

IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH AT NEW DELHI

21.

MA (Diary No. 3380/2015)

In OA 155/2011

Air Cmde TM Rao

.....Petitioner

Versus

UOI & Ors.

.....Respondents

For petitioner : Mr SM Dalal, Advocate

For respondents : Mr Ashok Chaitanya, Advocate

CORAM:

HON'BLE MR. JUSTICE PRAKASH TATIA, CHAIRPERSON.

HON'BLE LT. GEN. SANJIV LANGER, MEMBER.

ORDER

15.12.2015

The petitioner had filed O.A No. 155 of 2011 before this Tribunal, which was decided by order dated 06.01.2012. In the said O.A, the petitioner prayed that the appraisal report of the applicant for a period from September 1999 to 2008 may be called for and the moderation effected by the Principal Staff Officer (PSO) in the ACRs from October 2001 to 2007 be quashed, and the original appraisal report may be restored, his merit in the Promotion Board be re-fixed and he be promoted to the rank of Air Commodore along with consequential benefits. The petitioner also prayed that Para 17 of AFO 50/97 as well as the order dated 16.06.2011 may be declared as arbitrary. Finding merit in the contention of the petitioner, this Tribunal, vide order dated 06.01.2012, ordered as under:

"14. Therefore, we are of the opinion that the matter is remitted back to the authorities to give a proper consideration to the ACRs received by the petitioner for his achievements in the DRDO. These may be assessed objectively and not by stock standard, that since his prior to joining DRDO he got 7.33 in last ACRs then they reduced all the ACRs to 7.33. This is not, in our opinion, a rationale approach. Hence, we allow the petition in part and remit the matter back to the respondent to give due weightage to the ACRs received of the petitioner in DRDO and thereafter review his performance for the aforesaid period. In case it is moderated, then the case of the petitioner may be considered afresh for promotion to the post of Air Commodore by convening a special Promotion Board."

Thereafter, when no action was taken by the respondents, the petitioner filed an execution petition and ultimately his case was reconsidered. The petitioner was promoted to the rank of Air Commodore against the vacancy for the year 2010 on 14.01.2013.

2.. In the execution petition filed by the petitioner – M.A No. 479 of 2012, this Tribunal by order dated 18.01.2013, after taking note of the contention raised by the respondents that the petitioner was promoted, directed the respondents to produce the minutes of the deliberation. But, by the subsequent order dated 08.02.2013, the petitioner's execution petition, M.A No. 479 of 2012 was disposed of with a clear finding that the order passed by the Tribunal dated 06.01.2012 had been implemented. Not satisfied with the disposal of the execution petition, the petitioner filed W.P (C) No. 2407 of 2013 before the Delhi High Court. After considering the facts of the case, the Delhi High Court, by its order dated 15.09.2014, passed the following:

"Considering the fact that the petitioner in the present writ petition wants a fresh evaluation of his ACRs for the period 2001 to 2007 so as to consider his case for grant of promotion to the rank of Air Commodore against a vacancy for the year 2009 and as the said issue was also before the learned AFT when the order dated 8.2.2014 was passed, therefore, we are not inclined to exercise our jurisdiction in the present writ petition. However, we grant liberty to the petitioner to move an application which he is desirous of moving before the learned AFT and the learned AFT shall pass necessary orders on the same uninfluenced by the observations made by us hereinabove while taking into account, the totality of the case." (emphasis supplied)

A bare perusal of the above order of the Delhi High Court clearly reveals that the High Court had considered the facts of the case and thereafter held that the High Court was not inclined to exercise the jurisdiction in the said writ petition. After the said finding, as desired by the petitioner, the Delhi High Court granted liberty to the petitioner to move an application before this Tribunal. It was made clear in the said order that the Tribunal shall pass necessary orders uninfluenced by the observation made by the High Court.

3. On the basis of the direction given by the Delhi High Court, the petitioner filed O.A No. 664 of 2014 before this Tribunal seeking the following reliefs:

(a) Modification of the impugned order dated 09.01.2013 passed by Respondent No. 2 and approval of his promotion to the rank of Air Commodore in the year 2009 instead of 2010;

(b) Direction requiring the respondents to review his ACRs for the year 2001 to 2007 objectively, by giving due weightage to his exceptional achievements and outstanding performance as recorded in the pen picture of these ACRs; or

In the alternative, to restore original ACR grading for the years 2000-2005; hold special Review Promotion Board and consider him as a fresh review case in the year 2009 for promotion to the rank of Air Commodore;

(c) Direction requiring the respondents to grant all consequential benefits to the petitioner including promotion and monetary benefits flowing from such review of ACRs and promotion to the rank of Air Commodore w.e.f year 2009 including re-fixing his seniority in the rank of Group Captain in 2002/2003; and

(d) Direction requiring the respondents to review all promotions which were affected due to incorrect evaluation of the ACRs by Air Headquarters and grant all consequential benefits flowing from such review.

4. When O.A No. 664 of 2014 came up for consideration, another Bench of this Tribunal (Court No. 3) held that the fresh O.A filed by the petitioner is not maintainable. However, the Bench held that the petitioner is not precluded from moving an application before the same Bench which passed the order dated 08.02.2013, in accordance with the liberty granted by the Delhi High Court. Hence the petitioner filed this application seeking revival of the execution petition, M.A No. 479 of 2012.

5. When M.A No. 479 of 2012 was placed before Court No. 3, the following order was passed on 03.11.2015:

"This MA has arisen from the order dated 08.02.2013, passed in MA 479/2012, which was an application for execution of the order dated 06.01.2012, passed in OA No. 155/2011 by Court No. 1.

Registry is directed to place the matter before Hon'ble the Chairperson for appropriate orders regarding listing of this MA before the appropriate Bench on 05.11.2015."

Hence this application has come up before this Bench, in view of the fact that both the Members who passed the order dated 08.02.2013 have demitted the office upon superannuation.

6. We heard the learned counsel for the parties. The petitioner had filed O.A No. 115 of 2011 for the limited relief that his appraisal reports for the period from September 1999 to 2008 be called for and the moderation effected by the Principal Staff Officer (PSO) in the ACRs from October 2001 to 2007 be quashed restoring the original appraisal report and re-fixing his merit in Promotion Board and he be promoted to the rank of Air Commodore. By order dated 06.01.2012, this Tribunal accepted the petitioner's claim in part while refusing to restore the original appraisal report. The Tribunal directed the respondents to give proper consideration to the ACRs received by the petitioner for his achievements in the DRDO, assessing objectively and not by stock standard. The respondents were also directed to review the performance of the petitioner afresh. In addition, it was specifically held that *"in case it is moderated, then the case of the petitioner may be considered afresh for promotion to the post of Air Commodore by convening a special Promotion Board."*

7. From the very beginning, the contention of the respondents in the execution petition filed by the petitioner (M.A No. 479 of 2012) was that the order had been complied with. On 18.01.2013, the respondents placed a copy of the order dated 09.01.2013 promoting the petitioner to the rank of Air Commodore. The respondents were also directed to produce the minutes of the deliberation for the perusal of the Court. On 08.02.2013, the execution application was disposed of, as the order was implemented promoting the petitioner as Air Commodore.

8. Thereafter, the petitioner approached the Delhi High Court seeking to modify the order dated 09.01.2013 issued by the second respondent, which promoted the petitioner to the rank of Air Commodore against a vacancy for the year 2010 instead of 2009. With this prayer, the petitioner also sought to set

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aside the order dated 08.02.2013 passed by this Tribunal in M.A No. 479 of 2012 in O.A No. 155 of 2011. The petitioner also sought a direction to the respondents to review his ACRs from the year 2001 to 2007 by giving due weightage to his exceptional achievements and outstanding performance as recorded in the pen picture of these ACRs and to hold a special Review Promotion Board to consider the case of the petitioner for promotion to the rank of Air Commodore against a vacancy for the year 2009. While dismissing the writ petition, the Delhi High Court, as desired by the petitioner, granted him liberty to move an application before this Tribunal. It was made clear in the said order that this Tribunal, while taking into account the totality of the case, should pass necessary orders on the same uninfluenced by the observations made by the High Court.

9. We are of the considered opinion that the order passed by this Tribunal (Court No. 3) raises important questions of law and, therefore, require to be decided by a Larger Bench of this Tribunal. The questions involved are:

- (i) Whether the order of this Tribunal dated 18.01.2013, upon passing of the promotion order dated 09.01.2013, which was held to be in full compliance of the Tribunal's order, by the Execution Court on 08.02.2013 in M.A No. 479 of 2012, gives an end to the *lis* started by the petitioner in O.A No. 115 of 2011?
- (ii) Whether, in the facts of the case, the petitioner's only right was to challenge the order dated 09.01.2013 by moving appropriate application i.e. O.A before this Tribunal, on the basis of the fresh cause of action accrued to the petitioner by virtue of the order dated 09.01.2013?
- (iii) Whether the permission granted to the petitioner by the Delhi High Court for moving appropriate application before this Tribunal entitles him only to challenge the order dated 09.01.2013 or entitles him to seek recalling the earlier order dated 08.02.2013 disposing of the execution petition in full satisfaction?
- (iv) If the order dated 08.02.2013 passed in M.A No. 479 of 2012 is recalled, whether the petitioner can question the correctness, legality and validity of the promotion order dated 09.01.2013 in execution proceedings?

10. The Registry is directed to place the matter before the Hon'ble Chairperson for constitution of an appropriate Bench.

(PRAKASH TATIA)
CHAIRPERSON

(SANJIV LANGER)
MEMBER

Dated:15.12.2015
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