

A MAJOR GENERAL IPS DEWAN

v.

UNION OF INDIA AND ORS.

MARCH 7, 1995

B [B.P. JEEVAN REDDY AND K.S. PARIPOORNAN, JJ.]

Service Law

C *Promotion—Court of Inquiry—Adverse remarks based on inquiry—Representation against remarks—Declaration ‘Unfit’ for promotion—Record suggesting rejection for promotion was based on overall assessment—Rejection of representation subsequent to promotion proceedings—Held promotion proceedings were not invalid.*

D *Adverse Remarks—Can be made on the basis of mere assessment of employee—Unless rule provides no enquiry or opportunity to represent is necessary before making remarks—Nature of adverse remarks—Does not cease to be adverse remarks and becomes ‘severe displeasure’ merely because strong language is used.*

E *Selection Committee—Non-selection of a candidate—Unless rule requires Selection Committee is not obliged to record reasons.*

F **A Court of Inquiry constituted against the appellant a Major-General, reported that as In-charge he committed serious lapses in investigating certain cases. On the basis of this report the Chief of Army Staff made remarks for being placed on appellant’s service record stating that ‘he failed to appreciate the nuances of cases and to apply his professional acumen and experience to the examination of cases. He failed to examine the cases in detail and to consider the major issues involved. He is to be blamed for mishandling and closing the cases and for acting in a manner which is not expected of his rank and the higher responsibility entrusted to him.’ Against the said adverse remarks, appellant submitted statutory complaint to the Central Government. In the meantime the appellant, though senior most, yet was declared unfit for promotion by the Selection Board on the basis of his overall profile. Subsequent to the selection proceedings his representation against adverse remarks was rejected.**

H **Aggrieved with his denial of promotion, the respondent filed a writ petition**

in the High Court complaining that he was not promoted only on account of the said adverse remarks which were made against the procedure and in violation of the principles of natural justice but the same was dismissed.

In appeal to this Court it was contended on behalf of the appellant that (i) the remarks were void and could not have been taken into account because in fact they were "severe displeasure" for which the authorities were bound to issue a show cause notice under a Memorandum dated 5th January 1989 which lays down procedure for award of censure to officers; (ii) the statutory complaint preferred by the appellant against adverse remarks ought to have been disposed of before his case came up for consideration for promotion; and (iii) no particular reason has been assigned for not selecting the appellant.

Dismissing the appeal, this Court

HELD: 1. There is no illegality in the procedure adopted by the Selection Board. The selection was not based on seniority, but on merit. There is no allegation of *malafides* or bias against the members of the Selection Board. All that can be and is suggested against the process of selection is that the Board took into consideration the aforesaid adverse remarks. Assuming that the said remarks were indeed taken into consideration, the non-selection of the appellant cannot be faulted. Firstly, it cannot be said that the said remarks alone were the cause of non-selection; the non-selection of appellant appears to be based on an overall assessment. Secondly, the statutory complaint preferred by the appellant against the said remarks have been rejected by the Central Government, no doubt subsequent to the said consideration. The grievance that his statutory complaint ought to have been considered and disposed of before his case was considered by the Selection board, is merely technical. Had his statutory complaint been upheld wholly or partly, this grievance could have been merited serious consideration but not when it has been dismissed. In the circumstances, the Court cannot sit as an appellate authority over the acts and proceedings of the Selection Board.

[539-F-H, 540-A]

Baikuntha Nath Das and Anr. v. Chief District Medical Officer, Baripada and Anr., [1992] 2 S.C.C. 299 and *R.L. Butail v. Union of India and Ors.*, [1971] 2 S.C.R. 55, followed.

A *Brij Mohan Singh Chopra v. State of Punjab*, [1987] 2 S.C.C. 188, held inapplicable.

B 2. Adverse remark can be made by the appropriate superior officer on the basis of mere assessment of the performance of the officer and no enquiry or prior opportunity to represent need be provided before making such remarks-unless, of course, the Rules so provide. The remedy available to the officer in such a case is to make a representation against such remarks to the appropriate authority or to adopt such other remedies as are available to him in law. [538-H]

C 3. The remarks complained of cannot be understood or interpreted as amounting to expression of "severe displeasure" within the meaning of the Memorandum dated 5th January, 1989 and hence it was not necessary to follow the procedure prescribed by it. They purport to be and are adverse remarks; there is no warrant for construing them as expression of "severe displeasure". Merely because the language used is strong, the adverse remarks do not cease to be adverse remarks. Be that as it may, it cannot be said that the principle of natural justice, viz., *audi alteram partem*, has been violated in this case, inasmuch as the appellant could, and did in fact, submit a statutory complaint against the remarks to the Central Government. [539-A-B]

E 4. Unless the rules so require, the Selection Committee/Selection Board is not obliged to record reasons why they are not selecting a particular person and/or why they are selecting a particular person, as the case may be. 541-D]

F *Union of India v. H.P. Chothia and Ors.*, [1978] 2 S.C.C. 586 and *The Manager, Govt. Branch Press and Anr. v. D.B. Belliappa*, [1979] 2 S.C.R. 458, held inapplicable.

G CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3273 of 1995.

From the Judgment and Order dated 30.9.94 of the Delhi High Court C.W.P. No. 4133 of 1994.

-G. Ramaswamy, D.N. Goburdhan, Ms. Pinky Anand and Ms. Gita Luthra for the Appellant.

Altaf Ahmad, Additional Solicitor General and N.N. Goswamy, Y.P. A
Mahajan and Mrs. Anil Katiyar for the Respondents.

The Judgment of the Court was delivered by

B.P. JEEVAN REDDY, J. Leave granted.

The appeal is preferred against an order of the Delhi High Court B
dismissing the writ petition filed by the appellant at the stage of admission.
The appellant, Major General IPS Dewan, is aggrieved with, what he says, C
denial of promotion to the rank of Lt. General. He says that though he was
the senior-most of the several candidates considered for promotion and his D
record of service was the best of all, he was not promoted because of and
only on account of the adverse remarks made by Gen. S.F. Rodrigues, C
Chief of the Army Staff against him on 11th May, 1993. The appellant
complains that while making the said adverse remarks the procedure
prescribed by the relevant rules was not followed nor was the principle of D
natural justice observed. Accordingly, he prays for expunction of the said
remarks and promotion to the rank of Lt. General.

The adverse remarks complained of read as follows :

"CONFIDENTIAL

***ADVERSE REMARKS OF THE COAS TO BE ENDORSED E
ON DOSSEIR IN THE CASE OF IC-12599L MAJ GEN IPS
DEWAN, MGASC, HQ SOUTHERN COMMAND***

1. Consequent to a C of I ordered by this Headquarters to investigate into the mishandling of CBI cases of RC 19(A)89- JPR and F
PE 3(A)/9A-JPR by Headquarters Southern Command in 1992, it
has emerged that Maj Gen IPS Dewan (Ex-MG IC Adm) now
MGASC Headquarters Southern Command failed to appreciate
the nuances of both cases, and to apply his professional acumen
and experience to their examination. He also failed to examine the G
cases in details, or to carry out a detailed analysis and merely
endorsed his views, based on the perfunctory advice of the
MGASC. He had merely applied his mind to defend ASC con-
tracting procedures and did not consider the major issues involved.
He is to be blamed for mishandling and closing the cases and for H
acting in a manner which is not expected to his rank and the higher

A responsibility entrusted to him as MG IC Adm Headquarters Southern Command.

2. On analysis of the case, I find the conduct of Maj Gen IPS Dewan, then MG IC Admn. now MG ASC Headquarters Southern Command to be reprehensible and direct that my remarks be placed on record in the officer's dossier.

B

Sd/-

(SF Rodrigues)

General

COAS

C

11th May, 1993."

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With a view to satisfy ourselves, we called upon the respondents to produce the record relating to the said adverse remarks as also the record concerning the consideration of the appellant and others for promotion to the rank of Lt. General. Both the records have accordingly been placed before us, which we have perused. We shall first refer to the circumstances in which the aforementioned adverse remarks were made against the appellant.

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The C.B.I. had registered certain cases against one H.S. Nanda, the then DDST-61(I) sub-area. The sub-area fell within the command and control of the Southern Command. Accordingly, the two cases against Nanda were processed by it. The appellant was at that time Major General, In-charge of Administration in Southern Command. The allegation against the several officers including the appellant was that they did not process the said cases properly and in accordance with the rules, with the result that the said cases had to be dropped. The allegation was that the said cases had been dealt with by the officers in Southern Command including the appellant in a negligent and casual manner, resulting in mishandling of the cases. A Court of Enquiry was ordered into the circumstances concerning the mishandling of the said case. In the course of the enquiry, the Court of Enquiry recorded the statements of several officers including the appellant and submitted its report. It opined that while a malafide intent cannot be attributed, there have been serious lapses on the part of senior officers including the appellant in processing the said cases against Nanda. They set out the lapses and responsibility of each of the concerned officers. So

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far as the appellant is concerned, the Court of Enquiry found that he was to be blamed for the manner in which he discharged the responsibility entrusted to him as Major General, In-charge of Administration. (In the interest of all concerned, we are desisting from extracting the exact words used by the Court of Enquiry.) It is on the basis of the report of the Court of Enquiry that the aforesaid adverse remarks were made by the then Chief of the Army Staff, General Rodrigues.

Coming to the record relating to the consideration of the appellant for promotion to the rank of Lt. General, the Record of the Minutes of the 55th (1994) Meeting of Special Selection Board held on 18th July, 1994 shows that for promotion of ASC officers to the acting rank of Lt. General in the Corps of ASC, four officers were considered. The appellant was at Serial No. 1 in the list of four officers so considered. The Selection Board, however, selected the officer at S.No. 4. In the counter-affidavit filed on behalf of the respondents in this appeal, it is stated in Para III(25) that "the petitioner has been found 'unfit' for his promotion to the rank of Lt. General on the basis of his overall profile. The said letter (adverse remarks) though forming part of the dossier, but the same does not form part of the Member Data Sheet (MDS) which is used by the members of the Selection Boards." The record of the Selection board does not, however, bear out the said statement. We may, therefore, proceed on the assumption that the said adverse remarks were brought to the notice of the Selection Board.

A fact, which is relevant, may be noticed at this stage. Against the aforesaid adverse remarks the appellant submitted a statutory complaint to the Central Government which was rejected as devoid of merit. The rejection of the statutory complaint is dated October 3, 1994.

Sri G. Ramaswamy, the learned counsel for the appellant submitted that the aforesaid adverse remarks made against the appellant really amount to expression of "severe displeasure" and, therefore, the authorities were bound to follow the procedure prescribed in the Memorandum dated 5th January, 1989 on the subject of "award of censure to officers and junior commissioned officers". Para 15 of the Memorandum provides that before issuing a letter of "severe displeasure" or "displeasure", the authority shall issue a show-cause notice indicating the specific action contemplated against the officer along with such relevant papers and documents as are necessary to enable the officer to put forward his explanation effectively.

- A** Since this procedure was not followed, it is submitted, the remarks aforesaid are void and ineffective and could not have been taken into account while considering the appellant's case for promotion. Sri G. Ramaswamy submitted further, on the strength of the decision of this Court in *Brij Mohan Singh Chopra v. State of Punjab*, [1987] (2) S.C.C. 188, that
- B** the statutory complaint preferred by the appellant ought to have been disposed of before his case came up for consideration for promotion. As a matter of fact, he submitted, it happened just the other way, while the appellant's case for promotion was considered in the month of July 1994 his statutory complaint was disposed of only in October 1994. It is evident, said the learned counsel, that the said adverse remarks have clearly and
- C** definitely prejudiced the appellant's case. The denial of promotion to the appellant, submitted the learned counsel, is only and exclusively because of the said adverse remarks. It is for this reason, said Sri Ramaswamy that in the counter-affidavit no particular reason has been assigned for not selecting the appellant who was the senior-most of the four officers considered for the said promotion.
- D**

We must say that we are not impressed by any of the said submissions.

- E** The aforesaid adverse remarks were made by the highest functionary in the Army hierarchy, viz., the Chief of the Army Staff. The remarks were based not upon mere observation but upon the report of a Court of Enquiry which was appointed to go into the circumstances in which the cases against Nanda were mishandled. The Court of Enquiry held an elaborate enquiry wherein statements of the concerned officers including
- F** the appellant were also recorded. The appellant knew full well what was the Court of Enquiry about. It may be that the appellant was not formally charged and no regular enquiry as such was held but that was not necessary for making adverse remarks. Indeed adverse remarks, as is well-know, can be made by the appropriate superior officer on the basis of mere assessment of the performance of the officer and no enquiry or prior opportunity
- G** to represent need be provided before making such remarks - unless, of course, the Rules so provide. The remedy available to the officer in such a case is to make a representation against such remarks to the appropriate authority or to adopt such other remedies as are available to him in law.

- H** We are inclined to agree with the learned counsel for the respon-

dents that the remarks complained of cannot be understood or interpreted as amounting to expression of "severe displeasure" within the meaning of the Memorandum dated 5th January, 1989 and hence it was not necessary to follow the procedure prescribed by it. They purport to be and are adverse remarks; there is no warrant for construing them as expression of "severe displeasure". Merely because the language used is strong, the adverse remarks do not cease to be adverse remarks. Be that as it may, it cannot be said that the principle of natural justice, viz., *audi alteram partem*, has been violated in this case, inasmuch as the appellant could, and did in fact, submit a statutory complaint against the remarks to the Central Government.

With respect to the grievance that his statutory complaint ought to have been considered and disposed of before his case was considered by the Selection Board, it must be said that at best the said objection is merely technical. Had his statutory complaint been upheld wholly or partly, this grievance could have merited serious consideration but not when it has been dismissed. It is not suggested that the Central Government dismissed the said statutory complaint merely to buttress the non-selection of the appellant by the Selection Board. No allegation of *mala fides* has been made against the Central Government.

So far as the non-selection of the appellant by the Selection Board for promotion to the rank of Lt. General is concerned, we see no illegality in the procedure adopted by them. We have also perused the work sheets relating to all four officers considered. Not only the appellant but two other seniors to the person selected were overlooked. The selection, it may be noted, was not based on seniority, but on merit. There is no allegation of *mala fides* or bias against the members of the Selection Board. All that can be and is suggested against the process of selection is that the Board took into consideration the aforesaid adverse remarks. Assuming that the said remarks were indeed taken into consideration, the non-selection of the appellant cannot be faulted. Firstly, it cannot be said that the said remarks alone were the cause of non-selection; the non-selection of appellant appears to be based on an overall assessment. Secondly, the statutory complaint preferred by the appellant against the said remarks have been rejected by the Central Government, no doubt subsequent to the said consideration. As stated above, the situation may have been different had the said complaint been upheld partly or wholly. In the circumstances, the

A Court cannot sit as an appellate authority over the acts and proceedings of the Selection Board.

We are also satisfied on a perusal of the relevant record that the adverse remarks made by the Chief of the Army Staff against the appellant are based upon and consistent with the report of the Court of Enquiry regarding the responsibility of and the role played by the appellant in processing the cases against Nanda.

We make it clear that we express no opinion upon the validity or otherwise of the orders of the Central Government rejecting the statutory complaint preferred by the appellant against the adverse remarks aforesaid. If it is open to the appellant in law to question the said orders, he can always do so in accordance with law.

So far as the decision in *Brij Mohan Singh Chopra* cited by Sri Ramaswamy is concerned, it may be pointed out in the first instance that the said decision deals with compulsory retirement under F.R.56-J., and not with promotion. The said decision finds fault with an order of compulsory retirement based upon stale adverse entries made more than ten years earlier. The said decision no doubt says that the representation against adverse remarks should be disposed of before taking the said remarks into account while deciding the question of compulsory retirement under F.R.56-J. This aspect has however, been expressly dissected from in a later three-Judge Bench decision in *Baikuntha Nath Das and Anr. v. Chief District Medical Officer, Baripada and Anr.*, [1992] 2 S.C.C. 299. Be that as it may even if we proceed on the basis that the said adverse remarks were taken into account by the Selection Board while considering the appellant's case for promotion, the decision of the Board to overlook the appellant cannot be faulted or invalidated for the various reasons mentioned hereinbefore. We reiterate that while saying so we proceed upon the assumption that the Selection Board did take the said adverse remarks into consideration. Even so, the decision of the Board not to select the appellant is not vitiated for the reason *inter alia* that his statutory complaint against the adverse remarks was rejected by the Central Government. This is the view expressed in a Constitution Bench decision in *R.L. Butail v. Union of India and Ors.*, [1971] 2 S.C.R. 55, where a similar complaint was made.

Sri Ramaswamy relied upon the decision in *Union of India v. H.P. Chothia and Ors.*, [1978] 2 S.C.C. 586 in support of his yet another submis-

sion that where allegations of arbitrariness are made against a Selection Board/Selection Committee, one of the members of the Board/Committee should file a counter-affidavit explaining the circumstances in which the petitioner was not selected. We are unable to find any such proposition flowing from such decision. That was a case where neither the relevant record was produced nor did any responsible person swear to an affidavit with respect to reasons for which the petitioner therein was not included in the Select list. That is not the situation here, apart from the fact that there is no specific allegation of arbitrary conduct on the part of the Selection Board. The respondents have also produced all the relevant records which we have perused.

Sri Ramaswamy then relied upon the decision in *The Manager, Government Branch Press and Anr. v. D.B. Belliappa*, [1979] 2 S.C.R. 458 in support of his submission that administrative orders affecting the rights of citizens should contain reasons therefore. We are afraid, the said principle cannot be extended to matters of selection. Unless the rules so require, the Selection Committee/Selection Board is not obliged to record reasons why they are not selecting a particular person and/or why they are selecting a particular person, as the case may be. If the said decision is sought to be relied upon with respect to the adverse remarks made against the appellant, the attack should fail for the reason that the memo containing adverse remarks in this case does set out the particulars in support of the same. It is equally relevant to note that no allegation of *mala fides* or arbitrariness has been levelled against the Chief of the Army Staff who made the said remarks.

For all the above reasons, we dismiss the appeal but without costs.

T.N.A.

Appeal dismissed.