

COURT NO.1
ARMED FORCES TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

OA 790/2019 WITH MA 1413/2019

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|-------------------------|-------|-------------|
| Lt Col S G Upadhyay | | Applicant |
| Versus | | |
| Union of India and Ors. | | Respondents |

For Applicant : Mr. Indra Sen Singh, Advocate
For Respondents : Mr. V Pattabhi Ram, Advocate for R 1-3,
None for R-4

CORAM

HON'BLE MR. JUSTICE RAJENDRA MENON, CHAIRPERSON
HON'BLE LT GEN C.P. MOHANTY, MEMBER (A)

MA 1413/2019

Keeping in view the averments made in the miscellaneous application and finding the same to be bona fide, in the light of the decision in Union of India and others v. Tarsem Singh [(2008) 8 SCC 648], MA 4571/2023 is allowed condoning the delay in filing the OA.

2. Accordingly, the MA stands allowed.

OA 790/2019

3. The applicant, through the medium of this Original Application filed under Section 14 of the Armed Forces Tribunal Act 2007, seeks the following reliefs:

a. Call for the entire record of the case leading to the Impugned order dated 12.09.2018 and, subject to the redress already granted therein to the

Applicant, set-aside the said order dated 12.09.2018 being arbitrary and illegal to the extent it has declines the rest of the Applicant's prayers made therein;

b. Call for the complete Record of Service of the Applicant and after perusal thereof set aside the Confidential report (CR) for the period 01 Jan 2011 to 31 Dec 2011, the same being illegal, inconsistent, subjective/non-objective and without jurisdiction;

c. After setting aside the Impugned CR, direct the respondents to reconsider the Applicant afresh for promotion to the rank of Colonel with his updated/ modified record of service, and to promote the Applicant to the said rank if his updated/modified record of service/quantified merit matches with the cut-off merit of the Applicant's batch in the original consideration held in March 2018 & April 2019; and

d. Issue any other order(s) and direction(s) as deemed appropriate by this Hon'ble Tribunal under the facts and circumstances of this case.

FACTS OF THE CASE

4. The applicant was commissioned into the Indian Army on 8th December 2001, and was considered by No 3 Selection Board on three occasions including as a fresh case in April 2018, as a Special Review (Fresh) case in October 2018, and as a First Review case in March 2019, none of which resulted in favorable outcomes for the applicant. The applicant has filed a statutory complaint on 17 November 2017 challenging two Confidential Reports (CRs) for the periods 01/11-12/11 and 01/12-05/12.

5. Upon review, the respondents found limited grounds for interference and granted partial relief by setting aside the CR for 01/12-05/12 on technical grounds and expunging specific adverse remarks related to 'Maturity' and Effectiveness in carrying out administration' in the CR for 01/11-12/11. Not satisfied with

the aforementioned limited interference by the Respondents, applicant has filed this OA.

SUBMISSIONS ON BEHALF OF THE APPLICANT

6. It is the case of the applicant that on 07.01.2012, a baseless written complaint was lodged by an NCO that led to a unit CoI against the Applicant involving his character and military reputation and while this inquiry was ongoing, the Commanding Officer, who acted as the Initiating Officer (IO) for the CR, was unduly influenced and prejudiced by the pendency of the inquiry while initiating the applicant's Confidential Report for the period 01.01.2011 to 31.12.2011.

7. It is submitted by the applicant that the initial Unit CoI was set aside for the failure to invoke Army Rule 180, which mandates procedural safeguards when an inquiry implicates an officer's character and reputation. This procedural deficiency necessitated a fresh Staff Court of Inquiry where Army Rule 180 was properly invoked, confirming that Applicant's character and military reputation were involved in the inquiry.

8. With respect to impugned CRs, it is submitted by the applicant that the Army Order AO 45/2001/MS mandates that a Confidential Report shall not be initiated when an officer is subject to a disciplinary case without prior sanction of the Senior Reviewing

Officer (SRO), whereas the Applicant was under disciplinary proceedings from 13.01.2012 to 09.03.2013 when the award of censure was made and the impugned CR was initiated without securing this mandatory SRO sanction, rendering the CR *void ab initio* and without jurisdiction.

9. It is further submitted on behalf of the applicant that besides procedural invalidity, the assessments in the impugned CR were arbitrary, inconsistent with the applicant's overall outstanding profile, and motivated by mala fide bias and that the IO's personal animus against the applicant surfaced through attempts to stifle the applicant's career advancement, including efforts to block his nomination to the Defence Services Staff College (DSSC).

10. With respect to the assessment of RO and SRO, it is submitted by the applicant that the Reviewing Officer (RO) and Senior Reviewing Officer (SRO), lacking direct interaction with the Applicant, appear to have echoed the biased IO's downgraded appraisal mechanically, further compounding the unfairness, and thus, the Applicant prays that this Tribunal declare the impugned Confidential Report technically invalid, void for want of jurisdiction, vitiated by malice and bias, and set aside the adverse assessments therein.

SUBMISSIONS ON BEHALF OF THE RESPONDENTS

11. Per contra, it is submitted by the respondents that they have adhered strictly to applicable Army Orders and policies in preparing, reviewing, and assessing the Confidential Reports (CRs) challenged by the applicant and that Army Order 45/2001/MS was fully complied with, and the technical validity of the CRs has been confirmed by competent statutory authorities who granted only partial relief on technical, non-substantive grounds, thereby, affirming the lawfulness of the respondents' actions.

12. Elaborating further, it is submitted by the respondents that the assessments were conducted objectively by Competent Reporting, Intermediate Reviewing, and Senior Reviewing Officers based on verified performance data and standards relevant to the applicant's role and therefore allegations of bias, down grading, or inconsistency are unsubstantiated personal perceptions of the applicant and lack any evidentiary foundation, failing the burden to prove malice or unfairness. It is well established that direct personal interaction between the ratee and reporting/reviewing officers is not a mandatory requirement for a valid CR, as decisions rely on comprehensive records and performance indicators.

13. It is conclusively submitted by the respondents that the challenged CR for the period 01/11-12/11 was initiated before any

disciplinary proceedings against the applicant, thus, provisions requiring sanctions in such cases do not apply and that policies governing the CRs were applied prospectively according to prevailing guidelines at the time, with no retrospective or arbitrary application affecting the applicant adversely.

CONSIDERATION

14. We have heard the learned counsel for the parties and perused the material produced before us, including the statutory complaint processed by the Complaint Advisory Board of COAS Sectt and the Selection Board proceedings pertaining to the applicant. The record reveals that the applicant had assailed two Confidential Reports (CRs) for the periods 01/11–12/11 and 01/12–05/12 by way of his statutory complaint dated 17.11.2017. The said complaint was disposed of by the Ministry of Defence, Government of India, vide communication dated 12.09.2018. By the said order, the Central Government granted partial redress by way of expunction of only the Reviewing Officer's (RO's) assessment in the CR for the period 01/11–12/11 at Para 9(h) (Maturity) and Para 10(e) (Effectiveness in carrying out administration of his command), on the ground of inconsistency. The Government further set aside the entire CR for the period 01/12–05/12 on the ground of technical invalidity.

15. Upon a further and deeper scrutiny of the aspect of technical invalidity, and after examining the files of the Complaint Advisory Board (CAB) of the COAS Secretariat, it emerges that the CR for the period 01/11-12/11 was initiated on 18.01.2012 when a Court of Inquiry (CoI) was already in progress against the applicant. The applicant became subject to disciplinary proceedings vide an order dated 13.01.2012 issued by 147 Lt AD Regt (Comp) when the CoI was convened by his unit based on a written complaint by a soldier against the applicant amongst others and the proceedings of same continued until 05.05.2012, when the CoI was set aside on grounds of technical invalidity. During the pendency of the said CoI, the Initiating Officer (IO), who was also the convening authority of the disciplinary proceedings, initiated the CR without obtaining the mandatory sanction of the Senior Reviewing Officer (SRO), as required under the provisions of Para 32 (b) of Army Order 45/2001/MS.

16. It is further noticed that pursuant to the observations of the higher Headquarters (Brigade Headquarters), a fresh staff CoI was ordered by HQ 785 (I) AD Brigade vide convening order dated 05.05.2012 wherein the applicant was directly named as an accused and accordingly AR 180 was involved for the purpose of the same inquiry. The CoI commenced in August 2012 and in this

intervening period, the CR for the period 01/12–05/12 was initiated by the same IO on 09.06.2012 and reviewed by the RO on 28.08.2012. In this instance as well, the mandatory SRO sanction was neither sought nor obtained and on the same ground alone the impugned CR was set aside by competent authority vide their order dated 12.09.2018.

17. In our considered view, the initiation of not only the subsequent CR (already set aside by the respondents), but also the earlier CR, stands vitiated being in breach of Paras 32 to 36 of Army Order 45/2001/MS, which govern the technical validity of CRs. Consequently, both CRs ought to have been expunged. This conclusion is further reinforced by the fact that the IO, who had convened the initial CoI, was also the IO for the relevant CRs, thereby giving rise to a reasonable apprehension of bias against the applicant. Essentially, relevant Paras 32 to 36 of Army Order 45/2001/MS, relevant to this issue are reproduced as under:-

Initiation of Reports when Ratee or the Reporting Officer is involved in a Disciplinary Case

32. CRs will be initiated on all officers under disciplinary proceedings, subject to following conditions being met:-

(a) The disciplinary proceedings are completed within the reporting period. Ratee under this provision is also entitled for a Delayed CR, if reasons for delay are those other than the disciplinary case.

(b) In case, disciplinary proceedings are not completed within the reporting period and the officer continues to discharge his official duties for the appointment posted the CR will be initiated with prior permission of the SRO. It will be ensured that such CRs are objective and do not contain reference to the officer's involvement in the disciplinary case.

33. If the officer continues to remain under a disciplinary case during the reporting year, no CR will be initiated and a NIR will be forwarded to the MS Branch, provided the officer has not been discharging his official duties for the appointment posted.

34. 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 Court of Inquiry is ordered involving his character or military reputation (invoking of Para 180) of Army Rules), or

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

35. In case, the date on which cognizance was taken is, on or after the due date of initiation of CR, endorsement by affected reporting officers, in respect of those CRs, which have not been initiated and processed to the next level may be debarred by the SRO. The CRs which are already initiated before the next date of taking cognizance will be commented upon for objectivity by the higher reporting officers and all such CRs will be endorsed by the SRO. However, CRs, having reached the MS Branch without the endorsement of the SRO may be accepted without SRO's endorsement as per procedures of MS Branch.

18. We also consider it necessary to refer to the reply affidavit filed by Respondent No. 4, which forms part of the pleadings on record. The respondents have categorically averred that, on the basis of a written complaint submitted by Naik Vikram Singh against the applicant and another officer in the last week of December 2011, Respondent No. 4 had ordered a Court of Inquiry (CoI) in the first week of January 2012. Since the said complaint was duly submitted

to Respondent No. 4 and preliminary action, including initiation of the CoI, commenced on 13.01.2012, it is evident that cognizance of the alleged misconduct had already been taken. In these circumstances, we are of the considered view that the ACR for the period 01.01.2011 to 31.12.2011, which was initiated in the third or fourth week of January 2012, was likely to have been influenced by a predisposition or bias in the mind of the Initiating Officer (IO) against the applicant. This inference is further substantiated by the comparatively lower gradings in the said CR when contrasted with the applicant's other reports contained in his dossier.

19. Thus, even though the respondents have argued that the CR for the period 01/11–12/11 did not warrant complete interference on grounds of technical infirmity, we are satisfied that, in the interest of justice and in view of the evident technical invalidity, subjectivity, bias, and inconsistency vis-à-vis the applicant's overall profile, the entire CR deserves to be set aside.

20. Now, on examination of the Selection Board proceedings pertaining to the applicant, it is observed that he was first considered as a Fresh Case of AAD/2001 batch by No. 3 Selection Board in April 2018, when all the impugned CRs formed part of his profile. He was not empanelled for promotion on account of his lower merit relative to his batchmates. He was thereafter considered as a Special

Review (Fresh) case in October 2018, when his profile was compared with his original 2001 batch after taking into account the expunctions directed by Ministry of Defence letter dated 14.09.2018, whereby the entire CR for 01/12-05/12 was removed and the CR for 01/11-12/11 was partially expunged. Even on this occasion, he was not empanelled as he remained below the benchmark of his original batch. The applicant was again considered for the third time with the next junior batch (2002) in March 2019, and once again was not empanelled. However, on being considered for the fourth time as a Final Review case with the 2003 batch by No. 3 Selection Board in February 2020, he was finally found fit for promotion.

21. In view of the fact that the applicant was eventually found fit for promotion in the fourth and final consideration held in February 2020, we are of the opinion that he is entitled to reconsideration by No. 3 Selection Board after the expunction of the CR for 01/11-12/11 ordered herein, for the limited purpose of determining whether he would have been found fit in his original batch (2001) & junior batch (2002) , thereby entitling him to restoration of seniority to his original batch or next junior batch of 2002.

22. In view of the aforesaid detailed analysis, the OA 790/2019 is allowed with the following directions :-

(a) The Confidential Reports for the periods 01/11-12/11 and 01/12-05/12 are hereby set aside and expunged in their entirety from the applicant's profile, being technically invalid for non-compliance with Paras 32 to 36 of Army Order 45/2001/MS.

(b) The applicant shall be reconsidered by No 3 Selection Board as a Special Review Case, after giving full effect to the expunctions ordered as above. In the event he is found fit, the respondents shall restore his seniority in his original batch or his junior batch (2002) as the case may be, strictly in accordance with the applicable policy and rules.

(c) He shall be entitled to all consequential benefits accruing thereby in case of restoration of his original seniority or any subsequent promotion boards held for intermediary batches where he succeeds by virtue of being above the benchmark of the batch under consideration.

(d) The above directions shall be given effect within a period of three months from the date of pronouncement of this order.

23. In view of the above directions, the Original Application stands allowed.

24. No order as to costs.

25. Pending miscellaneous application(s), if any, stand closed.

Pronounced in the open court on this 19th day of December, 2025

(JUSTICE RAJENDRA MENON)
CHAIRPERSON

(LT GEN C.P. MOHANTY)
MEMBER (A)

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