

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

SWP No. 714/07

Dated:16.11.09

Col. Yatish Chandra Mishra v Union of India and
Others

Coram:

Hon'ble Mr Justice Sunil Hali, Judge

Appearing counsel:

For the petitioner(s) : Mr Rahul Pant
For the respondent(s) : Mr PS Chandel, CGSC

Whether approved for reporting in **Yes/No**
Digest/Journal/Media.

Promotion to the post of Brigadier made by the Promotion Board Medical No. 2 held on 2nd February, 2007, which resulted in exclusion of the petitioner, is subject matter of challenge in this writ petition. In order to appreciate the controversy, the backdrop of the case is enumerated herein below:

The petitioner is working as Colonel in Army Dental Corps (herein-after referred as AD Corps). He was commissioned in the Army as Lieutenant in the year 1978, and earned promotion during tenure of his service. He was considered by the Selection Board for being appointed as Colonel on 13.8.2000, but was not selected. He filed a non statutory complaint on

6.8.2000. The ground for his exclusion was down grading of his ACRs for the year 1995-1996. Inconsistency in ACRs was expunged by the Chief of Air Staff by allowing the non statutory complaint of the petitioner. Necessary implications of expunging of inconsistency in ACRs, was to consider the petitioner for the post of Colonel. This was to be done by holding a Review Promotion Board. It transpires that the Review Promotion Board did not hold any meeting till 10.6.2002, and the result of the Review Board was intimated to the petitioner after delay of seven months i.e. on 3.1.2003. The order was implemented six months thereafter when the petitioner was posted as Colonel on 3.7.2003.

In the month of December, 2005, a Regular Selection Board was held to consider all the eligible candidates for one available vacancy of Brigadier existing in the Army Dental Corps. The petitioner was also considered but was not selected by the Board. Non-statutory complaint came to be filed by him on 8.6.2006 in terms of para 364 of Regulations for the Army 1987, and para 79 of the Special Army Order 8/S/91.

In the complaint, stress was laid by the petitioner for reviewing the low gradings of ACRs, if any, awarded to him, which were not in consonance with the actual performance of the

petitioner. It specifically prayed for removing the aberrations in reporting by any Senior/ Higher Technical Officer by comparing it with the grading awarded by Initiating Officer and First Technical Officer. It is to be noted that the respondent no. 5 and 6 were also not considered by the Selection Board.

The respondent no. 5 was considered by the Selection Board for the post of Brigadier held on 31st of July'03, but was not selected; he filed a statutory complaint against his non selection by the said Board on 29th of September, 2003. The said Statutory complaint was decided on 15.9.2004 and partial redressal was granted to the said respondent by setting aside the assessment made by the First Technical Officer in the ACR of 2001 and SCR of 2002 on the ground of inconsistency. After redressal of his grievance, he was again considered but not selected for promotion by the Review Promotion Board held on 15.3.2005.

On 7th of Dec'2005, the respondent No.5 alongwith petitioner was again considered by the Promotion Board (Medical) 2, but both were not selected. After the non selection of the petitioner as also private respondent No.5, the said respondent submitted a non statutory complaint on 23rd of Jan'06, against his supersession by the said Board. The said

complaint was rejected by the authority concerned. It seems that he filed one more Statutory complaint on 28.11.2006 against his supersession. The Central Government vide its order dt. 11th of Jan'07, partially accepting the said complaint granted the relief to the private respondent No.5, by way of expunction of complete numerical assessment of ACR of 2001 on the ground of inconsistency. It be noted that ACRs for the year 2001 with respect to which respondent no. 5 got relief, the statutory complaint was already considered by the authority concerned and at that time no relief with respect to the ACRs of 2001 initiated by IO and RO was given and relief was granted only with respect to the assessment made by the First Technical Officer in the ACR of the years 2001 and SCR for the year 2002. The second statutory complaint in which relief of complete expunction of ACRs for the year 2001 has been granted, as indicated above, was decided on 11.01.2007.

It transpires from the record that the aforementioned statutory complaint was received on 21.12.2006 and within seven days, it was forwarded to the respondent no. 1 and the relief was granted to the private respondent No.5. His case was finalized by the respondent no. 1 on 12.1.2007. The Review Board was held on 2.2.2007 and the case of the respondent no. 5 was cleared

for promotion to the post of Brigadier, which resulted in supersession of the petitioner.

So far as respondent no. 6 is concerned, he had filed non statutory complaint against Special Confidential report initiated by the Initiating Officer in the year, 2002. Resultant effect of the complaint was that Higher Technical Officer upgraded the ACRs of respondent no. 6, which resulted in his selection by the Selection Board (Medical) No. 2 on 2.2.2007. It is in these circumstances the present writ petition has been filed by the petitioner.

I have heard learned counsel for the parties and perused the record.

Mr. Rahul Pant, learned counsel appearing for the petitioner has challenged the order of his supersession on the following grounds:

- a) That the selection of respondent no. 5 & 6 was the result of malicious exercise of power by the official respondents. He contends that the non statutory complaint filed by the petitioner in June 2006, against the decision of the Selection Board held in December, 2005 remained undecided till the impugned orders were passed. The complaint filed

by the respondents no. 5 & 6 were decided on neck breaking speed, resultant effect of the same was their promotion to the rank of Brigadier.

- b) Removal of aberrations which were inconsistent with the overall profile of the officer was done in case of respondent no. 5 and 6 and not in case of the petitioner. Same principle was required to be followed in the case of petitioner which was not done.
- c) That the assessment made by the Higher Technical Officer is based upon the report that he receives from the First Technical Officer. In case, he does not assess the officer personally, any down grading of ACRs by the Higher Technical Officer without personally assessing the work of the officer cannot be done arbitrarily. This down gradation in the ACRs will be aberration, which is required to be expunged.

On the other hand, the stand taken by the respondent-Union of India is that every officer in the chain of reporting is free to record his objective assessment as observed by him irrespective of what the other officers in the chain have recorded/observed. The contention of

the petitioner that the views expressed by the Initiating Officer/First Technical Officer are vital and are to be given weightage is not correct. The assessment made by the Higher Technical Officer in down grading the ACRs was done on objective basis. The rejection of the officer for promotion to the higher rank necessarily does not mean that he has been down graded or underrated by his reporting officer.

It is further contended that the disposal of non-statutory complaint filed by the petitioner depended upon various inputs and the contents of the said complaint. It may get delayed due to non-availability of inputs mentioned here-in-above. There was no intention in delaying the disposal of non statutory complaint of the petitioner. It is, however, admitted that the statutory complaint filed by the respondent No. 5 on 28.11.2006 was disposed of on 11th January, 2007, and he was granted the relief by way of expunction of complete numerical assessment of ACR of 2001, and after the grant of said redressal, his case for promotion was reviewed by the Review Promotion Board(Med) 2, on 2.2.2007 as per procedure given in para 18 of promotion policy letter dated 14.1.2004. It is further contended that there was no bar in making second statutory complaint by the respondent No. 5 as contended by the petitioner. So far as

respondent No.6 is concerned, it is stated that his case was also considered as per the policy.

It is, however, admitted that on 27.11.2006, the Promotion Board (Medical) No. 2 was convened for AMC & AD Corps officers by the DGAFMS, who was the convening authority. The promotion of the AD Corps Officer was withdrawn after certain observations were made before the Board proceedings. It is denied that the promotion Board was deferred with any intend of malice. The stand of petitioner that nothing has been disclosed by the official respondents to indicate the principles which are required to be followed in removing the aberrations which are inconsistent with overall profile of the officer is stated to be incorrect.

I have heard learned counsel for the parties and perused the record.

Armed Forces Medical Service is a tri service organisation in which medical and dental officers can be posted from one service to another depending upon the vacancies in the overall categories. Promotions in the Army Dental Corps from the rank of Colonel to Brigadier is done in accordance with the policy as per letter No. 10(1)/2004/D(Med) dt. 14th of Jan'04, as amended by a duly constituted

Promotion Board. In terms of the said policy, the officers/fresh candidates numbering twice the available vacancies in addition to the officers not selected by the previous Promotion Boards are considered for promotion as per seniority. Each officer is considered three times after which he is permanently passed over. The officers who are not selected have the option of making non statutory complaint under Army Act Section 27 and para 364 of DSR, referred to above. The final authorities to dispose of the complaints are the Chief of Army Staff, Chief of Naval Staff and Chief of Air Staff, depending upon the service to which the officers belong. The officers who are not satisfied with the decision of any of the authorities' mentioned above, on their non statutory complaints, may make representation to the Central Government, whose decision is final. Whenever any officer is granted redress in his complaint, then, his case is reviewed on the basis of changed ACRs as against the boards to which he was earlier exposed. After the assessment so made which includes the ACR average, marks for the qualifications, marks for awards and board marks become higher than the ACR average as last empanelled officer in that Board, then, the said officer is graded fit for promotion in his own turn. If on the basis of such review, the officer is found fit for promotion, his seniority is also protected.

As is evident from the record, promotion to the next higher rank is made on the basis of ACRs of the officer. It is to be noted that for promotion from the rank of Colonel to Brigadier, five ACRs of the previous years are required to be examined and taken note of for the said promotion. As indicated above, since the officers belonging to dental and other medical services can be posted from one service to another, their immediate officers may not be having the knowledge of assessment of professional qualities of the officers, therefore, such a procedure has been prescribed for grading the ACRs of Dental officers or other officers belonging to the Medical service in Special Army Order 8/S/91. As and when the Initiating Officer who does not belong to the Dental Services initiates the ACR of the officer belonging to the said service, then, the said initiation of the ratee is done regarding his personal qualities, comprehension, employability and administrative capabilities. So far as professional qualities of an officer are concerned, the technical reporting in this regard is done by the immediate officers belonging to the Dental Service only. The ACRs are initiated in two parts; the first part is Confidential report covering the administrative capabilities and the second part is regarding professional capabilities which is termed as

technical reporting. Regarding the professional qualities, the first reporting is done by the First Technical Officer who is the immediate superior of the ratee and thereafter, second reporting is done by the Senior Technical Officer/Higher Technical Officer. So far as administrative part of the ACR is concerned, the same is initiated by the Initiating Officer who is immediate superior officer of the ratee at the place of his posting and the same is then reviewed by the Reviewing Officer and finally by the Senior Reviewing Officer.

So far as the procedure for writing the ACRs is concerned, it be seen that on the administrative side, the Initiating Officers writes the reports taking into consideration 20 administrative attributes on the personality of the officer and the reporting officer has to award points to the ratee out of 9 points fixed for each of the 20 attributes. Same procedure is followed by the Reviewing Officer. However, when it comes to the Senior Reviewing Officer, he awards the points out of 9 marks keeping in view the overall grading to the officer concerned without going into 20 attributes. Thereafter the average of the ACR is calculated by adding the average of the ACR graded by the Initiating Officer plus average of the ACR graded by the Reviewing Officer and the ACR grading done by the Senior Reviewing Officer.

Similarly, the average of technical ACR is worked out and then the total average of the complete ACR is taken. The average of the first part of ACR i.e., the Initiating Officer plus Reviewing Officer plus Senior Reviewing Officer and the average of the other part of ACR i.e. Technical Report (FTO+HTO) is calculated and then these two averages are re-averaged to give a final average of a particular report.

The ACRs of the petitioner as also private respondents for the year 2001 to 2005 were considered by the Promotional Board constituted in the year 2005. Before proceeding further, it would be important to note the overall profile of the petitioner as also private respondent No. 5 from 2001 to 2004. This is as under:-

Petitioner:

<u>Period</u>	<u>IO</u>	<u>RO</u>	<u>SRO</u>	<u>DGMS</u>	<u>AVG.ACR</u>
2001ACR	8.90	8.90	9.00	9.00	8.95
2002ACR	8.90	8.90	9.00	8.00	8.70
ICR	8.95	8.00	8.00		8.31
2003ACR	8.70	8.70			8.70
2004ACR		8.80	8.00		8.40
ICR	8.90	8.70			8.80
FTO	STO	HTO	AVG.	AVG	Period
			TR	ACR	AVG
				TR	
2001ACR	8.90	8.00	8.45	8.70	8.7

2002ACR	8.90	8.00	8.45	8.57	8.47
ICR	8.90	8.00	8.45	8.38	
2003ACR	8.20	8.00	8.10	8.40	8.4
2004ACR	8.90	8.00	8.45	8.42	8.52
ICR	8.90	8.00	8.45	8.62	

Respondent No.5

Period	IO	RO	SRO	DGMS	AVR	ACR
2001ACR	7.90	7.80				7.85
2002ACR	8.70	8.75		9.00		8.81
SCR		8.25				8.25
2003ACR	8.95	8.80	9.00			8.91
SCR	8.80	8.80		9.00		8.86
2004ACR	8.90	8.90		9.00		8.93
ICR	8.55	8.85	8.00			8.46
	FTO	STO	HTO	AVG.	AVG	Period
				TR	ACR	AVG
					TR	
2001ACR			8.00	8.00	7.92	7.92
2002ACR	8.10		8.00	8.05	8.43	8.27
SCR			8.00	8.00	8.12	
2003ACR			9.00	9.00	8.95	8.69
SCR			8.00	8.00	8.43	
2004ACR	8.80		9.00	8.90	8.91	
ICR	8.80		9.00	8.90	8.68	8.79

A perusal of the above table shows that for the year 2001, the IO, RO and SRO has graded the

petitioner as 8.90, 8.90 and 9.00. The average ACR grading has been shown as 8.95 for the said period and the period average is 8.7. So far as respondent No.5 is concerned, his rating as per IO and RO for the same year is 7.90 and 7.80. The average rating is 7.85 and the period average is 7.92, though the same was expunged later on after he was granted the relief on filing the second statutory complaint. Similarly for the year 2002, the IO, RO and SRO has given the petitioner 8.90, 8.90 and 9.00 respectively whereas the grading in favour of private respondent No.5 is 8.70 and 8.75. For the year 2004, in the ICR, the IO and RO has rated the petitioner as 8.90 and 8.70. His average ICR is shown as 8.80 whereas the average ICR for the said period of respondent No.5 is 8.46. A perusal of the said record pertaining to the ACR/ICR of the petitioner as also private respondent No.5 shows that upto the year 2002, the petitioner was higher in grading than the said respondent and even in the ICR of 2004, the petitioner is above than the said respondent but it is for the year 2004 that the private respondent No.5 stole a march over the petitioner so far as ACR for the said period is concerned. A perusal of the ACR/ICR of the petitioner and private respondent No.5 shows that the petitioner all-along has been given 8 points by the Higher Technical Officer whereas for the ACR/ICR of 2003 and 2004, the

respondent No.5 has been awarded 9 points by the HTO.

It may also be noted that in the average profile of other officers, record whereof was produced by the official respondents pertaining to the year 2005 to 2007, the HTO has continued its consistency by giving 8 points to the petitioner whereas in the case of other officers i.e. GK Thapliyal, JP Singh, TK Bandhopadhyay, the HTO has consistently given 9 points. As the rating awarded by the HTO plays an important part so far as calculation of average ACR/ICR of an officer is concerned which further leads to his promotion/rejection, the principle adopted by the HTO in according such ratings is not discernible from record. This is clear from the fact that earlier for the year 2002, when the respondent No.5 was given 8.10 marks by the FTO, the HTO has given him 8 points. The petitioner for the said year has been accorded 8.90 points by the FTO but the HTO has given him 8 points, thus, lowering his period average. Similar is the position for the ACR of 2004. The FTO for the said period has granted 8.80 points to the respondent No.5 and the HTO has awarded him 9 points, whereas, the petitioner even though has been accorded 8.90 marks from

the FTO, the HTO has still persisted with 8.00 marks only in his favour for the said period. Therefore, as indicated above, the HTO has continuously awarded the petitioner 8 points right from 2001 to 2007. Even after 9 points given by the HTO in favour of private respondent No.5 in the ACR for the period 2003 and 2004 and in ICR of 2004, did not help his cause and he continued to have an average of 8.41, as is apparent from the record, which is less than the average ACR of the petitioner upto 2004 which has been assessed at 8.46.

It be seen that as the grading of respondent No.5 showed upward trend by the IO and FTO, the HTO also started increasing his grading. It is evident from the table reproduced here-in-above that for the year 2004, his ACR and ICR has been assessed at 8.80, the HTO has awarded him 9 points whereas, in the case of petitioner, he having been assessed higher than private respondent No.5 by FTO at 8.90, the HTO still has awarded him 8.00 points. Even for the year 2001-02, the IO and FTO all-along have awarded the petitioner 8.95 and 8.90 marks, but the HTO has downgraded him by awarding 8.00 points only.

As noticed above, the respondent No.5 after his second statutory complaint was accepted, his ACR initiated by the IO and RO for the year

2001 was expunged, as a result of which, his average ACR which was earlier assessed at 8.41 became 8.58. Therefore, it is clear that in case, the same yardstick as adopted in the case of private respondent NO.5 would have been adopted in the case of petitioner regarding considering his statutory complaint and the aberration in the ACR would have been removed keeping in view his overall profile and the assessment made by the HTO, who as indicated above, has given him 8 points all-along, the petitioner would have made the grade.

It be further seen that so far as service profile of respondent No.6 is concerned, the same has not been produced. However, it be noted that he was averaging 8.51 on the administrative side and 8.00 on the technical side. The HTO upgraded him by awarding 9.00 points for the year 2005, as a result of which he made the grade and was selected. However, as indicated, no record in this respect has been produced. Even the affidavit filed by the official respondents does not make any mention regarding upgrading his ACRs by the HTO and whether he could make the grade. In the absence of any averments in this regard and non production of record, the allegations levelled by the petitioner in the writ petition against

respondent No.6 would be deemed to have been accepted.

From the aforementioned factual discourse, following two things emerge:

a/ As to what is the principle on the basis of which aberrations in the ACRs of an officer are to be expunged; and

b/ as to what is the basis and manner on which the second statutory complaint of private respondent No.5 was accepted which ultimately resulted in his selection and the expeditious manner in which the said complaint of private respondent NO.5 was decided , which process, as alleged by the petitioner was actuated by malafides.

The case of the petitioner will have to be dealt in view of the formulations here-in-above.

It be seen that the partial relief given to respondent No.5 vide order dt. 17th of July'04, by the Chief of Army Staff was by way of expunging the complete assessment of FTO in ACR of 2001 and Special CR of 2002. While allowing the second statutory complaint of the said respondent, the Central Government again granted partial redress and this was by way of

expunction of complete numerical assessment of ACR of 2001 on the ground of inconsistency and thus, the assessment made by IO, RO i.e. 7.90, 7.80 and that made by HTO at 8.00 was expunged. It clearly emerges from the aforementioned facts that the principle of expunging the aberrations was to only maintain the consistency in the overall profile of the officer. In the case of the petitioner, the assessment recorded by the HTO all-along has been 8.00, which is not in consonance with the assessment made by the FTO who has al-along assessed the petitioner above 8.90 except for the ACR of 2003 when his assessment is at 8.20. Therefore, as indicated above, the yardstick which has been applied in the case of private respondent No.5 for expunging his remarks which were found inconsistent with his service profile, has not been applied in the case of the petitioner.

The grievance of the petitioner, as noticed above, is that the principle adopted by the official respondents in the matter of expunging the aberrations in the ACRs of respondent Nos. 5 and 6, should have been adopted by keeping his overall profile into consideration. The assessment of the FTO who is the initiating officer on the technical side and who personally assesses the officer has to be given weightage. I say so because, it is only the FTO who assesses the work of the officer concerned and

then submits his report to the HTO. Although, the officers of the Army Dental Corps work within the control of their own Commanding Officers but the overall control of the Dental Services remains with the officers who head the Army formation in a particular station where the Dental centre is located. The Initiating Officer and the First Technical Officer who initiate the ACRs of the ratee on the administrative and technical side have the best information about an officer regarding his work and conduct both on the administrative as well as on technical side. As per the policy in the armed forces, the views expressed by the Initiating Officer and the First Technical Officer are vital and the same, as indicated above, have to be given weightage as the aforesaid two authorities are the best persons to make the judicious and objective assessment of the work of an officer both on administrative and technical side. The Higher Technical Officer has no direct interaction with the officer as his office is located in Delhi and in the matter of making assessment, he is dependent upon the assessment so made by the Initiating Officer and the First Technical Officer.

It be noted that five officers have given their assessment i.e. IO, RO and SRO on the administrative side and FTO and HTO on the technical side. The petitioner, as noticed above has been given 8.90 points by the FTO so far as his ACR/ICR for the year 2001 and 2002 are concerned but the HTO for the said period, has rated the petitioner at 8.00. Again the ACR/ICR of the petitioner for 2004 have been assessed at 8.90 by the FTO but the HTO has again rated him at 8.00 which remarks are not in consistent with the overall profile of the petitioner and also the assessment made by his immediate superior officer i.e., the FTO, and therefore, while considering the complaint of the petitioner, the authority concerned taking into consideration the above aspect of the matter should have recommended for expunging the said aberration in the ACRs of the petitioner as has been done in the case of private respondent No.5.

One more aspect which has emerged from the pleadings and the record is that the respondent No.8 who has initiated the ACR of the petitioner for 2005 as HTO had not assumed the charge of Director General, Dental Services, at the relevant time, and therefore, could not have assessed the petitioner as his HTO for the said period.

From the reply affidavit filed by the official respondents, it is not revealed as to how the SRO or HTO assess the merit of an officer, in case, the said officers disagree with the assessment made by the IO or FTO. The SRO and HTO have the option of either to agree with the assessment made by the IO or FTO or to assess the merit of the officer concerned by personally assessing his work. There is no other method which can be applied by the SRO or HTO.

The stand of the respondent authorities is that 8.00 is an excellent grading as has been done in the case of the petitioner but it does not disclose as to what has been the material available with the HTO to assess the officer once he does not agree with the assessment of the IO or FTO. In case, such a stand of official respondents is accepted, then, all the officers should be assessed at 8.00 by the HTO as the said grading as per the official respondents is excellent. But the said principle is not adopted by the HTO in case of all the officers and in case he rates an officer at 9.00, then, the officer concerned who is awarded 9.00 points by the HTO, his average and period ACR becomes on the higher side and he steals the march over other officers who are similarly situated as has been done in the case of respondent No.5, who has al-along been assessed at 9.00 by the HTO from 2003 onwards. The IO and FTO, as noticed

above, in the ACR of 2001, has rated the petitioner at 8.90 but the HTO has assessed his merit at 8.00. Even the ACR for the period 2002 of the petitioner has been assessed at 8.90 by the IO and FTO, but again the grading given by HTO for the said period is 8.00, which has resulted in downgrading his average ACR and ultimately rejection of his claim for promotion to the next higher rank as the HTO throughout has assessed the petitioner at 8.00. This power of assessment by the HTO, therefore, as indicated above, is being exercised without disclosing the parameters and methodology to be adopted by the said officer in making such assessment. One cannot but agree with the contention of the petitioner that the SRO and HTO cannot be expected to have personal knowledge about an officer unless they have personally assessed the work of the said officer. While disagreeing with the recommendation made by the IO or FTO in the matter of assessment, the HTO and SRO are required to disclose reasons for the said assessment. They cannot exercise the said power arbitrarily.

The other aspect relates to exercise of power maliciously and arbitrarily by the official respondents. It be seen that the respondent No.5 filed a statutory complaint regarding expunction of his ACRs for the period

2001-02, which was partially accepted. His case was then reviewed on the basis of his changed ACRs on 15th of March'05, by the Promotion Board No.2, but he was found unfit for promotion to the rank of Brigadier as his average ACR was assessed at 8.41. Thereafter a non statutory complaint was filed by him which was rejected.

It be noted that a regular Selection Board Medical-2 was held in the month of Nov'06, but in the said Board, the cases of the officers of Dental branch for promotion to the rank of Brigadier were not considered. Respondent No.5 in the meantime, had filed a statutory complaint on 28th Nov'06, which was received by respondent No.2 on 21st of Dec'06. The same was forwarded to respondent No.1 on 28th of Dec'06. Thereafter, the same was finalised and relief was granted to respondent No.5 on 12th of Jan'07. The two available vacancies for which the promotion board assembled on 27th of Nov'06 were bifurcated. One vacancy was kept for the Review Board and other for the promotional board. The Board then met on 2nd of Feb'07 and the respondent Nos. 5 and 6 were promoted to the rank of Brigadier. The contention of the petitioner in this respect is that the official respondents in order to confer the benefit of promotion on the said private respondents manoeuvred the whole process manifestation of which is reflected from the fact that the manner

in which the second statutory complaint of respondent No.5 was decided while as the non-statutory complaint of the petitioner filed in June'06 was not decided. This fact is not being denied by the official respondents in their reply affidavit. What transpires from the aforementioned facts is:

a/ that after the rejection of the complaint filed by the respondent No.5, a second statutory complaint on the same cause of action was to be rejected as it did not disclose a fresh cause of action;

b/ that respondent No.5's second statutory complaint did not disclose any fresh cause of action, as such, the action purported to have been taken on the basis of the said complaint is in contravention of para 85 of Army Order (SAO) 8/S/91;

c/ that the manner in which the non-statutory complaint of the petitioner remained undecided and the hot haste with which the case of respondent No.5 was considered by the official respondents does indicate the element of eagerness on their part to effect promotion of said respondent.

There is no dispute that no second statutory complaint could have been filed by respondent No.5 after the rejection of his non statutory complaint without showing fresh cause. It is

manifestly clear that on the same set of information available with the official respondents, the earlier non statutory complaint of the private respondent No.5 was dismissed but subsequently, as indicated above, the second statutory complaint was accepted without any fresh cause having been shown by the said respondent. This clearly speaks volumes about the manner in which the official respondents have shown eagerness to promote respondent No.5. In terms of clause 2 of para 364, which deals with the statutory complaints, an officer has the right to file complaint to the Central Government but this right has to be exercised only once. A second complaint, as indicated above, is allowed only if fresh facts and circumstances are available with the complainant. The other attending circumstance relates to the speed with which the second statutory complaint of the private respondent No.5 was decided and the timing of the filing of the complaint also is an indicator to the said fact.

The common tendency in the modern democracy is to confer discretionary power on the government or the administrative officers. This power is usually couched in broad phraseology and gives a large area of choice to the administrator concerned to apply the law to actual factual situation. In order to ensure

that discretion is properly exercised, it is necessary that the statute in question lays down some norms or principles according to which the discretion has to be exercised by the administrator. The said principle manifests itself in the form of following propositions:

a/ The law conferring unguided and unrestricted power on an authority is bad for arbitrary power is discriminatory;

b/ Article 14 illegalises discrimination in the actual exercise of any discretionary power;

c/ Article 14 also strikes at arbitrariness in the administrative action and ensures fairness and equality of treatment.

Applying the above principle in the present context, it would be seen that the administrative power of the official respondents to expunge the aberrations in the CRs is to be exercised after looking to the overall service profile of the officers concerned. If any inconsistency is found in the said overall profile of the officer, then, the same is required to be expunged as has been done in case of private respondent 5 and 6. This broadly is the principle which is to be adopted while exercising the power of expunging of the aberrations in the Confidential Reports. In the

case in hand, the statute or the policy decision does not suffer from any such vice but the administrative authority has, while implementing the said policy, exercised the same discriminatory. This in law is called administrative discrimination. The official respondents have implemented the policy in a discriminatory manner so far as the petitioner is concerned. It is, thus, a case where violation of equal protection as envisaged under Article 14 of the Constitution can be validly raised.

Although the principle is well established that the discriminatory administrative action can be challenged under Article 14 yet in practice, the challenge to an administrative action succeeds only rarely, for the judicial attitude is generally to sustain the administrative action against attacks of discrimination. The courts start with a presumption that the administration has not acted in a discriminatory manner. Further, the onus to prove that there has been discrimination on the part of administration is on the complainant. If, however, in a case, the complainant points out the circumstance which *prima facie* make out the exercise of power discriminatory *qua* him, the authority is bound to explain the circumstances under which the order is made. Reference in this regard can be

made to the judgment of the Apex Court reported as Pannalal Binjraj v. UOI, AIR 1957 SC 397. What has been observed by the Apex Court in the above case may be noticed as under:-

"29.....This power is discretionary and not necessarily discriminatory and abuse of power cannot be easily assumed where the discretion is vested in such high officials (Vide Matajog Dobey v. H.C. Bhari 1955-2 SCR 925 at p.932:(S) AIR 1956 SC 44 at p.48) (J). There is moreover a presumption that public officials will discharge their duties honestly and in accordance with the rules of law (Vide people of the State of New York v. John E.Van Decarr, etc. (1905)199 U.S. 552: 50 Law Ed. 305(K)). It has also been observed by this court in A.Thangal Kunju Musaliar v. Venkatachalam Potti, 1955-2 S.C.R. 1196:((S) AIR 1956 S.C. 246)(L) with reference to the possibility of discrimination between assesseees in the matter of reference of their cases to the Income tax Investigation Commission that"it is to be presumed, unless the contrary were shown, that the administration of a particular law would be done 'not with an evil eye and unequal hand' and the selection made by the Government of the cases of persons to be referred for investigation by the commission would not be discriminatory."

"30 This presumption, however, cannot be stretched too far and cannot be carried to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminatory treatment (Vide *Gulf, Colorado etc. v. WH Ellis* (1897) 165 U.S. 150:41 *Law Ed.* 666 (M)). There may be cases where improper execution of power will result in injustice to the parties. As has been observed, however, the possibility of such discriminatory treatment cannot necessarily invalidate the legislation and where there is an abuse of such power, the parties aggrieved are not without ample remedies under the law.....What will be struck down in such cases will not be the provision which invests the authorities with such power but the abuse of the power itself.....31....Though, the burden of proving that there is an abuse of power lies on the assessee who challenges the order as discriminatory, such burden is not by way of proof to the hilt. There are instances where in the case of an accused person rebutting a presumption or proving an exception which will exonerate him from the liability for the offence with which he has been charged, the burden is held to be discharged by evidence satisfying the jury of the probability of that which the

accused is called upon to establish (Vide Rex v. Carr Brian, 1943-1 K.B. 607(0)), or in the case of a detenu under the Preventive Detention Act seeking to make out a case of want of bona fides in the detaining authority, the burden of proof is held not be one which requires proof to the hilt but such as will render the absence of bonafides reasonably probable..... If in a particular case, the assessee seeks to impeach the order of transfer as an abuse of power pointing out circumstances which prima facie and without anything more would make out the exercise of the power discriminatory qua him, it will be incumbent on the authority to explain the circumstances under which the order has been made.....The court will certainly not be powerless to strike down the abuse of power in appropriate cases and the assessee will not be without redress....."

It be seen that the public authority while exercising its discretion has to see that its action is not unjust, illegal or discriminatory so that there is no violation of Article 14 of the Constitution. The said Article secures the right of a person not only against the arbitrary laws but also against the arbitrary application of law and also ensures that there is non discrimination so far as a State action is concerned. This is because whenever there is an

arbitrariness in any State action, Article 14 comes into action.

Applying the above principle in the present case, the action of official respondents is found to be discriminatory for the following reasons:

A/ that while accepting the second statutory complaint of respondent No.5, his complete ACR initiated by the IO, RO and HTO for the year 2001 was expunged on the principle that it was not in consistent with the overall service profile of the said officer whereas, the said principle was not applied in the case of petitioner who all-along was graded higher by the IO, RO and FTO but the HTO consistently downgraded his ACRs without taking into consideration his overall profile.

B/ that the assessment made by the HTO in respect of respondent No.5 was enhanced after the FTO had started upgrading his assessment but in the case of petitioner, even though the FTO had assessed him at 8.90 for 2004, i.e., above the aforementioned respondent who was granted 8.80 by the FTO, the HTO consistently assessed the petitioner at 8.00 only.

C/ that applying the principle of removal of aberration depending upon the inconsistency of

service profile of an officer, its application has been consistent in so far as respondent No.5 is concerned whereas, the reasons other than the principle adopted by the official respondents in case of said respondent have weighed in case of the petitioner.

From the above discussion, it clearly emerges that exclusion of the petitioner from promotion to the rank of Brigadier was done by not removing the inconsistency in his ACRs recorded by the HTO. The said action on the part of authorities concerned per-se is discriminatory and violative of Article 14 of the Constitution of India.

I, accordingly, allow this petition and direct the official respondents to expunge the remarks of HTO as granted by him in favour of the petitioner w.e.f. 2001 to 2005 and make a fresh assessment on the basis of his overall service profile which has been assessed above 8 by the IO and FTO. After the fresh assessment is made, the case of the petitioner shall be submitted to the Review Promotional Board for promoting him to the rank of Brigadier w.e.f., the date, respondents 5 and 6 have been so

promoted. Let this exercise be completed and appropriate orders passed by or before 31st of Dec '09.

Disposed of accordingly.

Record be returned to the counsel for respondent-Union of India.

(Sunil Hali)
Judge

Jammu
Dt.16.11.09
SS/

