

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

+ **WP(C) No.5805/2007**

% Reserved on :18th September, 2008
Pronounced on :26th September, 2008

COLONEL SANDES Petitioner
Through: Petitioner in person.

Versus

UNION OF INDIA & ORS. Respondents
Through: Ms. Jyoti Singh, Advocate.

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

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

MOOL CHAND GARG,J

1. The short question involved in this writ petition is, "Whether the respondents were right in having initiated writing of the impugned Interim Confidential Report (for short "ICR") of the petitioner for the period from 01.09.1999 to 24.03.2000, despite pendency of a Court of Inquiry (hereinafter referred to "COI") in respect of the incident dated 27th February, 2000 which was likely to affect the Character and Military reputation of the petitioner being the commanding officer of the Unit under Scrutiny without following

rule 180 of the Army Rules 1954 and in violation of Para 26 of the Special Army Order (3/S/89)".

2. The petitioner was granted permanent commission in the Indian Army on 16.12.1978. During 1.9.1999 to 24.3.2000 (hereinafter referred to as "the relevant period"), he was working as Colonel and was commanding 17 Maratha LI in Jammu & Kashmir. One of the posts under the control of the Unit was "Ashok Post" (hereinafter referred to as "the said post") situated at the border in the Kargil area. Unfortunately, on 27th February, 2000 the said post was attacked by Pakistani Troops resulting in the seven fatal casualties, injury to three while a JCO went missing. There were also loss of weapons and equipments. A COI was ordered in the first week of March 2000 by Brigadier R.K.Saigal who also happened to be the Initiating officer (for short "IO") of the petitioner for the relevant period to find out the reasons which resulted in casualties, injuries to jawans beside loss of weapons and equipments. The inquiry was also to fix the responsibility of the persons responsible for the incident.

3. The petitioner was neither specifically implicated nor was given any opportunity to participate in the inquiry in accordance with the provisions of Rule 180 of the Army Rules, 1954 (hereinafter referred to as "the Army Rules"). However soon after setting up the COI, Brigadier R.K.Saigal also issued a warning letter dated 13th March, 2000 to the petitioner blaming him for the aforesaid incident. On 24th March, 2000 Brigadier Saigal initiated an Interim

Confidential Report (for short "ICR") for the relevant period in respect of the work and conduct of the petitioner despite pendency of the COI which, was likely to affect the character and military reputation of the petitioner being the Commanding Officer of the Unit under scrutiny. The pen picture of the petitioner forming part of the ICR described the aforesaid incident as a case of 'command failure' on the part of the petitioner. According to the petitioner, the impugned ICR also affected chances of his promotion to the next rank despite his overall 'Above Average Profile'.

4. The petitioner approached the Central Government by filing a statutory complaint dated 21st April, 2005 which was rejected vide order dated 1st May, 2006. Before that the petitioner also approached this Court for seeking a direction for early disposal of this complaint. While disposing of the aforesaid writ petition this Court allowed the petitioner to file a second complaint also as in the meanwhile the petitioner was not promoted to the next rank by the selection board due to the impugned ICR. The 2nd complaint was also rejected vide order dated 11th July, 2007.

5. Relying upon Para 26 of Special Army Order (3/S/89) petitioner has stated that during the pendency of the C O I, the ICR should not have been written and the case of the petitioner should have been treated as a case of NIR (Non Initiation Report). The aforesaid paragraph of the SAO is reproduced hereunder for the sake of reference:

26. When an officer is the subject of a disciplinary case, a CR will be initiated on him only after

finalization of the case. Where, however, such a case is not finalized for more than one year and the officer has been performing regular duties in a specific appointment, an ACR will be initiated. It will, however, be ensured that the report is objective and does not contain reference of the disciplinary case.

6. It is also submitted that Para 65 of the Special Army Order (Supra) required that the petitioner to have given 60 days notice for enabling the petitioner to give his defence in case any adverse remark was to be made against him in relation to the subject matter of the inquiry.

7. The COI was concluded only on 9th March, 2002 which has not blamed the petitioner for the incident. On the contrary, the Inquiry report suggests that such salutary and isolated posts which are tactically unsound should have been “**resited**” and strengthened by deploying service weapons, obstacles and surveillance devices which was also the suggestions given by petitioner earlier to the incident to his higher authority i.e. the I O. It is submitted that in such circumstances I O ought not to have initiated the impugned ICR. However, the IO not only initiated the ICR but also wrote the letter dated 13.3.2000 which shows his bent of mind to hold the petitioner guilty for the incident without waiting for the report of the COI.

8. The petitioner has also submitted that throughout his career he had outstanding career profile but for the period in question he had been given 7 out of 9 whereas earlier he used to be given 9 out of 9. Impugned ICR gives the reason for assigning a lower grade to

the petitioner as the pen picture blames the petitioner for the incident by mentioning it as a case of **Command failure**. Thus the impugned ICR has affected the career prospects of the petitioner, as the Selection Boards have not promoted him to the next rank which as stated above, is in violation of para 26 of the SAO 3/S/89.

9. The petitioner filed a statutory complaint dated 21st April, 2005 against the impugned ICR, which was rejected by the Central Government by passing the following order:

No.PC-36501/9171/Inf/2005/MS-19/82/SV/2006-D(MS)
Government of India
Ministry of Defence

New Delhi dated the 1st May, 2006

ORDER

IC-35684a Col Sandes, Inf (MARATHA LI) has submitted a Statutory Complaint dated 21.04.2005 to the Central Government against CR 09/99-03/00. The officer in his statutory complaint has highlighted his performance as CO of an INf Battalion deployed on the LC in Northern Command. He has stated that the vulnerability and untenability of one of the listening posts (LP) was brought to the notice of his superiors on a number of occasions. The vulnerability of the post had increased during Operation VIJAY and the need to relocate was projected verbally and in writing. His persistent request to re-site the post fell on deaf ears. The post was raided on 27 February, 2000 and consequent to this higher formation accorded permission to relocate/vacate the post. He is convinced that the incident of raid could have been avoided if his persistent request to relocate the post had been accepted by the authorities concerned in time. The officer has impugned the Cr 09/99-03/00 earned by him or relinquishing of command of the unit. He has stated that he has not been fairly assessed in the impugned CR by the IO and the entire report has been coloured solely by the incident of 27 February 2000. He states that the RI and the SRO would have endorsed the remarks of the IO. He has stated that the same IO had rated him 'Outstanding' in certain qualities in the previous report and an incident in the unit about which he had forewarned cannot point towards drop in the said qualities. He has added the Brigade HQ letter referred as written guidance for improvement in the CR was initiated after the incident to put the entire blame on him as the CO. He has highlighted his performance throughout his service and the CRs earned before and after the impugned CR.

2. The officer has requested that the ICR covering the period 01 September 1999 to 24 March 2000, which is totally incident based and not in consonance with his entire service profile be set aside.

3. The Statutory Complaint of the officer has been examined against his overall profile, comments of the Reporting Officers, other relevant documents and analysis/recommendations of Army Headquarters. After consideration of all the aspect of the complaint and viewing it against redress sought, it has emerged that impugned CR 09/99-03/00 has been assessed by IO and RO based on the demonstrated performance of the officer. No bias as alleged by the officer against the reporting officers is discernible in the impugned CR as the said CR is unambiguous and relates to the COI and other documents related to the incident of raid of the enemy on the post held by the unit resulting in fatal casualties to troops and loss of government property hence CR 09/99-03/00 does not merits any interference by the Government.

4. The Central Government, therefore, rejects the Statutory Complaint dated 21.04.2005 submitted by IC-35684A Col Sandes, Inf (MARATHA LI), against CR 09/99-03/00.

By order and in the name of the President

(S.D. Banga)

Under Secretary to the Government of India

10. A perusal of the aforesaid order shows that impugned ICR was very much taken into consideration and was accepted as an incident based ICR despite pendency of the COI at the relevant time. His second complaint dated 16th January, 2007 impugning the result of the Selection Board whereby he was not promoted to the next rank was also rejected by the Central Government vide its order dated 11th July, 2007. This time the Central Government stated that the promotion board of the petitioner had taken into consideration his overall profile which also included the aforesaid ICR.

11. According to the petitioner the impugned ICR could not have been initiated by the IO at a time when a COI to pin point the

responsibilities of those responsible for the unfortunate incident dated 27th February, 2000 was pending which was likely to affect the character and military reputation of the petitioner. It is his case that for the relevant period the petitioner should have been treated as a case of NIR. It is also his case, that the aforesaid ICR was written with a biased mind and without affording an opportunity to the petitioner under Rule 180 of the Army Rules, 1954, and by describing the incident dated 27.2.2000 as a case of 'command failure' which shows that the ICR was not a fair assessment of the overall performance of the petitioner and was vitiated due to the bent of mind of the officer who initiated the ICR after forming an opinion about the conduct of the petitioner even before the findings were given by the COI.

12. The petitioner also stated that in the report given by the Court of Inquiry, he has not been found blameworthy for the incident, and no action has been taken against him. However, the impugned ICR forms part of his profile.

13. The petitioner in support of his case has also relied upon the stand taken by the respondents regarding the ICR in their counter affidavit where they have stated:

It is further submitted that as per petitioners own admission the COI had been finalized on 9.03.2000, whereas the ICR was initiated after 24.03.2000. Therefore, even by the petitioner's own admission he was not subject of disciplinary case on the date when the ICR was initiated. It is submitted that Report for the period Sep 99— Mar 2000 was initiated due to his (petitioner's) moving out on posting and accordingly the same was correctly initiated and was technically valid. Since the petitioner was not a disciplinary case his contention

regarding initiation of Non Initiation Report (NIR) is misconceived and it is denied.

In so far as the contents of the said ACR are concerned it is submitted that the pen picture contains adverse remarks, which were duly communicated to the Petitioner. It is submitted that the petitioner is trying to mislead the Hon'ble Court by confusing adverse remarks and adverse report. An adverse report is one which is initiated under specific provisions of Para 79 of Special Army Order (SAO 3/S/89). An adverse report under the said para is one which is initiated when an officer's service is considered unsatisfactory, or when it is desired to recommend release of an officer from service, or removal from an appointment in his acting rank for reasons of professional incompetence, inefficiency or inherent traits of character which makes his utility to the service/unit doubtful. Whereas, adverse remarks in a report is one, which is endorsed by the reporting officer based on performance of the officer concerned during the relevant reporting period. In the instant case, the report for the period Sep 99 to March 2000 is not an adverse report in terms of Para 65 of SAO but it is a report containing adverse remarks. The said report was initiated in terms of Para 68 to 72 of the said SAO. A bare reading of the pen picture(Annexure P-1) shows the actual performance of the petitioner in that particular period of assessment. The letter dated 13 Mar 2000 mentioned in the pen picture (Page 23 of the writ petitioner) under column 18(b) of ICR form reveals that the letter was written as guidance to the petitioner for improvement and not a warning letter as claimed by the petitioner. This written guidance for improvement is not a warning order and is different from what is required to be issued under para 80 of SAO before initiation of an adverse report under para 79 of SAO.

In so far as the comparison sought to be drawn by the petitioner between his ICR and the earlier report written by Brig. RK Saigal it is submitted that because the petitioner got a good report prior to the report under challenge, it cannot be a ground to assail the confidential report in question which was recorded based on performance of the petitioner during the relevant reporting period. It is submitted that the Petitioner cannot absolve himself from his responsibility as a commanding Officer of the Battalion about the incident which resulted into the death of 07 jawans, three wounded and one subedar missing and loss of arms and ammunition.

14. Assailing the aforesaid stand of the respondents, the petitioner has also referred to the letter written by respondents dated 13.03.2000, which is reproduced hereunder:

Brigadier R K Saigal
Commander
Headquarters
80 Infantry Brigade
C/o 56 APO

205/DG/GS (Ops)

13 Mar 2000

Dear Colonel,

1. I am writing this letter to you to express my dissatisfaction regarding our op preparedness and inability to fight a successful def battel on the LC.
2. Consequent to the ops at Pallanwala in Jan 2000, and at Mendhar on 15 Feb and 25 Feb 2000, Pak raids in our posts were expected. Besides, int inputs on accretion inten str, recce of posts, presence of SSG pers/ militants in fwd posts and aggressive posture adopted by the en were a clear indication of en intentions. In spite of such clear indicators, and adequate forewarning, en had been able to successfully and brutally exec msns across the LC w/o any loss. We have not only failed to fight a successful def battle, we could not inflict any case on the en to make such ventures by him prohibitive in terms of losses. We seem to have lost the initiative on the LC.
3. What is even more surprising is that we have failed to derive and implement useful lessons from our experience gained during ops in Op Vijay period. I have constantly been issuing directions from time to time various forums/media be it my visits to the posts, periodic confs, address to offrs, instrs from my staff to improve our op preparedness and responses to ensure moral ascendancy on the en and fulfillment of the tasks assigned to us. It is to my dismay that units have been adopting a lackadaisical appch in this regard. Such an attitude needs to be corrected immediately and accountability at various levels needs to be fixed. Your attn is once again invited to the instrs for improving our comb readiness issued vide this HQ letters No.:-

- a) 201/1/CS(SD) dt 20 Jun 99
- b) 201/1/GS(SD) dt 25 Jul 99

- c) 201/1/GS(SD) dt 07 Dec 99
- d) Mins of Conf held on 02 Mar 2000
- e) 204/1/GS(SD) dt 05 Mar 2000

- 4. Please ensure that a review of the sit incl threat perception in your bn def as is carried out and remedial measures instituted in all seriousness. A very serious view will be taken on any lapses in future.

Col Sandes
CO, 17 Maratha LI.

Sd/xx
Brig RK Saigal

15. It is submitted that this letter as well as the orders passed by the Central Government are a reflection upon the work and conduct of the petitioner in respect of the incident. Similar allegations also find a reflection in his pen picture. The pen picture also goes to show that the Commander had made up his mind that the incident dated 27.02.2000 was a major command failure. The same for the sake of reference is reproduced hereunder:

Initiating Officer:-

(a) Brief comments: A short, smart and cheerful officer who is well turned out. He is mentally and physically tough.

The officer is well read, intelligent and quick on the uptake. He is hardworking and sincere.

The officer has commanded his battalion on the Line of Control in a sensitive area reasonably well. The unit prevented infiltration, through its area of responsibility.

However despite adequate indicators and warnings about enemy's intention, a successful raid was carried out by the enemy on one of its forward posts of the unit resulting in seven fatal casualties and loss of six weapons besides ammunition and equipment, which has been a major command failure.

The officer is happily married and has Spartan habits.

(b) Has the rate been given verbal or written guidance for improvement during the reporting period, if so, give details,

(i) Verbal : Yes

(ii) Written: Yes HQ Inf Bde Letter No. 205/DO/GS (Ops) dated 13 Mar 2000.

Sd/xx
Signature of Initiating Officer
27 May, 2000

16. By way of the present writ the petitioner has prayed that the impugned ICR covering the relevant period which is technically invalid and biased, be set aside and he may be considered as a fresh look case by No. 2 selection board for promotion to the rank of 'Brigadier' which has not selected him only because of the aforesaid ICR along with his batch mates. The petitioner also prays for setting aside the orders dated 01.05.2006 and 11.07.2007 passed by the Central Government rejecting the statutory complaints filed by him.

17. The respondents have contested the petition. It is their case that the petition is not maintainable and is liable to be dismissed *inter alia* on the following grounds:

- i) The petitioner is guilty of delay and laches in having approached this Court by way of the present writ petition which has been filed after seven years.
- ii) The COI, subject matter of the dispute, was not against the petitioner and therefore para 26 of the Special Army Order (3/S/89) had no application to the case. In fact, it was a case covered by para 28 and, therefore, there was nothing wrong in having initiated the ICR concerned.

The said para reads as under:

28. An officer will be considered to be the subject of a disciplinary case with effect from the earlier of the following two dates:--

(a) The date on which a COI is ordered involving his character or military reputation, or

(b) The date on which formal cognizance of an offence is taken against him.

In view of the aforesaid, Rule 180 of the Army Rules was not applicable.

- iii) If today, the impugned ICR is taken off from the records, the result of the selection board may affect many others who may have been selected without their being party to the proceedings and are also not a party to the proceedings. Moreover, taking into consideration the total profile of the petitioner, he would not have been promoted.
- iv) Insofar as the conduct of the petitioner is concerned it is stated that a warning letter was also written to the petitioner on 13.03.2000 (supra).
- (v) It has also been stated that the petitioner was neither subject to a disciplinary case nor COI was ordered involving his character or military reputation, initiation of the ICR was legal and in accordance with law. He was not entitled to the protection of Rule 180 of the Army Rules. Thus the petitioner is not entitled to any relief as prayed for.

18. We have considered the rival submissions made by the parties and have gone through the records. We have also examined the written submission filed by the petitioner.

19. At the outset we may observe that the following facts are undisputed:

(a) That at the relevant time the petitioner was commanding 17, Maratha LI in J & K;

(b) Pakistani troops attacked Ashok Post on 27.02.2000, which was under the command of the unit of the petitioner;

(c) That the unfortunate incident took life of seven resulting in injuries to three, one of the subedars went missing. It also resulted in the loss of weapons and equipments;

(d) That a COI was ordered in the first week of March, 2000 and the impugned Interim Confidential Report (ICR) was initiated by Brigadier R.K. Saigal on 24.3.2000 who also blamed the petitioner for the tactical blunder as is reflected from the pen picture in the impugned ICR (supra) which is available as Annexure P-1 to the writ petition and vide his letter dated 13.03.2000.

20. A reading of the ICR in question along with the pen picture (supra) leaves no room for doubt that the writing of the ICR in question was directly influenced by an opinion formed by the initiating officer even before the conclusion of the COI that the incident dated 27.02.2000 was a case of command failure which was the subject matter of the COI as aforesaid. In this regard, it is

relevant to take note of the reference made to the presiding officer of the COI who was deputed to inquire about the incident dated 27.02.2000 as mentioned in page 43 of the paper book as part of the COI proceedings which reads as under:

<i>Proceedings of a</i>	<i>:</i>	<i>COI</i>
<i>Assembled at</i>	<i>:</i>	<i>17 Maratha LI, C/O 56 APO</i>
<i>On the day</i>	<i>:</i>	<i>Mar 2000</i>
<i>By the order of</i>	<i>:</i>	<i>Cdr 80 Inf Bde</i>
<i>For the purpose of</i>	<i>:</i>	<i>Investigating circumstances Under which Ashok LP MY 026151 was raided at 0430h on 27 Feb 2000 by en and pers were killed/missing and arms amn and eqpt were lost. Further to pin point responsibility and suggest remedial measures with a view to prevent such cases in future.</i>

21. A bare reading of the aforesaid reference shows that the role of the petitioner being the commanding officer was very much under investigation by the aforesaid COI. It is also not in dispute that no opportunity under Rule 180 was given to the petitioner for enabling him to participate in the COI right from the beginning even though his character and military reputation was directly at stake. Thus the submission made by the learned counsel for the respondent that in the present case paragraph 26 of the relevant DSR (supra) is not applicable but paragraph 28 is applicable is of no

consequence for the simple reason that even if one goes by para 28 of SAO 3/S/89, the COI was likely to affect the character and military reputation of the petitioner even though he was not implicated by name. It was therefore incumbent upon the initiating officer to have avoided initiation of the impugned ICR.

22. In any case, the IO had no authority to have drawn conclusions about the role of the petitioner with respect to the incident dated 27th February, 2000 as the reasons about the happening of the unfortunate incident and the role played by all concerned was still subject matter of the COI particularly when the petitioner was not associated with the enquiry for the purpose of giving him the benefit of Rule 180 of the Army Rules. Since the petitioner had been taking steps for the vindication of rights right from 2002 by approaching the Central Government, this Court, again the Central Government, it cannot be said that the petition filed by him suffers from delay and laches.

23. On having scrutinized the records submitted for our perusal by the respondents, we find that the comments given by the reporting officer for the consideration of the Central Government makes exhaustive reference to the enemy action dated 27.02.2000 and the loss suffered by the unit. Further the record also shows that the petitioner throughout had an "above average profile" whereas in the impugned ICR, he has been given 7 only because OF THE reference made about the loss suffered by the Army in the incident which occurred on 27.02.2000. In this regard the initiating officer

had used the following words. *“Despite adequate indicators and warnings about enemy’s intentions, a successful raid was carried out by the enemy on one of its forward posts of the unit resulting in seven fatal casualties and loss of six weapons besides ammunition and equipment, which has been a major command failure”.*

24. The statutory complaint was also rejected by the Central Government making observation that the impugned CR was based upon the demonstrated performance of the officer and *“that the said CR is unambiguous and relates to the COI and other documents related to the incident of raid of the enemy on the post held by the unit resulting fatal casualties of troops and loss of government property”.* However, while deciding his non-statutory complaint filed on 02.05.2006 against his non-empanelment the same has been rejected without taking into consideration the grievance of the petitioner that his non-selection was because of the ICR as aforesaid. In fact, the grievance about the ICR has simply been overlooked by stating:

“19. I have perused the Non Statutory Complaint submitted by the officer and examined the same against his overall profile and other relevant documents. After consideration of all aspects of the complaint and viewing it against the redress sought, it has emerged that the officer has a balanced profile wherein all CRs in the reckonable period are fair, consistent, mutually corroborated and in tune with his overall profile. None of the CRs merit any interference.

20. Apparently, the officer has not been placed in an acceptable grade for promotion to the rank of Brig because of his overall profile and its comparative evaluation by No 2 Selection Board.”

25. We have no hesitation in concluding that the impugned confidential report for the relevant period i.e. for 01.09.1999 to 24.03.2000 is not sustainable in law, as it is in violation of para 26 of the Special Army Order and without having given an opportunity to the petitioner to have availed the benefit of Rule 180 of the Army Rules. and therefore should not have been taken into consideration by the selection board at the time of considering the case of the petitioner for his promotion to the next rank, i.e., the rank of the 'Brigadier'. If the aforesaid ICR would not have been part of the overall profile of the petitioner the possibility of a different conclusion having been reached by the promotion board cannot be ruled out. Even while deciding the non-statutory complaint against the non-promotion of the petitioner by the selection board in question, the authorities have not considered the distinction which would have been there between the profile of the petitioner with the aforesaid ICR and without the ICR. The complaint has been simply rejected by stating that the petitioner had not been promoted in view of his overall profile, including the impugned ICR.

26. We do not find ourselves in agreement with the submissions of the learned Counsel for the respondents that the COI was not to deal with the character and reputation of the petitioner and therefore para 26 of the special army order was not applicable in his case or that he was not entitled to the benefit of rule 180 of the Army rules for the simple reason that the reference made to COI, was to deal with the role of the petitioner in the incident dated 27th February, 2000, which occurred in his Unit .

27. Taking all these facts into consideration, we find force in the contentions raised by the petitioner that ICR for the period 01.09.1999 to 24.03.2000 is unsustainable in law and liable to be set aside. We are also satisfied that the non-promotion of the petitioner to the next rank is also vitiated as the Selection Board has taken into consideration the impugned ICR in question while taking into consideration the profile of the petitioner for such consideration.

28. A writ of certiorari is issued to set aside the impugned ICR as well as the orders passed by the Central Government on the statutory as well as the non-statutory complaint of the petitioner. We also issue a writ of mandamus directing the respondents to consider the case of the petitioner for promotion to the next rank along with his batch mates by holding a review selection board without taking into consideration the impugned ICR. In case he is successful, he would get his seniority as per the recommendations of the second Selection Board.

29. The needful shall be done within a period of three months from the date of pronouncement of this judgment.

30. The writ petition is accordingly allowed with the aforesaid directions leaving parties to bear their own costs.

MOOL CHAND GARG,J

SANJAY KISHAN KAUL,J

SEPTEMBER 26, 2008
anb/dc
W.P.(C) 5805/2007