



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

Judgment Reserved on: 28.02.2024
% *Judgment Pronounced on: 13.03.2024*

+ **W.P.(C) 15167/2023**

BRIG ROHIT MEHTA

..... Petitioner

Through: Mr. P.S. Patwalia, Sr. Adv. with
Mr. Inder Sen Singh, Mr. Abhishek
Singh, Mr. Nasir Mohd. and Ms.
Kaberi Sharma, Advs.

Versus

UNION OF INDIA THROUGH & ORS.

..... Respondents

Through: Mr. Neeraj, Sr. PC with Mr.
Vedansh Anand, Mr. Rudra Paliwal
and Mr. Mahesh Kumar Rathore,
Advs. for UOI

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

HON'BLE MR. JUSTICE SAURABH BANERJEE

J U D G M E N T

SAURABH BANERJEE, J.

1. The petitioner, after being commissioned into 63 Cavalry, an armoured regiment on 13.06.1992, was first promoted to the rank of Colonel in September 2009 and then to the rank of Brigadier in March 2018, wherein he commanded 62 Armoured Brigade¹ from 31.03.2018 to 05.07.2020 and earned 5 Confidential Reports² during this period. Of

¹ Hereinafter referred to as 'Armd Bde'

² Hereinafter referred to as 'CR'



these, though in the first three CRs he was graded ‘*Outstanding*’, however, in CR-4 for the period 01.07.2019 to 11.02.2020 and in CR-5 for the period 12.02.2020 to 30.06.2020, he was graded ‘*Above Average*’.

2. Aggrieved by such grading, the petitioner filed a statutory complaint dated 05.02.2022, seeking expunging of the grading given by the Senior Reviewing Officer³ in CR-4 and removal of CR-5 in its entirety, claiming that the said grading of ‘*Above Average*’ therein were inconsistent with his previous reports and his achievements and that they are bound to have an adverse effect on his overall profile and be detrimental to his future prospects. Vide order dated 22.06.2022, the statutory complaint was rejected as the impugned CRs were found to be fair, objective, well corroborated, performance based and technically valid, and hence did not merit any interference.

3. The petitioner then filed an O.A. 288/2022 before the Regional Bench, Jaipur of the Armed Forces Tribunal⁴ on 27.07.2022, which was transferred to the Principal Bench, New Delhi vide order dated 09.12.2022, and renumbered as O.A. 06/2023.

4. The learned AFT, while partly allowing O.A. 06/2023 vide order dated 08.08.2023 expunged the CR-4 entirely but upheld the CR-5, *inter-alia*, holding as under:-

a. As regards the impugned CR-4, a comparison of CR-4 and the preceding CR-3 indicated that the same were initiated by the same Initiating Officer⁵ and while in CR-3, the applicant was

³ Hereinafter referred to as ‘SRO’

⁴ Hereinafter referred to as ‘AFT’

⁵ Hereinafter referred to as ‘IO’



awarded '*Outstanding*' in 11 qualities and '*Above Average*' in 5 qualities, in CR-4, he was awarded '*Outstanding*' in 9 qualities and '*Above Average*' in 7 qualities. Though there is a shift in the grading from CR-3, the pen picture in CR-4 is also laudatory and does not reflect any reasons necessitating a downward change in the overall grading and the IO, despite knowledge of both the CRs, has failed to accord any reasons for the downgrading.

b. The Reviewing Officer⁶ had mentioned the applicant's performance as '*Outstanding*', while the SRO did not make a suitable pen picture to substantiate his grading of '*Above Average*' in CR-4, and had only endorsed a cryptic '*An above average offr.*'. Thus, in view of the difference in the grading by the IO and the RO, the SRO ought to have substantiated his grading through a suitable pen picture, which he failed to do, rendering CR-4 as inconsistent and liable to be set aside.

c. As regards CR-5, though the SRO was the same, the IO and RO were different and hence the grading was *de novo*, since the IO and RO were unaware of the previous CRs. The applicant had been rated '*Outstanding*' in 11 qualities and '*Above Average*' in 5 qualities and both the IO and the RO had rated the applicant as '*Above Average*', which were consistent with the grading by the SRO who had also assessed the applicant as '*Above Average*', and hence the CR-5 being consistent required no interference.

5. Aggrieved therefrom, the petitioner has now filed the present

⁶ Hereinafter referred to as '**RO**'



petition under Article 226 of The Constitution of India, seeking the following reliefs:-

“a) Issue an appropriate writ, order or direction, including the writ of CERTIORARI, to quash the final judgement/order dated 08.08.2023 passed by Ld. Armed Forces Tribunal, Principal Bench, New Delhi, only to the extent Ld. Tribunal has arbitrarily rejected the petitioner's prayer made in the OA for setting aside his complete CR covering the period 12.02.2020 to 30.06.2020 (CR-5) and has unmindfully set aside/expunged the RO's outstanding assessment in Petitioner's CR for the period 01.07.2019 to 11.02.2020 (CR-4) even as the Petitioner had made no such prayer before the Ld. Tribunal;

b) Issue an appropriate writ, order or direction, including the writ of MANDAMUS & CERTIORARI, to quash the Petitioner's complete CR covering the period 12.02.2020 to 30.06.2020 (CR-5) and restore the RO's outstanding assessment in Petitioner's CR for the period 01.07.2019 to 11.02.2020 (CR-4);”

6. While hearing the present petition on 18.01.2024, learned senior counsel for the petitioner stated that the petitioner shall not press qua reliefs in respect of CR-4 as according to him the same already stands quashed by the learned AFT and shall only press the conclusion of the learned AFT with regard to CR-5 in the impugned order.

7. Of the numerous grounds taken by the petitioner, the prime arguments addressed by the learned senior counsel for the petitioner are that the learned AFT has failed to consider that the ratings in CR-5 were not objective but based on extraneous circumstances. He submitted that it has come to the knowledge of the petitioner that the IO of CR-5, despite giving an advance intimation to the RO and the SRO of his intention to grade the petitioner as ‘*Outstanding*’ in CR-5 in terms of the policy of advance intimation dated 31.10.2011, graded the petitioner as ‘*Above Average*’ without any reasons and justification for the change therein.



Relying upon the judgment dated 17.03.2016 passed by the learned AFT, Regional Bench, Lucknow in O.A. 202/2015 titled **Brig H.S. Ratnaparkhi v. Union of India and Ors.**, he submitted that it was incumbent upon the IO, in case of change of his opinion, to record the reasons for such change.

8. Learned senior counsel further submitted that considering the unblemished track record of the petitioner of over 30 years, wherein he has rendered exemplary service and has received several accolades and awards, as also the previous 3 CRs wherein he has been graded 'Outstanding', it is evident that the impugned CR-5 is inconsistent with the overall performance of the petitioner as the petitioner's performance deserves to be rated 'Outstanding', especially when the petitioner has always received a laudatory pen picture and his work and performance has been appreciated by his Seniors. He, then, relying upon the judgment dated 11.10.2011 passed by the AFT, Principal Bench, New Delhi in O.A. 13/2010 titled **Col. Sanjay Kumar v. Union of India** and judgment dated 19.08.2013 passed by the AFT, Kolkata Bench in O.A. 98/2012 titled **Col. Sudeep Kumar Mukherjee v. Union of India and Ors.**, submitted that in absence of corroborative pen picture, the SRO, RO or the IO ought not to have arbitrarily and inconsistently downgraded the CR of the petitioner.

9. Learned senior counsel, thence relying upon the judgment in **State of U.P. v. Yamuna Shanker Misra** (1997) 4 SCC 7, submitted that the officer entrusted with the task of writing CR is required to do the same objectively and fairly and the CR-5 in the present case shows that since the IO, RO as also the SRO have failed to justify the reasons for downgrading the petitioner, they have acted in an unfair manner. This



shows that CR-5 has been arbitrarily made and thus is liable to be set aside. He also submitted that despite observing that CR-5 was a deflated CR which meant that it is downgraded and inconsistent, the learned AFT failed to set aside the same.

10. Learned senior counsel for the petitioner further submitted that since the 62 Armd Bde under the command of the petitioner was split between Suratgarh and Kanpur and his quarter was located at Suratgarh (Rajasthan), the IO (i.e. GOC 4 RAPID) was located at Prayagraj (U.P), the RO (i.e. GOC 1 Corps) was located at Mathura and the SRO (i.e. GOC in-C South-Western Command) was located at Jaipur (Rajasthan), the SRO did not even meet the petitioner during the relevant period of CR-5. The same clearly shows that the grading was given without proper assessment of the petitioner as also due to the limited interaction with the petitioner because of Covid-19 pandemic. He also submitted that neither the petitioner was informed of any shortcomings in his performance, nor was he accorded any opportunity to improve/ rectify the same before the impugned CR-5 was passed.

11. Learned senior counsel further submitted that the impugned CR-5 is liable to be set aside as the same has become an impediment in the future prospects of the petitioner in as much as barring the petitioner, over 40 officers of his batch were empanelled in No.1 Selection Board for promotion to the rank of Major General but the petitioner was not empanelled due to the Selection Board taking note of CR-5 wherein he has only been graded '*Above Average*', thus pushing the petitioner to the bottom of the barrel.



12. Learned senior counsel further submitted that CR-5 suffers from 'intra-se' inconsistency & contradictions, to the extent that despite rating the petitioner '*Outstanding*' with 9 points in majority of the columns of the open portion (probably 8 out of 11 columns), and despite describing the petitioner in superlative form in the pen picture, the overall box grading of the petitioner was only '*Above Average*' with 8 points, thus downgrading the petitioner.

13. *Per Contra*, learned counsel for the respondents opposed the present petition on the ground that the same ought to be dismissed on the grounds of non-joinder of essential parties in as much as though the petitioner has made specific averments of arbitrariness and mala fide against the IO, the RO and the SRO, none of them have been impleaded as a party. He further submitted that in any event, the petitioner has approached this Court without exercising the remedy under *Section 30* of the AFT Act, 2007 and thus the present petition is not maintainable in the present form.

14. Learned counsel submitted that the assessment of '*Outstanding*' denoted by the numerical '9' is reserved for exceptional special achievements of the concerned officer during the reporting period which is beyond the performance of an officer with '*Above Average*' performance. He submitted that the assessing officers are required to maintain some differentiation between truly outstanding officer and others, and if every officer is graded outstanding, it would defeat the very purpose of appraisal. Thus, no officer has any right to claim an '*Outstanding*' assessment in the Confidential Reports, and it is upon the



assessing officers who are competent to objectively assess an officer's performance to independently grade him.

15. Learned counsel further submitted that 'deflated' is only a term given to the CR if it is downgraded in comparison to the previous CRs and it can in no way lead to the deflated CR being held inconsistent and be expunged only for the reason that it is deflated. He submitted that it is only when any grounds such as violation of prescribed procedure or technical faults for expunging are made out that the CR is liable to be expunged. He thus submitted that in the absence of any procedural defects, the CR of the petitioner cannot be expunged only because the petitioner is dissatisfied with his grading.

16. Learned counsel further submitted that the averment of the petitioner that the CR-5 has led him to be on the bottom of the list of his batch-mates and has resulted in his non-empanelment for the promotion to the post of Major General is incorrect in as much as it is up-to the Selection Board to assess the suitability of the officer for promotion. The grading by the Selection Board is recommendatory in nature and not binding until approved by the competent authority; viz, Chief of the Army Staff (COAS) or the Central Government as the case may be. He further submitted that in any event, the non-empanelment of the petitioner for promotion is a fresh cause of action requiring fresh proceedings and the same cannot be considered in the present proceedings.

17. Learned counsel then relying upon *Union of India v. Major Bahadur Singh*, (2006) 1 SCC 36 and *Union of India & Ors. v. Parashottam Dass* 2023 SCC OnLine SC 314, submitted that, in any event, the formulation of the CR is done by the competent officers who



are entrusted with the said task to rate the concerned officer based upon the officer's performance for the reportable period and the same is outside the scope of judicial review and the High Court, under writ jurisdiction cannot act as a court of appeal and assess the CR of the petitioner. Further, relying on *Surinder Shukla v. Union of India and Ors.* (2008) 2 SCC 649, learned counsel submitted that in the absence of any violation of due procedure, judicial review cannot permit substitution of the decision on merits.

18. This Court has heard the arguments addressed by the learned senior counsel for the petitioner as also the arguments made by the learned counsel for respondents in reference thereto at length and has further gone through the pleadings coupled with the other documents on record including the various judgments cited by them across the bar.

19. At the outset, in view of the statement of the learned senior counsel for petitioner on 18.01.2024, this Court, sans the other reliefs in the present petition, is left to adjudicate upon the grading/ assessment of petitioner in CR-5 for the period 12.02.2020 to 30.06.2020 only which follows herein below.

20. The grading/ assessing of CR-5 of the petitioner herein is a result of a policy decision taken by the respondents after they have devised specific procedure/ mechanism after due deliberation. The CR-5 involved the due application of mind by not one, but as many as three officials being first the IO, then the RO and finally the SRO and that too at three different stages. Thus, there is no scope of overlap or connection inter se them. Needless to mention, each of the IO, the RO and the SRO are specialised experts in their respective fields. In view thereof, this Court is



neither inclined to meddle nor dwell upon the correctness of the CR-5 of the petitioner. Even otherwise, as per settled law, this Court ought not to generally interfere where such factors are involved. This Court is fortified by ***Jacob Puliyel v. Union of India and Ors.***, 2022 SCC OnLine SC 533 wherein the Hon'ble Supreme Court has held as under:

“21. It is well settled that the Courts, in exercise of their power of judicial review, do not ordinarily interfere with the policy decisions of the executive unless the policy can be faulted on grounds of mala fide, unreasonableness, arbitrariness or unfairness etc. Indeed, arbitrariness, irrationality, perversity and mala fide will render the policy unconstitutional. It is neither within the domain of the courts nor the scope of judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are the courts inclined to strike down a policy at the behest of a petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical. Courts do not and cannot act as appellate authorities examining the correctness, suitability and appropriateness of a policy, nor are courts advisors to the executive on matters of policy which the executive is entitled to formulate. The scope of judicial review when examining a policy of the Government is to check whether it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution, or opposed to any statutory provision or manifestly arbitrary.”

21. This is more so since there can be no straight jacket formula or fix benchmark or some yardsticks or specific prescribed guidelines for grading/ assessing by the IO, the RO or even the SRO as it all depends upon their respective discretion as also on the surrounding, intrinsic and extraneous circumstances involved in every case separately. As such, merely because the petitioner had previously been graded/ assessed as ‘*Outstanding*’ in CR-1, CR-2, CR-3, does not necessarily mean that he ought to be graded/ assessed as such even at the time of his CR-5. In any



event, grading/ assessing by the IO or the RO or even the SRO, is not a matter of right. Thus, holding such would render any fresh CR, in this case the CR-5 of the petitioner, otiose. Therefore, since there can be no comparison of CRs, the petitioner cannot avail any benefit of any of his previous CRs be it CR-1, CR-2, CR-3 or for that matter CR-4.

22. Furthermore, since the petitioner has not doubted the procedure/ mechanism followed by the IO or the RO or the SRO, there is no reason for the same being faulted with by this Court. Reliance in this regard is placed upon ***Union of India v. Lt. Gen. Rajendra Singh Kadyan*** (2000) 6 SCC 698 wherein the Hon'ble Supreme Court has held as under:

“29. Critical analysis or appraisal of the file by the Court may neither be conducive to the interests of the officers concerned or for the morale of the entire force. Maybe one may emphasize one aspect rather than the other but in the appraisal of the total profile, the entire service profile has been taken care of by the authorities concerned and we cannot substitute our view to that of the authorities. It is a well-known principle of administrative law that when relevant considerations have been taken note of and irrelevant aspects have been eschewed from consideration and that no relevant aspect has been ignored and the administrative decisions have nexus with the facts on record, the same cannot be attacked on merits. Judicial review is permissible only to the extent of finding whether the process in reaching decision has been observed correctly and not the decision as such. In that view of the matter, we think there is no justification for the High Court to have interfered with the order made by the Government.”

23. Therefore, no judicial review is called for, moreover, since this is not a case falling under the rarest of rare category which calls for such/ any interference under Article 226 of the Constitution of India by a Court of law.



24. Furthermore, since there is no provision of any requirement of providing any interaction to anyone like the petitioner with either the IO or the RO or with the SRO, there can hardly be any reason for this Court to provide or give any occasion of interaction of the petitioner with either the IO, the RO or the SRO as such. Similarly, since there is also no such provision qua communicating the downgrading of anyone like the petitioner by the respondents, once again, there is hardly any occasion for this Court to do so in the present case. In fact the Hon'ble Supreme Court in ***Dev Dutt v. Union of India (2008) 8 SCC 725*** has held as under:

“36. In the present case, we are developing the principles of natural justice by holding that fairness and transparency in public administration requires that all entries (whether poor, fair, average, good or very good) in the annual confidential report of a public servant, whether in civil, judicial, police or any other State service (except the military), must be communicated to him within a reasonable period so that he can make a representation for its upgradation. This in our opinion is the correct legal position even though there may be no rule/G.O. requiring communication of the entry, or even if there is a rule/G.O. prohibiting it, because the principle of non-arbitrariness in State action as envisaged by Article 14 of the Constitution in our opinion requires such communication. Article 14 will override all rules or government orders.

38. We, however, make it clear that the above directions will not apply to military officers because the position for them is different as clarified by this Court in Union of India v. Major Bahadur Singh [(2006) 1 SCC 368 : 2006 SCC (L&S) 959] . But they will apply to employees of statutory authorities, public sector corporations and other instrumentalities of the State (in addition to government servants).”

25. In fact, the respondents, after taking due note of the aforesaid issue of communication in para 137 of the AO2/2016/MS issued by the Chief of the Army Staff has specifically laid down as under:



“137. A ratee will not be communicated any portion of assessment by second/ higher level reporting officers except in the following cases: ~

- (a) Lower than Average marks (i.e. 6 or less) in any of the PQs/DPV/TPV/QsAP or box grading (as applicable in CR forms promulgated by MS Branch from time to time).*
- (b) Adverse remark in the pen picture.*
- (c) When ratee is Not recommended for promotion.”*

26. Interestingly, though the petitioner has levelled allegations against the IO, the RO and even the SRO, but since they being not substantive in nature and rather bald, general and vague, this Court finds no reason to proceed for adjudication thereon.

27. In any event, it is to be borne in mind that the petitioner by way of the present petition, cannot ask this Court to call upon the IO or the RO or the SRO to conduct a *de novo* grading/ assessment of the CRs of the petitioner, more particularly, as the same are bereft of any material particulars and/or cogent evidence and merely because there is another interpretation possible from that what has been arrived at by the learned AFT. Moreover, in the present case, change of both the IO and the RO at the time of grading/ assessment of the petitioner during CR-5, leaving only the SRO as it is resulted in a *de novo* grading/ assessment of petitioner, wherein both the IO and the RO as also the SRO consistently assessed him as ‘Above Average’. The same was another additional factor carrying sufficient weightage for consideration by the learned AFT. In fact, dealing with the above, the learned AFT has correctly rendered its finding as under:-

“17. CR-5- By the time CR-5 was to be initiated, both the IO and RO had changed and thus the assessment here was a de novo assessment by a fresh IO and RO, with the SRO



being the same who had assessed the applicant in CR-4.. Though both the IO and RO have assessed the applicant as 'above average', in the figurative assessment both the IO and RO have rated the applicant 'outstanding' in 11 out of the total 16 qualities and 'above average' in the remaining five, Both the IO and RO have given laudatory pen pictures. The SRO assessed the applicant as 'above average' and once again has given a cryptic one-line pen picture; 'An above average officer'. Both, the IO and RO have offered their comments on the statutory complaint. The IO has stated that the Bde under the applicant had performed well and had made significant contributions in both operational and administrative fields and has recommended that the profile of the applicant be reviewed and aberrations/inconsistencies, if any be removed. The RO in his comments has stated that the applicant is professionally competent and that he had been graded as per his demonstrated performance in the reporting period. Notwithstanding the fact that this report was endorsed by the same SRO as in CR-4, we held this as a valid CR since the IO and RO have assessed the applicant independently without any previous knowledge, and moreover even if the box gradings of the IO/RO are 'above average, the cumulative figurative assessments are in sync with the overall profile of the officer.'"

28. Lastly, this Court finds that the learned AFT, while adjudicating the case of the petitioner has not found any perversity, arbitrariness, mala fide, bias or such on the part of the respondents be it the IO, the RO or the SRO at the time of grading/ assessing the CR-5 of the petitioner or in the procedure/ mechanism followed by them or the practice adopted by them or the findings rendered by them.

29. Since this Court is agreeable with the reasons and findings rendered by the learned AFT, there is no occasion for the petitioner to be permitted to once again reargue the same facts under the garb of the present petition and call this Court to once again re-adjudicate upon them. The same, as per the settled position of law, is impermissible. This Court in this regard



finds able support in *Parashottam Dass(supra)* and *Union of India v. Rajasthan High Court*, (2017) 2 SCC 599, wherein the Hon'ble Supreme Court held as under:-

“13. The powers under Article 226 are wide—wide enough to reach out to injustice wherever it may originate. These powers have been construed liberally and have been applied expansively where human rights have been violated. But, the notion of injustice is relatable to justice under the law. Justice should not be made to depend upon the individual perception of a decision-maker on where a balance or solution should lie.The distinction between what lies within and what lies outside the power of judicial review is necessary to preserve the sanctity of judicial power. Judicial power is respected and adhered to in a system based on the rule of law precisely for its nuanced and restrained exercise. If these restraints are not maintained the court as an institution would invite a justifiable criticism of encroaching upon a terrain on which it singularly lacks expertise and which is entrusted for governance to the legislative and executive arms of Government.That is the rationale for the principle that judicial review is confined to cases where there is a breach of law or of the Constitution.....”

30. In view of the discussion herein above, the judgments relied upon by the learned counsel for the petitioner are of no assistance in the facts involved herein and hence the same have not been considered by this Court.

31. Accordingly, the present petition being devoid of merits, is dismissed with no order as to costs.

SAURABH BANERJEE, J.

V. KAMESWAR RAO, J.

MARCH 13, 2024/akr