

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ WP (C) No.12023/2006

% Reserved on: 23.07.2008
Date of decision: 14.08.2008

NAIB SUBEDAR MAJOR SINGH ...PETITIONER
Through: Mr.C.P.Singh, Adv.

Versus

UNION OF INDIA & ORS. ...RESPONDENTS
Through: Ms.Maninder Acharya, Advocate
with Major S.S.Pandey for the
Respondents.

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE MOOL CHAND GARG

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

SANJAY KISHAN KAUL, J.

1. The petitioner was enrolled in the Indian Army in the Mechanized Infantry on 22.06.1981 and earned his promotions up to the rank of Havildar. The petitioner was granted a Junior Commission as Naib Subedar in 1997. The petitioner claims to have earned outstanding ACRs which resulted in his posting in critical posts. The petitioner in September, 2003 came to know of his

adverse ACR for the period 2002-2003 when he was asked to sign an extract of the said ACR. The petitioner had been granted four points out of nine points, which is an average grading. The consequence was that when the candidates were considered for promotion to the rank of Subedars, the petitioner was not promoted while his juniors were promoted on 01.04.2004.

2. The petitioner submitted a non statutory complaint dated 21.04.2004 against the said ACR for the period of 2002-2003, but the same was rejected on 05.12.2004. Thereafter the statutory complaint filed by the petitioner dated 30.04.2005 was also returned by the Army Headquarters on account of the same being submitted beyond the stipulated period of 60 days from the date of initiation of the extract of the ACR. The petitioner filed WP(C) 894/2006 before this Court challenging the said ACR and seeking promotion to the rank of a Subedar. The petition was disposed of by an Order dated 23.01.2006 directing that the statutory complaint be again filed by the petitioner and be considered on merits. The petitioner on being called upon to submit the statutory complaint, however, stated that whatever he had to state was so stated in the previous complaint and thus desired that his earlier statutory complaint be considered on merits. The statutory complaint was

accordingly considered by the Chief of Army Staff, but was rejected vide Order dated 26.05.2006. It is this order, which is sought to be impugned in the present writ petition.

3. A perusal of the impugned order shows that the Chief of Army Staff has opined that the ACR of the petitioner was performance-based, corroborative, objective and was unbiased. There was no mala fide intent on the part of either the Initiating Officer ('IO' for short) or the Reviewing Officer ('RO' for short). The overall gradings and the pen picture of both the IO and the RO were communicated to the petitioner in accordance with provisions of para 44 of AO 1/2002/MP though the petitioner refused to sign the same. The petitioner having not met the ACR criteria, his promotion was rightly rejected.
4. The sum and substance of the submissions of the learned counsel for the petitioner was that the ACR for the period 2002-2003 was an aberration in the overall profile of the petitioner. The petitioner had maintained an outstanding profile with an overall of 7 or 8 when the marking was done out of 9 points. The only exception was the ACR for the period of 2002-2003 in which he was graded four points. The last three reports were required to be considered for promotion out of which none was to be

less than 5 points, which was an average grading. It was thus only the ACR for the year 2002-2003 which came in the way of the promotion of the petitioner.

5. Learned counsel for the petitioner further pleaded that there was no previous counseling, advice or guidance given to the petitioner before the said ACR was filled and there was a requirement of giving such warning and/or counseling as per the Policy contained in the Army Order 1/2000/MP.
6. Learned counsel for the petitioner has relied upon a Division Bench judgment of this Court in Naib Risaldar Balwan Singh v. Union of India & Ors; 2002 (2) FLJ 210. The Division Bench held that the decision of the Supreme Court in U.P.Jal Nigam & Ors v. Prabhat Chandra Jain; (1996) 2 SCC 363 equally applied to the Army personnel and it was incumbent upon the respondents to give a warning and/or counselling to such personnel so as to improve his performance which had not been done. A personnel's right to be considered for promotion in terms of Article 16 of the Constitution of India was observed to be a fundamental right which could not be curtailed unless it was pointed out that there existed a law enacted by the Parliament of India in that behalf in terms of Article 33 of the Constitution of India. In the facts of that case also there was one particular year where the

RO reduced the grading given by the IO. The grading was reduced from 5 to 4 though the petitioner there had been earning a grading of 7 throughout except for one other year where he was graded 5 by the RO.

7. In the State of UP v. Yamuna Shankar Misra and Anr; 1997(2) SLJ 121, the fairness and objectivity of an ACR, which was an aberration in the general profile of a candidate, had been dealt with the requirement of early communication of the ACR. The judgment in Sedu Ram (Havildar) v. The Chief of Army Staff & Ors; 2000 III AD (Delhi) 134 was also referred to support the proposition that an uncommunicated adverse remark cannot be the basis for denying the promotion. In Rajinder Singh Sehrawat v. Union of India & Ors; 2001 (59) DRJ 596 (DB), the adverse entries in the ACR were not in keeping with the petitioner's past excellent record. The Division Bench of this Court found that the Central Administrative Tribunal ('CAT' for short) ought to have made an attempt to find out the real cause of sudden downgrading and consequently quashing the adverse entries. In Gurdial Singh Fijji v. State of Punjab; AIR 1979 SC 1622, it has been pointed out that any adverse entry in the confidential report cannot be acted upon to deny the promotional opportunities unless it is communicated to the concerned person.

8. Learned counsel for the respondents on the other hand submitted that the grievance of the petitioner about the non communication of the ACR is fallacious. The petitioner was sent the extract of the ACR vide letter dated 18.08.2003 but he refused to sign the extract and returned the letter. The same was the position when it was once again sent to the petitioner on 17.10.2003. The requirement of communicating an average grading was, thus, complied with. Learned counsel for the respondents sought to deny the requirement of any counseling as it was not contained in the Army Order 1/2002/MP and the only requirement was communication of the ACR. Learned counsel for the respondents relied upon the observations of the Supreme Court in Union of India & Anr. V. Major Bahadur Singh; (2006) 1 SCC 368 where the Supreme Court significantly held that that the decision in U.P. Jal Nigam & Ors v. Prabhat Chandra Jain's case (supra) had no universal application and was made only for the employees of the UP Jal Nigam. The Army was held to have its own procedure for recording of the ACR and in that behalf made certain observations as to how a judgment should be interpreted and applied, which are as under:

9. The courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation

of the decision on which reliance is placed. Observations of the courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of the courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In *London Graving Dock Co. Ltd. v. Horton*³ Lord MacDermott observed: (All ER p. 14 C-D)

"The matter cannot, of course, be settled merely by treating the *ipsissima verba* of Willes, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge...."

10. In *Home Office v. Dorset Yacht Co.*⁴ Lord Reid said: (All ER p. 297g-h)

"Lord Atkin's speech ... is not to be treated as if it were a statutory definition. It will require qualification in new circumstances."

Megarry, J. in *Shepherd Homes Ltd. v. Sandham (No. 2)*⁵ observed: (All ER p. 1274d-e) "One must not, of course, construe even a reserved judgment of even Russell, L.J. as if it were an Act of Parliament;" and, in *Herrington v. British Railways Board*⁶ Lord Morris said: (All ER p. 761c)

"There is always peril in treating the words of a speech or a judgment as though they were words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case."

9. The rationale for the lower grading of the petitioner for the ACR for the period of 2002-2003 is sought to be

justified on the basis of records which were produced. Operation Parakram was carried out at the relevant stage of time and the performance of the petitioner was assessed on that basis. It was thus submitted that it is possible that a personnel performs well in normal circumstances, but may not be able to rise to the occasion when a specific operation is taking place.

10. Learned counsel strongly relied upon the judgment of the Amrik Singh v. Union of India AIR 2002 SC 2382 and in the facts of that case, promotion was denied on account of a single adverse remark in one year out of the preceding five years. It was held that the scope of the judicial review was limited and the Court could not go into the correctness of adverse remarks in order to go into the assessment of merit made in the matter of promotion. Judicial review was permissible only to the extent of finding whether process in reaching to a decision had been observed correctly and not the decision as such.
11. We have considered the submissions advanced by learned counsel for the parties and perused the record.
12. The principles while scrutinizing a case of denial of promotion must be kept in mind by the Court as emphasized in Amrik Singh v. Union of India's case (supra), wherein it was observed that the Court while

exercising writ jurisdiction under Article 226 of the Constitution of India does not sit as a court of appeal. There cannot be a substitution of the view of the Court for the view expressed by the authorities while appraising total profile of a personnel. No doubt, if relevant considerations have not been taken note of or irrelevant aspects not eschewed from consideration, the Court would not be without jurisdiction to interfere in the matter. The question thus is whether there has been such procedural failure in the present case.

13. On a perusal of the record, there is no doubt that the profile of the petitioner has been otherwise rated as 7 or 8 and the only exception is the ACR of the petitioner for the period of 2002-2003. The said period is thus certainly an aberration in the overall profile of the petitioner. The Court would certainly have to see whether there are reasons for such aberration and, in fact, that is what persuaded the Division Bench of this Court to interfere in Rajinder Singh Sehrawat v. Union of India & Ors's case (supra) as the CAT had not gone into that aspect.

14. The records show that the reasons for the lower grading of the personnel had been mentioned by the IO and the RO. It was specifically observed that the petitioner was professionally weak with lack of initiative,

preferring to be a passenger looking for soft jobs. The performance of the petitioner in Operation Parakram was found to be below the expected performance of a JCO. The RO while agreeing with the IO in the pen picture found the performance of the petitioner weak who required improvement in his knowledge and handling of men and equipment. The aforesaid aberration in the ACR of the petitioner has thus been justified for recorded reasons when a specific operation Parakram took place and the petitioner was found wanting in the performance of his duties. The relevant extracts of the ACR have been reproduced below:

“EXTRACT OF PARA 17 OF ACR IN RESEPECT OF JC-418900N NB SUB MAJOR SINGH

17. <u>Initiating Officer</u>	Overall : <u>96</u>
	Grading : <u>4</u>

Pen Picture

(Comments on qualities not specifically included in Part II above)

Naib Subedar Major Singh is an average JCO. He is professionally weak and has shown no interest in improving the same or taken any initiative to train his subordinates. He prefers to be a ‘passenger’ and looks for soft jobs. His performance in Operation PARAKRAM has been below the expected performance of a JCO.

AND

EXTRACT OF PARA 18 OF ACR IN RESEPECT OF JC-418900N NB SUB MAJOR SINGH

18. <u>Reviewing Officer</u>	Overall : <u>97</u>
	Grading : <u>4</u>

Pen Picture

(Comments on qualities not specifically included in Part II above and any aspect of IO report as relevant)

A professionally weak JCO who needs to improve his knowledge and handling of men and equipment of his pl substantially”

15. The Chief of Army Staff while considering the statutory complaint of the petitioner vide the impugned order dated 26.05.2006 specifically found that there were reasons recorded for such performance and that there was no mala fide intent on the part of the IO which could be discerned. In fact, there is really an absence of allegations of mala fide in the petition nor can a case be made out of any past quarrel or enmity with the IO, which would have weighed with the IO in taking a different line from the earlier ACRs. This fact is fortified by the RO also observing in the same line.
16. It is thus not possible for us to interfere with the ACR of the petitioner for the period of 2002-2003, which is based on consideration of the performance of the petitioner.
17. Learned counsel for the petitioner had referred to a number of judgments on the requirement of adverse ACR being communicated to the petitioner. The relevant extracts were communicated to the petitioner but he refused to receive the same. He is thus to blame himself for the same and cannot seek to take advantage of that

aspect. The judgment in Union of India & Anr. V. Major Bahadur Singh's case (supra) is also significant as contrary legal view taken by this Court would not prevail in view of the clear observations of the Apex Court that what has been observed in U.P. Jal Nigam & Ors v. Prabhat Chandra Jain's case (supra) applies to that Institution i.e. UP Jal Nigam and the Army has to be governed by its own rules and regulations. The requirement of counseling arises where there is deterioration in the performance of a personnel over a period of time. The present case is one where the performance of the petitioner appears to have dipped during a particular Operation and the pen picture seems to suggest that while the petitioner may be performing well in normal circumstances, he was unable to rise to the occasion expected of him in a particular Operation. It is in this context that the observations have been made about the petitioner preferring to be a passenger and looking for soft jobs.

18. The gradings of the petitioner in the ACR for the period of 2002-2003 have obviously come in the way of the petitioner, which are a deviation from a normal service profile, but it is not possible to interfere with the said grading or substitute the same when the rationale for the same is specifically stated in the pen picture.

19. The writ petition is dismissed leaving the parties to bear their own costs.

SANJAY KISHAN KAUL, J.

AUGUST 14, 2008
dm

MOOL CHAND GARG, J.