarks would reflect true attribute of the petitioner as no reporting officer has the knowledge of what was reported by any reporting officer in the earlier CRs. We also note that the CRs which were earned in operational areas are appropriately enfacend and that the Certificate of Physical Service under each RO, SRO and HTO were signed by the petitioner before the impugned CRs were submitted for initiation. The CRs carry enfacements to indicate that they were earned in operational area which is indicative of acknowledgement of petitioner's performance in operational areas. In the light of these observations, we are of the view that the assessments by more than two officers over a period of four years, firstly do not amount to inconsistency since assessments become consistent when made by different officers, and secondly do not merit any interference. It is also to be noted that the impugned CRs from 2006 to 2010 have been challenged on the ground that the Reporting Officers were not co-located with the petitioner. If the petitioner felt he was not being given his due by a particular Reporting Officer due to reasons elaborated by him, he should have represented after initiation of the CRs and not waited till 2011 to

make a representation. In any case, he was well aware of the names of the ROs, SROs and HTOs as he had signed the Physical Service Certificate in each case. The assessments by ROs, HTOs and SROs in the impugned CRs are therefore not liable to be set aside. Point No.4 is thus answered against the petitioner.

17. **Point No 5.** The petitioner has cited judgments in two cases in support of his case which are as follows:

" 2012(1)AFLJ 247 Nb. Sub Syed Athar Javed vs. UOI & Ors.

" Held: A person's right to be considered for promotion in terms of Article 16 of the Constitution of India is a Fundamental Right and such a right cannot be curtailed unless it is pointed out that there exists a law enacted by the Parliament of India in this behalf in terms of Article 33 of Constitution of India.

Adverse remarks which reflect on the conduct, reputation and character of the incumbent should be communicated to the individual so that the officer reported upon gets opportunity either to improve himself or to explain his conduct. "

"2011 (1) AFTLJ 249 Sanjay Kaul vs. UOI & ors.

"Held, Apex court held that an administrative order passed by an authority affecting rights of the citizen must

be speaking one, even down grading entries in confidential report is required to be communicated--all reporting officers must be fair, impartial and objective in their assessment.

The learned counsel for the petitioner cited the above mentioned cases to plead that in the event of moderation or downgrading of CRs, the concerned person must be informed. A careful examination of the CRD reveals action taken by MS Branch on a letter dated 12 February 2002 written by the petitioner to the Military Secretary referred to by the petitioner in his Brief Written Arguments in which he brought out acts of irregularities by Lt Col Hartaj Singh who was a non-selection grade officer. IO's assessment in the CR of 01 June 2001 to 31 January 2002 was expunged vide MS Branch Noting Sheet dated 23 October 2002. The petitioner's contention that IO's remarks in this ACR were expunged after filing this O.A. is incorrect. The assessments by RO and SRO in this ACR continue to be on record. The ACR has not been moderated to a lower level. He has stated that 699 CRs have been moderated, enfaced etc from 01 January to 30 June 2011. His demand that details of moderation etc in respect of 1993 batch officers of ASC is unreasonable and vexatious. His apprehension is that his CRs too have been moderated to a lower value. We have found that no ACR of the petitioner has been moderated or expunged or enfaced as inflated or deflated.

There are no adverse remarks that needed to be communicated to the petitioner, and therefore, the above cited cases are not attracted in this case and petitioner's apprehension in this regard is ill founded.

18. Point No 6. The issue of VJ marks is linked to Selection Board proceedings. We have perused the Selection Board merit list of ASC 1993 Batch officers. Including Review cases a total of 205 officers were considered of which 98 were Fresh cases from serial No 199 to 297. Petitioner's name appears at serial No. 289 which is indicative of his order of merit in his course at the time of passing out. Out of 205 cases, 30 were found fit. Out of 98 Fresh cases, 25 were found fit for promotion. The petitioner's concern is VJ marks. The selected officer who is No. 1 in the merit list had 86.813 marks pre-VJ, was awarded 3.62 marks in VJ bringing his overall marks to 90.433. As we go down the merit list, we find that VJ marks progressively reduce. An officer with overall marks of 89.068 was awarded 3.46 in VJ, officer with 86.041 as overall marks was awarded 3.41 in VJ and so on. The officer last in the merit of selected officers was a First Review case who had pre-VJ marks as 84.993, was awarded 3.41 in VJ for a total of 88.403. The petitioner's pre-VJ marks were 82.601, he was awarded 3.22 in VJ for a total of 85.821 which is well below the threshold of selection. Just to further illustrate this point, we find that those who were non-empanelled were awarded less than 3.41 in VJ.

No one was awarded VJ marks higher than 3.62. It is clear that there is a system in awarding VJ marks. Also, pre and post VJ marks do not make any difference in the position of the petitioner in the merit list. He has missed the selection threshold by a wide margin due to relative merit which is a cumulative effect of CR assessments, course reports, honours and awards and VJ marks. We have seen his course performance reports too and find that his course gradings are average or high average. As regards approval percentages, which is an issue raised by the petitioner while elaborating Point No 3, he claims that the approval percentage in ASC was less as compared to other Arms and Services. Approval is the sole prerogative of the Selection Board which is not subject to judicial review. Here we turn to the case of **Surinder Shukla vs. Union of India & Ors.** reported in **(2008) 2 SCC 649**, wherein it is observed,

" 11. Considering the comparative batch merit, if the Selection Board did not recommend the name of the appellant for promotion to the rank of Colonel which appears to have been approved by the Chief of the Army Staff, it is not for the court exercising power of judicial review to enter into the merit of the decision. The Selection Board was constituted by senior officers presided over by an officer of the rank of Lt. General. It has been contended before us that the Selection Board was not even aware of the identity of the candidates considered by them because only in the member data sheet all the informations of the candidates

required to be considered by the Selection Board are stated, but the identity of the officers is not disclosed. The appellant moreover did not allege any mala fide against the members of the Selection Board. What impelled the Selection Board not to recommend his case but the names of other two officers is not known.

.....
"14. The peculiarities of special requirements of defence services in a case of this nature must also be kept in view. The considerations which apply to other government servants in the matter of promotion may not be held to be applicable in the Army services. (See Lt. Col. K.D. Gupta v. Union of India)."

Point No 6 is answered accordingly against the petitioner.

19. Point No 7. The petitioner prays for setting aside inconsistency and aberration, if any. Scrutiny of the petitioner's CRs indicates no inconsistency or aberration that merit interference. He has been assessed Above Average by the reporting officers whose assessments he sought to be expunged. There are no '7's in any of the impugned CRs. There are a few '7's in a report in 2002 when the petitioner had less than 10 years of service. These are well corroborated within the CR and merits no interference. This ACR is not in the list of impugned CRs.

20. In his O.A. the petitioner has prayed that he be considered by a Selection Board as a Fresh case and be notionally promoted. Our understanding of the Policy being followed by the respondents is that

in the event an officer has been found not fit for promotion, represents against non-empanelment and if he is granted redress, then he is considered as a fresh case with his original seniority. The petitioner has not been granted any redress by the respondents on his Statutory Complaint. We too are not inclined to grant the relief of setting aside the assessments in the impugned CRs. It is not up to us say whether or not the petitioner is entitled to be considered as a fresh case. It is entirely up to the respondents to decide on this matter.

21. The petitioner has stated that an Appreciation Report was denied to him when he completed the AWS ahead of time. He has not produced the basis on which he made the claim that denial of Appreciation Report was discriminatory to him. We have found that there is no provision for an Appreciation Report. Achievements are reflected in ACR assessment. This claim of the petitioner is unsustainable. He has also stated that the Army does not advertise that ASC officers will be discriminated against. We find this allegation to be irresponsible and immature and not worthy of consideration. There is no doubt in our minds that there is no discrimination of any kind in the Army.

22. Now we turn to the fresh set of reliefs that the petitioner has asked for in the Brief Written Arguments. Quashing of the

impugned order rejecting Rejection of his Statutory Complaint, setting aside the impugned CRs, expunction and moderation, additional vacancy to ASC 1993 batch, and consideration for promotion on merits have been examined in detail and all reliefs have been found to be non-grantable. Fresh reliefs asked for are setting aside proceedings of Selection Board on 02 and 03 May 2011, to allocate 95% weightage to CR and full marks for value based judgement to the petitioner and award of exemplary cost to the petitioner. It is settled law that in the matters of selection by a Selection Boards the scope of judicial review by Supreme Court/High Court/Tribunals is very limited and a Court cannot substitute its opinion or assessment for that of the Selection Board or assessment of Reporting Officers. There are several judgements to this effect. To cite a few, **Air Vice Marshal S.L. Chhabra vs. UOI and others** reported in **1993 Supp (4) SCC 441**; **Amrik Singh vs. Union of India and others** reported in **(2001) 10 SCC 424**; **UOI & Ors. vs. Lt Gen RS Kadyan** reported in **(2000) 6 SCC 698** and **Surinder Shukla vs. Union of India & Ors.** reported in **(2008) 2 SCC 649**. This Tribunal cannot and is not inclined to interfere with the Selection Board proceedings. The relief of allocation of 95 % weightage to CRs and full marks in VJ is astounding and beyond rational explanation. Total marks for CR, honours and awards and

courses are 95 and for VJ are 5. The petitioner seeks allocation of full 100 marks. On what grounds we do not know. All we can say is that he seems to be afflicted by a sense of utterly false grandeur. This claim is unrealistic, unreasonable and vexatious. Next relief which the petitioner seeks is exemplary costs for himself. No legal right of the petitioner has been jeopardised and he has been adjudged fairly in service. There is no justification for award of costs to him. On the contrary, we are inclined to impose costs on the petitioner for keeping copies of his CRs and for making vexatious, irrational and unreasonable claims.

23. In fine, having considered all the relevant issues, we find that there is no merit in the application and it is dismissed accordingly. The petitioner is directed to pay a sum of Rs 10000/- (Rupees ten thousand only) to the respondents being the costs of this application.

Sd/

Sd/

LT GEN ANAND MOHAN VERMA
MEMBER (ADMINISTRATIVE)

JUSTICE V. PERIYA KARUPPIAH
MEMBER (JUDICIAL)

24.10.2013
(true copy)

Member (J) – Index : Yes / No Internet : Yes / No
Member (A) – Index : Yes / No Internet : Yes / No
vs

To:

1.The Under Secretary
to Government of India
Ministry of Defence
New Delhi-110 011.

2. The Chief of the Army Staff
Army Head Quarters
DHQ – PO, New Delhi-110 011.

3. Military Secretary's Branch
Integrated Head Quarter of MOD (Army)
DHQ PO, New Delhi-110 011.

4. M/s. M.K. Sikdar, S.Biju & V.Balakrishnan
Counsel for Petitioner.

5. Mr. B. Shanthakumar, SPC
Counsel for respondents.

6.OIC, ATNK & K Area HQ, Chennai.

7.Library, AFT, Chennai.

HON'BLE JUSTICE V. PERIYA KARUPPIAH
(MEMBER-JUDICIAL)
AND
HON'BLE LT GEN ANAND MOHAN VERMA
(MEMBER – ADMINISTRATIVE)

O.A.No.32 of 2013

Dt: 24.10.2013