

**ARMED FORCES TRIBUNAL, CHANDIGARH REGIONAL
BENCH AT CHANDIMANDIR**

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OA 173 of 2011

Col Randeep Singh Guleria	Petitioner(s)
Vs		
Union of India and other	Respondent(s)

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For the Petitioner (s) : Mr. Navdeep Singh, Advocate
For the Respondent(s) : Mr. Vibhor Bansal, CGC

**Coram: Justice Prakash Krishna, Judicial Member.
Lt Gen (Retd) DS Sidhu, Administrative Member.**

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ORDER
05.08.2014

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The present petition has been filed under Section 14 of the Armed Forces Tribunal Act, 2007. The petitioner a commissioned officer of the year 1988, was full Colonel in 2006 and was the Commander of 33rd Battalion of Rashtriya Rifles (33 RR) on 6.12.2005. By means of present petition, the petitioner has sought the quashing of the adverse confidential report (ACR) for the period March, 2006 to August, 2006. For the sake of convenience, the relief clause from the petition is reproduced below:-

“(i) Setting aside of the final rejection letter (Annexure A-9) and consequently the impugned Adverse Report for the period March 2006 to August 2006 since the same is not only based on the incorrect assumption of ‘guilt’ of killing ‘innocent civilians’ by the petitioner’s Reporting officers which is in direct contravention of the report of statutory, quasi-judicial and investigative bodies but also due to the fact that it takes cognizance of an incident which was of a prior date (February 2006) to the period covered by the impugned Adverse Report (March 2006 – August 2006) and of a time when the petitioner and his Initiating Officer were on long (Annual) leave and the same having been initiated by an Initiating Officer under whom the petitioner only had 27 days of actual physical service.

- (ii) With a further prayer that the petitioner may be allowed to complete his Command tenure by giving him command of an Infantry Battalion and assessing him afresh thereon.
- (iii) Any other direction that the Hon'ble Tribunal may deem appropriate in the peculiar facts and circumstances of the matter at hand.”

Shorn off unnecessary details, it may be noted that an adverse confidential report was initiated as per Para-V-Special, adverse review reports as provided for by Army Order 45/2001/MS and other relevant policies at the relevant point of time. The Initiating Officer (In short 'IO'), the Reviewing Officer (In short 'RO') and Senior Reviewing Officer (In short 'SRO'), all have adversely commented upon the working of the petitioner as Commander of 33rd Rashtriya Rifles and the working of the Unit. In the petition, the petitioner has impugned the following remarks made by the Reviewing Officer :-

"Col R.S. Guleria while in command of 33 RR has created a dangerous degree of tension in the unit by various immature actions and utterances. His method of handling various issues, incl day-to-day matters has been very abrasive. The unit, under his command has also been guilty of six innocent civs deaths on two different occasions. He is not suitable to continue in command of 33 RR in the CT ops environment of Kashmir.

(a) Details of guidance for improvement during the Reporting Period:-

(i) Verbal Yes on 24 Feb 06 (ii) Written NIL

(b) Do you recommend any portion of the report by the IO to be expunged ? If so state such portions and reasons. No”

(c) XXX XXX”

Before proceeding further, it would be appropriate at this juncture to reproduce the adverse remarks recorded by the IO and SRO as well. The remarks recorded by the IO are reproduced below :-

“Guleria is a medium built offr with good military bearing. On assuming Comd of a Rashtriya Rifles (RR) bn, he could not comprehend dynamics of the org and environment in which tps were operating. His transactional apch to leadership created disharmony in unit and apprehension in the minds of all rks of bn. The tension in the unit coupled with poor drills and procedures led to unfortunate killing of civs by unit in ops effecting the morale of the bn. The adm procedures of unit too need improvement. The offr has aptitude for dealing with civ populace and govt. officials.

Guleria needs to better his leadership apch and quotient.”

In box grading, he has given 6 marks and it further finds mention that the guidance for improvement during the reporting period was given in written.

The remarks recorded by Superior Reviewing Officer who has given 5 marks in box grading is reproduced below :-

“Since assuming command of 33 RR in Dec 05, there have been rumblings and turbulence in the unit. The two incidents of killing innocent civilians and the discontent in the unit indicate necessity for removal of the CO from Command – a situation I cannot accept in an op active area. I consider him unfit to comd. any unit.

(a) Details of guidance for improvement during the Reporting Period:-

(i) Verbal Yes, (ii) Written No

In my office on 15 July 06.

(b) Do you recommend any portion of the report by the IO/RO to be expunged ? If so state such portions and reasons.
No”

(c) XXX XXX”

During the course of arguments, we were informed that all the 3 remarks recorded by IO, RO and SRO being adverse were communicated to the petitioner, which could not be seriously disputed by the learned counsel for the petitioner.

Quashing of the impugned remarks have been sought for on number of grounds which will be discussed at the appropriate place herein after.

The Unit of the petitioner on relevant period was posted at a highly volatile and active insurgency effected area in the State of Jammu and Kashmir in a semi-urban population. On 22.02.2006, at Dudipur, unit of the petitioner opened fire causing death of 4 civilians including 3 children. This action of the petitioner's unit was not appreciated as the killing took place due to inappropriate action by one of the sub Units under the command of the petitioner. The petitioner was given verbal and written counselling, according to the respondents several times to pervert recurring of such incidents. However, again on 12.08.2006, firing took place by the petitioner's unit causing civilians death.

On 24.08.2006, Brigadier Commander gave performance counselling to the petitioner and also initiated the recording of adverse ACR on 30.08.2006. This resulted the recording of the adverse ACR by the IO, RO and SRO already reproduced above.

Having been unsuccessful in obtaining the desired relief by filing statutory and non-statutory complaints for quashing the adverse remarks, the present petition has been filed.

The learned counsel for the petitioner has raised the following pleas for our consideration :-

- (i) Firstly, the ACRs are based in respect of Dudipur incident dated 22.02.2006 which falls prior to the reckoning period of the ACR. The ACR relates to the period March, 2006 to August, 2006. The lapses if any on the part of the petitioner cannot be taken into consideration for judging the performance of the petitioner for the reckonable period.
- (ii) Secondly, Court of Inquiries were ordered in respect of aforesaid two incidents i.e. 22.02.2006 and 12.08.2006 and Court of Inquiry has exonerated the petitioner. Therefore, in

view of the findings returned by the Court of Inquiry, the impugned ACRs are liable to be set aside.

- (iii) Thirdly, as per the prescribed procedure for recording adverse ACR, 60 days period is provided for after the counselling letter to provide an opportunity to the ratee to improve his performance. But in the present case, the respondents have recorded adverse ACR before waiting for the completion of 60 days after the service of counselling warning.
- (iv) Fourthly, the petitioner actually served for 27 days under the IO and therefore, the IO could not have initiated the adverse report against the petitioner.

Heard the learned counsel for the parties and perused the record. The respondents placed before us the dossier of the petitioner's service record as also the findings recorded by the two Court of Inquiries in respect of the aforesaid two incidents. These were examined by us with the help of the learned counsel for the parties.

Before considering the aforesaid pleas, it would be appropriate to notice the manner of recording the adverse ACRs as referred by the learned counsel for the parties. The manner of initiation and recording of adverse report and the authority who will initiate an adverse report is prescribed in Paras 110 to 113 and 115 of the Army Order 45/2001/MS. For the sake of convenience, the same is reproduced below:-

“Adverse Report:

110. The authority to initiate an Adverse Report is solely vested in the IO (or RO when initiating CR). It is to record cases in which an officer's service is considered unsatisfactory, viz, when it is desired to recommend release of an officer from service, or removal from an appointment, or employment in his active rank, or to indicate Drop in Performance of the officer for reasons of professional incompetence, inefficiency or inherent traits of character, which makes his utility to his present appointment doubtful.

111. Before an Adverse Report is initiated, the following will be ensured:-

- (a) The officer will be warned in writing of all his shortcomings, which are intended to be reflected in the Adverse Report.
- (b) The written warning as in Paragraph 111(a) above will specifically mention that the same has been issued for the purpose of initiating an Adverse Report/Drop in Performance.
- (c) The next higher headquarters, reporting officers and MS Branch will be informed of the fact that the officer has been warned. A copy of the warning letter will also accompany the Adverse Report, if and when initiated.
- (d) **The officer will be given a period of 60 days to show improvement. However, this period of 60 days may be waived by the SRO not below the rank of Divisional or Area Commander or a PSO at Army Headquarters.**
- (e) **The period of 90 days physical service under the IO/RO, (where RO is initiating the report) can also be waived under exceptional circumstances, due to organisational interests by the SRO as at Sub Paragraph 111(d) above, with information to MS Branch. The sanction letter for waiver of 90 days physical service must specifically mention this aspect.**
- (f) The officer may be debarred from initiating CR of officers serving under him, if such officers are directly connected with the case, and the CRs become due for initiation during the period he remains on Adverse Report. However, prior approval of the MS Branch in such cases must be obtained.
- (g) All other provisions of channels of reporting and the appointment to which the officer is posted to and being reported upon, will continue to remain and cannot be waived.
- (h) It will be ensured that issue of warning, waivers if any granted and initiation of Adverse Report are chronologically in the same sequence and practiced in the same spirit.

112. The warning period of 60 days prescribed in Paragraph 111(d) above, may be waived by the SRO (Rank/appointment specified vide paragraph 111(d) above), in case of gross professional inefficiency or when the retention of the officer in his unit or appointment is considered inadvisable in operational situation and in the larger interests of the service. Such sanction will be accorded in writing before the Adverse Report is initiated and a copy thereof will accompany the report. The officer (Ratee) in such cases can only be posted out after acceptance of Adverse Report by the MS Branch and while being placed on Review Report with a change in environment. The following procedure will be adopted in cases where the warning period of 60 days for initiation of Adverse CRs has been waived :-

- (a) Immediate initiation of Adverse CRs
- (b) Information to MS 4 Coord, concerned Library and Controlling Groups by telephone and signal.
- (c) Processing the Adverse Reports through fastest means, for endorsement by the higher reporting officers and further despatch to MS Branch.
- (d) Controlling Groups would initiate simultaneous action for providing immediate relief, pending approval of the Ratee's Adverse Report and orders for change of environment.
- (e) Reporting officers will ensure that the Adverse Report is endorsed and despatched to the higher reporting officer/MS Branch expeditiously, through a special courier. The same will not be kept in any headquarter for more than three days.

113. The MS Branch will be informed by signal as soon as an officer is warned for initiation of an Adverse Report. The report will be marked 'Adverse Report' in

red ink and must reach the MS Branch within 30 days of its initiation.

Status of Officers Placed on Adverse, Review and Special Report:

115. Move on Courses/Temporary duty/Leave.

(a) Adverse Reports. An officer placed on an Adverse Report will not be sent on leave or temporary duty for a period exceeding 10 days without prior approval from the MS Branch. He will also not be sent on a course of instruction without obtaining prior approval of the MS Branch.

(b) xxxxxxxxx”

The dispute in the present petition relates to the recording of ACR for the period March, 2006 to August, 2006. The main plank of submissions of the petitioner is that an incident which happened prior to this period should not be taken into consideration while recording the performance report of the petitioner for the reckonable period. Elaborating the arguments, he justifies the firing by the petitioner's unit on 22.02.2006 as also on 12.08.2006. The submission is that when Army is posted in a sensitive area and there is insurgency activity, the decision taken by Commander of firing cannot be regarded as failure of his performance of duties. There was cross-firing incident involving the petitioner's unit and militants. Two soldiers of the petitioner's unit were also injured. Unfortunately, if some civilians have lost their lives in the firing, the petitioner being the Commander should not be blamed for firing. Reference was made to a letter issued by the District Magistrate filed as Annexure A-2, dated 22.03.2006, advising the villagers in the light of the mishap which had already happened, to prevent any such mishap in future, to all bonafide farmers or civilians of the district that in case of unavoidable movement during night hours from 10-00 PM to 04-00 AM shall duly carry lanterns to establish their identity. It was also argued with the help of Annexure A-3 that the petitioner was actually physically present in the command only for 27 days and was absent for 128 days from the period 29.3.2006 to

26.6.2006. Reliance was also placed on few decisions in support of his above contention that the incident dated 22.02.2006 being prior to the reckonable period, was outside the purview of the reckonable period, Judgments given by the Principal Bench in OA No. 190 of 2009 – Brig. Rajiv Verma Vs Union of India and others dated 29.11.2010, TA No. 486 of 2010 – Col. A.K. Singh Vs Union of India and others decided on 16.12.2010, were relied upon.

In reply, the respondents have come up with the case that although in the ACR, the period is mentioned as March, 2006 to August, 2006 but the petitioner took over the command of 33 RR on 6.12.2005. Therefore, the ACR should be taken for his entire period of command beginning with 6.12.2005 to August, 2006. In the alternative, it was submitted that all the three officers have adversely commented upon the performance and working of the petitioner as Commander and there being no allegation of mala fide against any of these officers, any judicial intervention is not called for. The working of the petitioner has been assessed objectively by these officers which shows his incompetence to command the unit. At any rate, it was submitted that overall performance of the petitioner as observed by these officers during their visit and the counselling given by them, oral or written to the petitioner from time to time justifies the recording of impugned ACRs by them.

On a perusal of the original record with regard to the impugned ACRs, we find that under the heading period covered by the report, it is mentioned as from 29.3.2006 to 30.8.2006. Further the IO has mentioned that written counselling was given to the petitioner vide letter dated 24.08.2006. We have very minutely gone through the ACR recorded by the Initiating Officer and find that there is no mention of the incident dated 22.02.2006 therein. The reporting is based on the overall performance of the petitioner as Commander of the unit. In the absence of any other material, no fault or illegality, legal or factual mistake could be found therein. That appears to be the reason that the same though adverse, has not been impugned by the petitioner.

Now coming to the impugned ACR recorded by the RO who has justified the report by the IO by putting remarks at the appropriate place and thereafter has recorded his own observation with regard to the overall

performance of the petitioner as Commanding Officer of the unit. The RO has undoubtedly has not given the dates of the two incidents i.e. 22.02.2006 and 12.08.2006 but has mentioned that the unit under the command of the petitioner has been guilty of death of six innocent civilians on two different occasions. He has further written that verbal counselling was given to the petitioner on 24.02.2006. On a careful consideration of the entire remarks of the petitioner, we find that the recording of two incidents and death of six innocent civilians is one part of the report but the other part of the report is regarding the overall behaviour, performance and mode of command, poor drills in the unit under his command, his manner of handling various issues. These remarks themselves justify the other part dealing with the petitioner's manner of dealing of various issues that the petitioner lacked the leadership potential to command a unit.

The endorsement of the RO that 'the unit under his command has also been guilty of death of six civilians on two different occasions', may partly pertain to beyond the purview of reckoning period. Undisputedly the second incident dated 12.08.2006 wherein also two civilian deaths took place falls within the period covered under the ACR.

At this juncture, we can not lose sight of an argument advanced by the respondents' counsel as well as the stand taken in the reply that this ACR should be considered for the entire period i.e. period covering 6.12.2005 when the petitioner took the command of the unit till August, 2006. He submits that for the period December, 2005 upto February, 2006, there is no other ACR and it appears to be a case of some mistake or oversight that in the impugned ACR, the period is mentioned as covering 29.3.2006 to 30.8.2006. Under Column 3 on the third page of the dossier against the heading "Details of Confidential Report/Non Initiating Reports Rendered during the Reporting Year, the period 24.11.2005 to 28.03.2006, it is mentioned Non Initiation Reports (NIR) due to the reason that IO posted out and ratee not completed 90 days physical service under IO. This signifies that the performance of the petitioner was not assessed by the then IO as he was posted out and the petitioner had not completed 90 days physical service under IO.

We take the A.C.R. period as mentioned in the A.C.R. itself.

Viewed as above, the sentence in the ROs report – “The unit under his command has also been guilty of six innocent civilians death on two different occasions in the report of Reviewing Officer” takes note of incident dated 22.02.2006 also though not specifically mentioned be expunged but the other part of Reviewing Officer’s report remains intact and undisturbed being based on overall performance of the petitioner and on objective consideration by the RO. By way of clarification, we may add that this will not in any manner change or effect the tone, tenor and validity of the A.C.R.

Much was argued that Court of Inquiries were ordered in respect of aforesaid two incidents and according to the petitioner he was found not guilty in any of them. Record of Court of Inquiry was produced before us. The learned counsel for the respondents raised objection that the findings were recorded by Court of Inquiry in a different context and has nothing to do with the recording of the ACR of the petitioner or of competence of the petitioner as Commander. The considerations weighed differently while recording the ACR of an officer and recording of finding by Court of Inquiry.

The shortcomings mentioned in the counselling letter and in pen picture of the three reporting officers are relevant to professional incompetence and inefficiency which are the relevant factors in Para 111 for initiating an adverse report. A Court of Inquiry is ordered to ascertain the facts with regard to an incident. It is a fact finding inquiry. The recording of ACR of an individual is with regard to his capabilities to handle a situation and his performance. This is more or less administrative and professional competence. Having said so as above, we find that even the findings recorded by the Court of Inquiry will not come to the rescue of the petitioner. Even if the incident of 22.02.2006 is excluded, Major General, General Officer Commanding through his order dated 31.10.2006 concurred Court of Inquiry with regard to the incident on 12.08.2006 near village Chailpatti, and made the following remarks:-

“3. However, as there was no retaliation even after the warning shot was fired, the ambush party Cdr should have exercised restraint before ordering his party to open effective fire on the suspect movement.

4. Based on the facts revealed by the Court of Inquiry, I direct that administrative action be taken against SS-40299A Capt Yash Srivastava for not fully ascertaining the identity of the concerned civilians before opening fire.”

The argument that the petitioner being on leave on 12.08.06 and by implication is not responsible for the act of his troops, has got no substance. The sub unit under the command of the petitioner caused the civilians death which reflects that the troops were inadequately trained and did not follow proper drills in spite of counselling given to the petitioner. The Commanding Officer of the unit is responsible for the acts and omissions of the troop, under his command. It is the Commander who gets the Kudos prestige if troops under his command are successful and also is equally responsible for the failure of the troops. The petitioner cannot put himself at a distance with regard to the incident of 12.08.06.

The Company Commander is responsible for supervising his subordinates during combat operations. Military law recognizes no principle which is more firmly fixed than the rule that the military superior is responsible for the proper performance by his subordinates of their duties. The responsibility of a Commander for controlling and supervising his subordinates is the cornerstone of a responsible Armed force. A Commander must give clear, concise orders and must be sure that they are understood. After taking action or issuing an order, a Commander must remain alert and make timely adjustments as required by a changing situation. The military Commander has complete and overall responsibility for all activities within his unit. He alone is responsible for everything his unit does or does not do. In addition to controlling or supervising his subordinates, the company commander, due to his superior rank and senior position, must conduct himself in an exemplary manner whether the company commander is present in the particular camp or not, is the responsibility and duty to take actions as were available to him to maintain the morale of the Army and to counsel, advise and where necessary, order them to conduct themselves in keeping with the standards of conduct of Indian Army.

Alternatively we are of the view that in such matters, the scope of judicial interference is almost nil as the report of the Court of Inquiry has

been approved by the Major General, General Officer Commanding who has found fault with the ambush party of 33 Rashtriya Rifles of which the petitioner was the Commanding Officer. At any rate, the impugned ACR could not be faulted on the finding recorded by Court of Inquiry subsequently as the both operate in different fields.

In the petition as well as during the course of the arguments, it was submitted by the petitioner's counsel that the relevant provisions for recording the ACR have not been followed as the recording adverse ACR was initiated within few days of the serving of the counselling letter. This argument was not pursued any further in view of the stand taken by the respondents which was not disputed by the petitioner and has borne out from the record also that looking to the exigency of the situation, waiver of 60 days and 90 days for initiating and recording the adverse ACR by the appropriate authority were granted. Therefore, we need not to dwell upon the issue any further there being no challenge whatsoever with regard to the legality of grant of waiver.

Lastly it was argued that the IO could not have recorded the adverse ACR as the petitioner had physically served under him only 27 days and was on leave for the remaining period. The Rule 111(e) permits the waiver of 90 days physical service to be granted by the SRO under exceptional circumstances due to organisational interest. The said waiver was granted in the present case and the grant of waiver is not in issue. Therefore, the argument of the learned counsel for the petitioner is based on wrong assumption of facts.

The upshot of the above discussion is that except on the point no. 1, we do not find any merit in the other arguments of the learned counsel for the petitioner.

Therefore, the petition is liable to be allowed partly by expunging the following remarks from the report of RO:-

“The unit, under his command has also been guilty of six innocent civilians deaths on two different occasions.”.

This brings us to the second relief claimed in the petition. The petitioner has sought for to complete his command tenure by giving him command of Infantry Battalion and assessing him afresh thereon. We are of

the opinion that no such relief can be granted to the petitioner by us notwithstanding the fact that the present petition is being allowed partly. Un-expunged portion of the ACR that the petitioner is not fit to command Infantry Battalion having been remained intact, the second relief therefore is denied. The record shows that by the order dated 24.10.2008, the petitioner's application seeking second command tenure was rejected by the M.S. Branch.

The petitioner was working in a counter insurgency area where mistakes such as death of innocent civilians can cost heavy and have an adverse affect on the entire situation.

In the result, petition succeeds and is allowed in part as indicated above and is rejected for the remaining part. No order as to costs.

The original ACRs and complaint file are returned.

(Justice Prakash Krishna)

(Lt Gen (Retd) DS Sidhu)

05.08.2014

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Whether the judgment for reference to be put up on website – Yes/No