

FORM NO – 21

(See Rule 102 (1))

ARMED FORCES TRIBUNAL, KOLKATA BENCH

APPLICATION NO : OA 36 OF 2013

THIS 12TH DAY OF JUNE, 2014

**CORAM : Hon'ble Mr. Justice Raghunath Ray, Member (Judicial)
Hon'ble Lt. Gen. K.P.D. Samanta, Member (Administrative)**

TA-42152H, Colonel S K Padhi,
S/o Late Shri Mahadev Padhi,
Ex-2nd in Command, 120 Inf Bn (TA), Bihar,
Bhubaneshwar, Orissa,
R/o Vill/PO/The-Titilagarh, Dist. Bolangir,
Odisha-767033

..... Petitioner

-VS -

1. Union of India through the Secretary,
Ministry of Defence, South Block,
New Delhi-110 011
2. Chief of Army Staff,
Army Headquarters,
Integrated HQ of MoD (Army)
PO New Delhi-110 011
3. The Military Secretary,
Integrated HQ of MoD (Army), DHQ,
PO New Delhi-110 011
4. Additional Director General (TA),
Integrated HQ of MoD (Army), DHQ,
PO New Delhi-110 011

..... Respondents

For the petitioner : Mr. Rajiv Mangalik, Advocate

For the respondents: Mr. Anand Bhandari, Advocate

O R D E R

Per Lt. Gen. K.P.D.Samanta, MEMBER (Administrative)

Being aggrieved by his non-empanelment for promotion to the rank of Colonel (SG), the applicant, who retired while holding the rank of Colonel (TS), has filed this O.A. ventilating various grievances mainly with regard to two ACRs and incorrect fixing of his batch seniority.

2. The facts giving rise to this application may be stated briefly at the outset.

The applicant was initially commissioned in 8 BIHAR Regiment (Infantry Battalion) as a Short Service Commissioned (SSC) officer in the rank of 2nd Lt. on 26.08.1982. On completion of initial 5 years tenure, his term was further extended by another 5 years and he was ultimately released from Indian Army on 25.08.1992. His last posting as a SSC officer was at 120 Infantry Battalion (TA) BIHAR in the rank of Major (acting) (Substantive Captain).

3. As per extant policy, army personnel, after release from regular Army, are eligible to join in the Territorial Army (TA for short), which is a part-time concept where civilians of all walks of life can join to undergo military training so that in the event of war or national emergency, they can come in aid to regular Army. The TA officers are governed by separate set of rules called TA Act and Regulations, 1948.

4. The applicant joined the TA on 1st of December, 1992 and was posted to 120 Infantry Battalion (TA) BIHAR (same unit where he last served before being released from SSC) located at Bhubaneswar as Company Commander. When he got appointment in the TA in December, 1992, he also got an appointment in the State Bank of India as Security Officer. He made prayer for his release from TA to join SBI but his CO did not allow him to leave TA. However, after much persuasion,

the applicant got disembodied from TA and joined SBI on 14.06.1993, ie, after putting in seven months of embodied service in TA.

5. According to the applicant, his tenure in the TA was a nightmare. It is stated by the applicant that when a SSC/army officer joins TA, he is eligible to get ante date seniority and pay protection to the extent of his past commissioned service in the regular army. The applicant prayed for benefit of his past ten years service as SSC officer but his CO did not agree and he was posted as 2nd Lt and not in the rank of Captain, which he was entitled to since he was holding substantive rank of Captain in SSC. The applicant further states that when the regular CO went on leave, the 2nd-in-Command allowed him the rank of Captain. But on return from leave the CO became annoyed for upgradation of rank of the applicant. However, he could not downgrade the applicant in view of the rule position and, therefore, by way of vindictive action, he tried to humiliate the applicant by addressing him as 2nd Lt not only in written communications but also while addressing him in front of others during meetings, conferences etc.

6. The grievance of the applicant is that this CO initiated his ACR for the period from 01.12.1992 to 31.01.1993 and April, 1993 to May, 1993 as IO. Incidentally, it may be mentioned here that for the TA officers, unlike regular Army officers, ACR is written for 2 months period. The first ACR of the applicant for Dec 1992 to Jan, 1993 was initiated after he joined TA on 01.12.1992 and on completion of his training for two months during training year 1992-1993(April, 1992- March, 1993). The applicant alleges that his ACR for the aforesaid period was spoiled by the CO and he also stood in the way of his joining the civil job in SBI. His next ACR for two months i.e. Apr, 1993 to May, 1993 was also written by this particular CO and his overall grading was

below his actual performance i.e. he was awarded box grading 7, which according to the applicant is deflationary CR.

7. The applicant while working in the SBI on regular basis was again embodied in TA and from March, 1996 to March, 1997 and during that period he served in counter insurgency and counter terrorism areas of Srinagar and Punch in J & K successfully shouldering important responsibility. Due to his prolonged absence from Bank Service, the Bank did not agree to release him any further for TA duty and, therefore, he was asked either to resign from TA or from Bank. After repeated requests, the Bank agreed to allow him to continue in TA on part-time basis. During this embodiment period of 1996-97, the CO again turned hostile against him and did not allow him to join SBI and his application for disembodiment was eventually sanctioned by the higher authorities. The ACR written by this CO for the period from June, 1996 to March, 1997 also contained box grading '7', again a deflationary grading. In January, 1998 the applicant was asked for re-embodiment for one year for Guard and Escort duty at Jabalpur though this was against the concept of TA because frequent and prolonged embodiment is not ordinarily done for the civilians. The applicant approached the Bank for his release to join TA but the Bank refused. Therefore, the applicant sent for unwillingness for such embodiment.

8. The CO in order to humiliate him and to ruin his career declared him as 'Deserter' and issued apprehension roll dated 03.02.1998 for his arrest (Annex.A4). At that point of time, the applicant approached the Hon'ble Orissa High Court and the Hon'ble High Court by order dated 03.11.1998 stayed the operation of apprehension roll and ultimately on 23.03.2002, the apprehension roll was withdrawn by the authorities.

9. This incident created serious problem for the applicant- both in his TA service and Bank service. The SBI authorities initiated disciplinary action against him and punished him by withholding his 1st stagnation increment from 01.06.2002 vide order dated 20.03.2002 (Annex.A7) and he was also denied further promotion in SBI. Subsequently, in June, 2003, the applicant was released by SBI to join OP PARAKRAM for 6 months. At the same time, he was also transferred to Guwahati against the interest of the applicant, which the applicant has termed as punitive transfer.

10. Thereafter, the applicant was promoted to the rank of Lt. Col. in April, 2006 with retrospective effect from 16.12.2004 and served continuously from June, 2003 till he was made to retire on 30.09.2012 in the rank of Col.(TS) on attaining the age of 54 years. During this period, according to the applicant, he earned 12 good ACRs due to his sincere and diligent service. The applicant was considered for promotion to the rank of Col.(SG) by No.3 Selection Board in September, 2006 but his case was deferred due to non-availability of ACRs as Lt. Col. He was again considered in May, 2007 as fresh case but was not empanelled due to low grading in his ACR covering the period June, 1996 to March, 1997. In December, 2007 the applicant was again considered as first review case but was not empanelled. Similarly, in April, 2008 he was considered as 2nd and final review case but again not empanelled.

11. Being aggrieved the applicant preferred a statutory complaint on 22.10.2009. However, it was returned being voluminous. Thereafter, applicant was granted promotion as Col.(TS) on 03.11.2010 after 28 years of service as per rules. The applicant submitted a fresh statutory complaint on 15.06.2011 (Annex. A9). It was finally decided after a lapse of a year on 27.06.2012 (Annex. A1) and the applicant

was granted partial relief by the Central Govt. by way of expunging all '7' figurative assessments and box grading by IO and RO in the ibid ACR of 1996-97.

12. Now, the grievance of the applicant is in respect of his ACR for the periods 01.12.1992 – 31.01.1993 and April, 1993 – May, 1993 wherein also box grading of '7' was awarded and, therefore, that should also be expunged being illegal firstly because those ACRs were initiated in the lower rank of 2nd Lt and secondly, such grading was not consistent and deflationary. Incidentally, it may be mentioned that the even though initially the applicant was appointed as 2nd Lt. in TA, but subsequently, by way of granting his past service benefit, and he was conferred the rank of 2nd Lt. w.e.f. 3.11.82, Lt. w.e.f. 3.11.85 and Captain with effect from 3rd Nov 1989 along with pay benefit by an order issued on 10th May 1994 (annexure-A12). Thus, even though the applicant joined TA w.e.f. 1.12.92 physically in the rank of 2nd Lt, he was granted notional commission in the TA with retrospective effect from 3.11.82 and was made Captain from 3rd Nov 89 i.e. even before he physically joined in TA on 1.12.92.

13. Further grievance of the applicant is that due to delay in disposal of his statutory complaint he could not get chance for promotion to the rank of Colonel (SG) in due time and in the mean time, he having completed 54 years of age, had to retire as Col (TS) though he could have served up to 56 years had he been promoted to the rank of Colonel (SG). The applicant made representations to consider his case as special review (fresh) case in view of partial redressal granted to him by expunging low grading in his ACR for 1996-97, at least before his retirement and if he got through the said selection he would have served up to 56 years of age and would also be eligible for consideration for promotion to the next rank of Brigadier by No. 2 Selection Board.

14. The applicant had earlier approached before the Principal Bench being O.A. 336/2012 for certain relief, which was transferred to this Tribunal and registered as T.A. 63/2012. In the mean time, the applicant's case for promotion by No.3 SB was considered in December, 2012 after his retirement but the applicant was not empanelled and in order to challenge such non-empanelment, he withdrew the said TA with liberty to file a fresh OA and hence, this OA.

15. According to the applicant, the main reasons for his non-empanelment are:-

- a) His ACRs in the rank of Major and those above 9 years service, starting from 2005-2006 ought to have been taken into account for promotion as Col (SG) like his batch mates.
- b) ACRs for the period from 01.12.1992 to Jan 1993 and from Apr to May 1993, which were in the rank of 2nd Lt, should not have been considered.
- c) He could not earn ACR during 1997-98 to 2001-02 i.e total five years for no fault of his as he was illegally declared a deserter. This fact ought to have been taken into consideration.
- d) Thus, he was left with only seven ACRs out of 12 good ACRs.
- e) The respondents considered him as special review (fresh case) as 1985 batch while he belongs to 1982 batch and he lost seniority for one year when he was not empanelled for Lt. Col in 2004 and subsequently on getting promotion from December 2004, his seniority should have been restored and he should have been considered and compared along with his original batch of 1982.

16. In filing the present application the applicant has prayed for the following relief(s):-

- (i) To call for the records of all the No.3 selection boards held for consideration of the applicant as a Special Review (Fresh) case; and
- (ii) To declare the action of the respondents as unjust, arbitrary and illegal; and
- (iii) To quash and set aside the impugned order dated 27 June 2012 to the extent that the ACRs for the period 01.12.1992 to 31.01.1993 and 04/93 to 05/93 have been stated to be fair; and

- (iv) To quash and set aside the impugned order dated 26 Dec 2012 qua the applicant; and
- (v) To quash and set aside the ACRs for the period 01.12.1992 to 31.01.1993 and 04/93 to 05/93 containing grading of '7' being inconsistent with the overall profile of the applicant and also deflationary reports as already held by respondents; and
- (vi) To direct the respondents to consider the applicant by Special Review (Fresh) No.3 selection board and if required by other two chances of consideration should also be granted to the applicant; and
- (vii) To grant the applicant all the consequential benefits including retention in service up to the age of 56 years in case the applicant is promoted to the rank of Col (SG) in any of the consideration by the No.3 SB and also to consider the applicant for further rank of Brig as per his batch without insisting upon the ACRs in the rank of Col.

17. The respondents have contested the application by filing a written reply affidavit in which they have denied all the allegations made by the applicant on all material points.

18. The respondents have raised the question of limitation so far as his prayer for quashing of ACRs for the periods Dec, 1992 to Jan, 1993 and April – May, 1993 is concerned. It is contended that in the statutory complaint dated 15th June, 2011 the applicant did not make any grievance with regard to these two ACRs nor did he claim any relief in his earlier OA i.e. O.A. 336/2012 filed before the Principal Bench, AFT which later was transferred to this Tribunal and registered as T.A. 63/2012. Subsequently, after withdrawing the said TA the present OA has been filed. It is, therefore, submitted by the respondents that the applicant cannot add new prayers to challenge his time-barred ACRs of 1992-93 vintage by filing an application in the year 2013.

19. However, we find that in paragraph 22 of the reply affidavit, the respondents have themselves stated that while considering his statutory complaint dated 15th June, 2011 in which he had complained against ACR of 1996-97, the earlier ACRs for Dec, 1992-Jan1993 and April-May 1993 were duly examined and the assessment and box grading were found to be justified and consistent. It is also stated that figurative assessment of '7' was "above average" and not adverse. Thus, the respondents themselves having considered these two ACRs on merit while dealing with his statutory complaint of 15 June 2011; and replied on 27 June 2012. Therefore, they are not justified in raising the question of limitation at this stage. We, therefore, overrule this objection on limitation.

20. It is stated by the respondents that as per extant rules, all ex-service officers are commissioned in TA initially as 2nd Lt and after verification of their past service records by the CDA (O) they are entitled to get ante dated seniority and pay protection for the years of service they had rendered in the regular Army. Therefore, the ACRs for the periods Dec, 1992 – Jan, 1993 and April – May, 1993 were raised as 2nd Lt in terms of paragraph 54 of SAO/3/S/89. However, the applicant was subsequently granted ante dated seniority as Captain with effect from 3rd November, 1989 along with pay benefit. This order was issued in May 1994 by which time the ACRs were already recorded and approved. Therefore, there was no alternative but to take into consideration these two ACRs because it was not practically possible to re-write the ACRs subsequently in the rank of Captain for the aforesaid period.

21. It is further stated that the case of the applicant was considered for promotion to the rank of Col. by No.3 Selection Board during September, 2006. Since he did not earn any ACR as Lt. Col. his case was deferred. Subsequently he was considered again in May, 2007 as a fresh case of 1985 batch and in December, 2007, as first

review case with 1986 batch and then as final review case in April, 2008 with 1987 batch but he could not be empanelled being low in merit. He was, however, granted the rank of Col.(TS) with effect from 03.11.2010 on completion of 28 years of service. It is further stated that the applicant was previously not empanelled by No.4 Selection Board in June, 2004 and September, 2005 for promotion to the rank of Lt Col. Thus, he lost seniority and his batch seniority was reckoned as that of 1985. The applicant was, however, promoted as Lt Col with retrospective effect from 16.12.84 in terms of AVSC Committee's recommendations in 2006.

22. The applicant submitted a statutory complaint in 2009 which was returned without any action as the complaint was voluminous. Thereafter, he filed a fresh complaint in 15th June, 2011 which was considered by the competent authority and he was granted partial relief by way of expunction of all '7' points grading by IO and RO including box grading in ACR of 06/96 - 03/97 being inconsistent and deflationary vide Annex. A1 dated 27.06.2012. On such revised profile the case of the applicant could not be considered earlier because the applicant had already retired with effect from 30.09.2012 on completion of 54 years of service. It is submitted that as per Rule 14 (C) of TA Regulations 1948, retiring age of Lt. Col/Colonel is 56 years or 04 years tenure, whichever is earlier but not before 54 years of age. As per retirement order letter No.56212/II/TAS-4 dated 20 Jan 2011, the applicant had completed 54 years of age on 04.09.2012. He had already completed four years' tenure in the substantive rank of Lt. Col. on 15.12.2008. It is submitted that schedule of No.3 SB has not been promulgated until 2014. Holding of unscheduled Board may give rise to arbitrariness and discrimination. Neither there is any policy on conduct of unscheduled Board. The applicant could not be considered by No.3 Selection Board during September, 2012 i.e. before his retirement, as prayed, because no Selection Board of MS Branch was

held during September, 2012. Even if the applicant was considered and approved, he would have superannuated on 30.09.2012, as the first vacancy in the rank of Col (SG) in Territorial Army would have come up only on 01.06.2013. Subsequently, the applicant was considered as special review (fresh) case by No.3 SB in December, 2012 but he could not be empanelled by taking into account his reckonable profile. The result was also intimated to the applicant accordingly.

23. The applicant has filed a rejoinder to the reply affidavit filed by the respondents in which he has contested the allegations of the respondents.

24. We have heard Mr. Rajiv Mangalik, Id. counsel for the applicant and Mr. Anand Bhandari, Id. adv. for the respondents *in extenso* and have gone through the documents placed on record. We have also gone through the ACR Dossier of the applicant as also the Selection Board proceedings, as produced by the respondents.

25. Mr. Rajiv Manglik, Id. adv. for the applicant has raised mainly three issues. His first contention is with regard to the seniority of the applicant. Admittedly, the applicant was physically commissioned in the TA on 1st December, 1992. It is also admitted position that he had earlier served as a SSC officer for a total period of 10 years from 26.08.1982 to 25.08.1992. Therefore, as per rules he was entitled to ante dated commission/seniority and pay protection to the extent of years of service rendered in the regular Army. According to the respondents, by granting benefit of his past service, the seniority of the applicant was initially fixed as on 3rd November, 1982 as 2nd Lt i.e. of 1982 batch. However, this seniority was subsequently revised to 13th February, 1983 i.e 1983 batch. The reason for depression of seniority by one year is due to late passing of promotional examination from Captain to Major. The respondents have further stated that the applicant could not be empanelled by No.4 Selection Board for promotion to the rank of Lt. Col. as fresh and first review case in

June, 2004 and September, 2005. Therefore, his seniority was further depressed first to 1984 batch and then to 1985 batch, by losing two more years seniority. However, he was granted promotion as Lt. Col. in terms of AVSC Committee's recommendation in 2006 with retrospective effect from 16.12.2004.

26. According to Mr. Manglik, the depression of seniority from 1982 batch to 1983 batch was against the rules. The respondents in their supplementary affidavit have submitted that as per paragraph 38(a) of TA Regulations, an officer becomes eligible for grant of substantive rank of Major on completion of 13 years of service from the date of first commission. As per paragraph 3 of Appendix V of TA Regulations, an officer is required to pass Part C and Part D promotion examination for promotion from Captain to Major and practical examination (Part C) is required to be cleared first. As per paragraph 5 of General Instructions of TA Regulations, as amended by SAI No.1/S/86, an officer must clear C & D Part within 13 years without loss of seniority and maximum time permitted is 20 years with corresponding loss of seniority to the extent of extra time taken to pass the examination.

27. The applicant was granted notional commission on 3rd November, 1982 and his batch seniority was 1982. Therefore, he was required to pass the promotion examination within 13 years i.e. by November, 1995. However, he passed on 13.02.1996 i.e. with two months delay. Therefore, his seniority was re-fixed from 13.02.1983. Thus, he lost one year's seniority i.e. initially he was treated as of 1982 batch and now due to late passing of examination, he was treated as of 1983 batch.

28. Mr. Manglik has drawn our attention to Rule 4 of Appendix V which states as follows-

“4. Territorial Army officers are required to pass the examination for promotion to Captain and Major before they have completed the prescribed period of service for promotion to these ranks laid down in paragraphs 38(a), Territorial Army Regulations 1948. Officers failing

to pass within the prescribed time will be permitted to complete the examination within one year from the date they are due for promotion. For the purposes of this limit, any period of service forfeited by an officer for promotion as a result of disciplinary action will not be ignored.

5. Officers who pass the examination within the time limit will be promoted, if recommended, on completion of prescribed length of service. Those passing the examination after expiry of prescribed limit and within the 12 months extra time allowed, will be promoted, if recommended, from the date of passing their examination. An officer who passes in any of the practical tests or written test will be deemed to have passed such tests or paper on the first day of the examination (in any particular part), at which he finally qualifies.”

29. The contention of Mr. Manglik is that since the applicant passed the examination within one year after expiry of the prescribed time limit on 3rd Nov 1992, (and he passed on 13 Feb 1993) his seniority need not be depressed. Therefore, he should retain his original seniority i.e. of 1982 batch.

30. The second part of the argument of Mr. Manglik is that the non-empanelment of the applicant by No.4 Selection Board (Major to Lt Col) during 2004 and 2005 was due to non-availability of requisite ACRs. According to him, the applicant was wrongly declared deserter in February, 1998 and apprehension roll was issued. However, the said apprehension roll was subsequently withdrawn by order dated 23.03.2002 (Annex. A6). In the mean time, the applicant also moved the Hon'ble Orissa High Court by filing a writ petition being OJC No.2560 and an interim order was issued on 03.11.1998 directing the Commanding Officer (OP No.4 in that writ petition) not to take any coercive action against the applicant. Therefore, it would be evident that due to such wrong action by the concerned CO to declare the applicant as a deserter, which ultimately was withdrawn, the applicant had suffered in that his ACRs for five years from 1998 to 2002 could not be raised which resulted in his non-empanelment by No.4 SB for promotion from Major to Lt. Col. Had his ACRs for these five years were there, he could have been promoted in August, 2000. However,

he was subsequently granted promotion as Lt. Col. (substantive) from 16.12.2004. In that view of the matter, his seniority should be restored as that of his original batch i.e. of 1982 and not 1985. The respondents in their reply have not dealt with the issue of deserter clearly. In such situation, benefit of doubt will go in favour of the applicant. If he was actually deferred for non-availability of ACRs for five years, then the applicant cannot be blamed. In any event when he was subsequently promoted on 16.12.2004 his original batch seniority is to be restored.

31. The other limb of argument of Mr. Manglik is that the impugned two ACRs i.e. December, 1992 –January, 1993 and April –May, 1993 were recorded treating the applicant as 2nd Lt. But the fact remains that after grant of ante dated commission and seniority the applicant was treated as Captain with effect from Nov 1989. Therefore, the above two ACRs, which were written in a lower rank, are invalid and required to be quashed. The respondents have contended that no doubt the ACRs for the aforesaid two reporting periods were written as 2nd Lt. in terms of paragraph 87 of SAO3/S/89. The grant of ante dated seniority was a subsequent event i.e of May, 1994 when order was passed by the competent authority for antedated benefits and Part II order was also issued accordingly. Therefore, there was nothing wrong in writing his ACRs as 2nd Lt and not as Captain. It is contended by Mr. Manglik that for promotion as Lt. Col or Col, ACRs for 2nd Lt. cannot be considered because for such promotion, ACRs for nine years and above are only to be considered as per policy. Therefore, the aforesaid two ACRs for the first two years of commissioning are required to be ignored.

32. That apart, it is also argued by Mr. Managlik that in consideration of his statutory complaint dated 15.06.2011 in which he ventilated his grievance with regard to ACRs of 1996-97, the Central Government accepted his plea and directed

expunction of all '7' points grading by IO and RO including box grading on ground of deflationary reporting. Mr. Manglik submits that the Commanding Officer of the applicant at the time of his joining the TA in December, 1992, was the same person who was also his Commanding Officer when the applicant was in regular Army as SSC officer and working in TA. He was very much biased and vindictive against the applicant and all the sufferings that the applicant had to undergo are because of the hostile action of the said Commanding Officer. Although the respondents have submitted that the applicant has not arrayed the said CO as a party in this proceeding, Mr. Manglik contends that when the Central Govt. have expunged all '7' points grading in respect of ACRs of 1996-1997 being inconsistent and deflationary, by the same logic the ibid two ACRs of December, 1992 –January, 1993 and April – May, 1993 in which also the applicant was awarded '7' points grading and in a wrong rank by the CO, who nurtured animus against the applicant from his past service period, should also be expunged on the same analogy.

33. Mr. Anand Bhandari, Id. adv. for the respondents apart from oral arguments has also filed a written note of arguments in which he has raised the objection with regard to limitation so far as challenge of the applicant in respect of two ACRs of 12/92-1/93 and 4-5/93 is concerned. He has contended that the applicant never made any complaint with regard to these two ACRs and after a lapse of 20 years it is not permissible to challenge the same at this belated stage. He has relied on the following decisions in support of his contention with regard to limitation:-

- i) **DCS Negi –vs- UOI** (judgement dt. 11.4.08 in Civil Appeal No. 3709/2011).

We find that it is an unreported decision of the Hon'ble Delhi High Court. But it does not relate to the question of limitation but on the question of ACR and outcome of fall in standard in performance. This decision obviously is not applicable on the question of limitation.

- ii) **UIO –vs- M.K.Sarkar** (2010) 2 SCC 59, in which it is observed by the Hon'ble Apex Court that period of limitation is to be reckoned with reference to original cause of action.
- iii) **Col. CR Dalal –Vs- UIO & Ors**, judgement dt. 6.5.11 in OA 644/2010 by Principal Bench of AFT.
- iv) **Col P. Prem Kumar –vs- UIO**, Judgement dt. 4.5.11 in OA 371/2010 by Principal Bench of AFT.

Both these decisions of the Principal Bench of AFT are unreported ones but no copy has been produced before us by the respondents. As such, we are not in a position to go through the same and consider the applicability of the ratio decided therein to the case in hand.

34. We have already observed in para 19 above that in this particular case, the respondents themselves have reopened the stale issue by examining the ACRs of the applicant for the periods 12/92-1/93 and 4-5/93 on merit while dealing with his statutory complaint dt. 15 Jun 2011. We have also gone through the original departmental records in which the *ibid* statutory complaint of the applicant was dealt with and we find that indeed these two ACRs were considered on merit and rejected holding the same were consistent and no infirmity was there. This was also communicated to the applicant in June 2012. Therefore, the respondents cannot raise the point of limitation now.

35. On merit of the case, Mr. Bhandari has placed reliance on the decisions of the Hon'ble Apex Court in **Amrik Singh –vs- UIO & Ors**, (2001) 10 SCC 424 to contend that the Tribunal cannot go into the correctness of adverse remarks nor into assessment made by the selection board. He has also relied on the decision of the Apex Court in the case of **UIO & Ors –vs- AVM SL Chhabra**, (1993) Supp (4) SCC 441 in which also similar view was taken that court cannot moderate the appraisal and grading of ACR of any particular year. He has also referred to the decisions of the

Hon'ble Delhi High Court in the case of **Lt. Col. (TS) DS Pandey –vs- UOI & Ors**, in WP(C) 6572/02 dt. 31.5.08 and of Principal Bench of AFT in **Brig Rakesh Sharma –vs- UOI & Ors** in OA 217/09 dt. 8.4.10 and **Col. P.K.Nair –vs- UOI & Ors** in TA 198/2010 dt. 4.5.10 wherein it is held that assessment of '7' is above average and cannot be construed as adverse.

36. So far as other issues regarding depression of seniority and consideration by No. 3 selection board are concerned, we will deal with the contentions of Mr. Bhandari in the succeeding paragraphs.

37. After having carefully considered the submissions of both sides and on going through the materials placed on record, we find that the entire controversy boils down to two main issues :-

- i) Whether the respondents were justified in treating the applicant to be of 1985 batch while considering his case for promotion to the rank of Col (SG) by No. 3 Selection Board?
- ii) Whether No. 3 SB has correctly considered the case of the applicant in special review(fresh) case after the Central Govt. granted him partial relief by expunging all '7' points grading and box grading so far as ACR of 1996-97 is concerned?

38. There is no dispute that the applicant joined TA initially as 2nd Lt i.e. lowest rung on first commissioning on 1.12.92. He was granted ante dated commission and seniority by taking into consideration his past SSC service for 10 years and his revised date of commissioning was treated as of 3.11.82 and he was also granted higher rank of Captain from 3rd Nov 1989 after treating him in the rank of 2nd Lt. from 3.11.82 and Lt. from 3.11.85. Thus, he belonged to 1982 batch and his rank was Captain as on 1.12.1992 i.e. the date of physical commission. His next promotion was to the rank of

Major for which he was required to pass promotional examination within the prescribed time limit as per reg. 38(a) of TA Regulations.

39. In the supplementary affidavit filed by the respondents, apart from seeking correction of certain typing errors crept in the original reply affidavit, have annexed extracts from TA Regulations. It is stated that as per para 38(a) of TA Regulations as amended vide CS No. 273/1/88 dt. 16 Nov. 1988 an officer becomes eligible for grant of substantive rank of Major on completion of 13 years of service from the date of first commission. As per para 3 of Appendix V of TA Regulations, for promotion to the rank of Major from the rank of Captain, an officer is required to pass Part C and D examinations. As per SAO 9/S/86 and SAI No. 1/S/86, practical examination (Part C) is required to be passed first.

40. So far as time limit for passing promotion examination is concerned, as per 5 of appendix V of TA regulations as amended by SAI 1/S/86, it is provided in para 13 as under :-

“13. Non Departmental TA officers promotion Examinations parts C and Part D :

- (a) *** ***
- (b) *** ***
- (c) *Qualify in Parts C and D in any order without any loss o seniority till completion of 13 years commissioned service.*
- (d) *Qualify in Parts C or D in any order till completion of 20 years commissioned service with corresponding loss of seniority to the extent of extra period taken to pass these examinations over the specified period as specified in Appendix B to SAI 1/3/86.”*

Appendix B to SAI/1/3/86
(From Captain to Major)

- 1. *Eligibility* : (a) 8 years commissioned service
 (b) Passed promotional examination Parts A and B
- 2. *Time Limit for* : 13 years commissioned service
 Passing

3. *Penalties* : *Officers who do not pass these promotion examination Within the prescribed length of commissioned service for the substantive rank of Major will lose seniority to the extent of extra period taken by them to pass the examination(s) i.e. officer will lose seniority from the date of completion of 13 years service to the first day of the examination in which they successfully qualify."*

41. It is argued by Mr. Bhandari that the applicant having been treated to have been commissioned on Nov 3, 1982, he was required to pass the Parts C and D examination within 13 years i.e. by 3rd Nov 1995. The applicant, however, passed the examination on 13 Feb 1996 and was promoted as Major from that date. Thus, due to late passing of examination, he lost seniority to the extent of extra time taken to pass the examination and thus, was treated as of 1983 batch.

42. Mr. Mangalik has countered this argument by relying on para 4 of Appendix V of TA Regulations, which we have quoted earlier. In that para, a grace period of one year is prescribed and according to Mr. Manglik, since the applicant passed the examination within this grace period of one year, question of losing seniority does not arise. Prima facie, the argument of Mr. Mangalik has some force.

43. The matter can be looked from another angle too. Xerox copies of SAO/9/86 and SAO 1/S/86 on which the respondents have placed reliance, have been annexed with the supplementary affidavit. We have gone through the same. It appears that both these special army orders/instructions came into force from 1st Jan 1985. Admittedly, the applicant was commissioned in Nov 1982. It is also seen from these two special army orders/instructions that earlier, the time limit for passing such examination was 15 years and the number '15' has been penned through and instead written '13' by ink. It also appears that the ibid two orders amended the earlier special army orders/instructions No. SAI-7/S/70. The respondents have also clearly stated in the

supplementary affidavit that para 38(a) of TA Regulations, 1948 was amended by CS No. 273/1/88, to the following effect :-

“38(a) Promotion – Officers other than Medical – Officers (other than medical) will be eligible for promotion if qualified and recommended as follows :-

“Substantive promotion – (i) by time-scale to the rank of Lieutenant, Captain and Major completing 3,7 and 13 years service respectively from the date of first commission or from the date from which service for promotion reckons irrespective of vacancies. “

44. On conjoint reading of the ibid special army orders/instructions and reg. 38(a) of TA Regulations, 1948, it is quite apparent that earlier the time limit for passing parts C and D examination was 15 years which was reduced to 13 years by CS No. 273/1/88. In our view, in the absence of any specific provision, such amendment reducing the time limit from 15 to 13 should take prospective effect and cannot be applied to the persons who were commissioned earlier to such amendment. In other words, the time limit for passing promotion examination, when amended, would apply to persons commissioned in the year when such amendment comes into force for the simple reason that any amendment cannot adversely affect or take away the vested right of an individual. We also notice from TA Regulations that the time limit of 13 years was also subsequently amended to 12 years in 2003.

45. No reasons or rationale could be provided by the respondents including by the officer appearing for the Additional DG, Army HQ to explain such changes from 15 years to 13 years and then 12 years as the maximum permissible service limit to clear promotion examination (Capt to Major) Parts C & D. The only possible connotation could be the fact that the service limit to attain substantive Major rank was first 13 years and then reduced to 11 years and then 10 years in Army. Accordingly, perhaps, the service limit to clear Parts C & D was 15 years (13+2); 13 years (11+2) and then 12 years (10+2). What emerges from the above understanding is that two years grace

was always given to clear such examination. In TA, however, it is clear from rule 4 & 4 of Appendix V (Promotion Examination for TA Officers) to the TA Regulations (quoted above) that 12 months grace period is always permissible to clear such promotion examination. In the instant case, the applicant just took two months and few days more than the stipulated period of 13 years, that was well within the grace period.

46. When an individual is commissioned as an officer, he knows that he has to clear the promotion examination within specified time. If this period is reduced to his disadvantage, it certainly affects him and results in civil consequence. Therefore, unless it is specifically indicated, any such amendment would always take prospective effect only and would not apply to those who were already commissioned before such amendment comes into force. Since the applicant was commissioned in 1982, in his case the time limit would be 15 years and not 13 years, which was introduced in 1988 only and in that view of the matter, it is quite evident that he cleared the examination within the prescribed time limit and hence, question of losing seniority in his case does not arise. That apart, there is also a grace period of one year embodied in appendix V, para 4 quoted above. In either view of the matter, we are of considered opinion that the applicant's seniority should remain as 1982 batch and cannot be taken as that of 1983 batch.

47. It is the further case of Mr. Bhandari that the applicant was considered by No. 4 SB for promotion to the rank of Lt Col in Jun 2004 and Sept 2005 as 1983 batch as fresh and first review case respectively. But he could not be empanelled. Therefore, he lost further seniority and came down to 1985 batch – i.e. for non-empanelment in 2004, he lost one year i.e. became of 1984 batch and then again due to non-empanelment in 2005, he lost another year's seniority i.e. of 1985 batch. It is,

however, submitted that subsequently on implementation of AVSC recommendations in April 2006, he was granted promotion as Lt Col. (TS) from 16 Dec 2004. Since he had already lost seniority, he remained of 1985 batch and he was further considered for Col.(SG) as 1985 batch.

As per MS Policy letter dt. 11 Dec 1991, in para 5 it is provided as follows:-

“5. Every officer is given three chances for consideration for promotion. If an officer is not approved for promotion during the first consideration, he loses one year of seniority and slides into the batch of the next year. In the eventuality of his not being approved for promotion even in the second consideration, he loses one more year of seniority and slides further into the next batch. Thereafter, the officer is considered for promotion for the last time and if he is not approved even in the third chance, he is not given any further consideration and is regarded as a finally superseded officer....”

48. Although the respondents have not brought on record the ibid policy letter, it appears that they have followed this policy while depressing the seniority of the applicant to 1985 batch for his non-empanelment for promotion as Lt. Col in 2004 and 2005 No. 4 selection board.

49. We have gone through the No. 4 selection board proceedings, extracts of which have been produced before us. We find that the applicant was considered by the board during the period from Aug 1999 to Dec 2003 but on all these ten occasions he was either deferred or withdrawn, obviously, due to lack of requisite ACRs. The applicant has complained that during the period from 1998 to 2002 he was declared as deserter illegally due to which he could neither be embodied nor any ACR was raised during this period of 5 years. However, we need not go into this question as the applicant had already challenged such action of the respondents in the Hon'ble Orissa High Court and obtained stay order and eventually, the apprehension roll was withdrawn/cancelled vide order dt. 23 Mar 2002 (annexure-A6). Final outcome in that writ petition has not been brought on record by either party.

50. The applicant was again considered in June 2004 as fresh case but was not empanelled. Thereafter, he was considered in Sept 2005 as first review case but not recommended. Thus, he was effectively considered on two occasions and before his third chance for consideration as final review case came, Govt. issued order dt. 18 Apr 2006 (annexure-R3) implementing AVSC committee's recommendation whereby the applicant was granted promotion as Lt. Col. (TS) w.e.f. 16 Dec 2004 since he had already completed the required 13 years service. Thus, in December 2004 itself the applicant got promotion without subjecting to any further selection process. Therefore, question of his losing seniority for non-empanelment in June 2004 board as fresh case, is not relevant since he was never considered as final review case before introduction of AVSC recommendation. Had he been considered as final review case, and not empanelled, question of his final supersession would come as per policy.

51. That apart, admittedly in June 2004 or Sept 2005 selection, his entire ACRs, (numbering 4, i.e. 12/92-1/93, 04-05/93, 06/96-03/97 and 06-09/03), were considered including that of Jun 96-Mar 97. In respect of this particular ACR the applicant got partial redress from Central Govt. by way of expunction of all '7' points grading and box grading by order passed in June 2012 (annexure-A). Such being the position, he was eligible to be considered by a special review (fresh) case by No. 4 SB which was not done nor can it be done now because in terms of circular dt. 18 Apr 2006 (annexure-R3), no further No. 4 selection board would be held. In other words, No. 4 SB was abolished. In paras 4 and 5 of the ibid circular it is stated as follows:-

“ 4. Those serving in the rank of Lieutenant Colonel (Time Scale) will now be eligible for grant of substantive rank of Lieutenant Colonel. The existing rank of Lieutenant Colonel (Selection) shall remain applicable till the existing Lieutenant colonel (selection) are either promoted to the rank of Colonel (Selection) or Colonel ((Time Scale) or are retired. No further consideration for promotion to the rank of Lieutenant Colonel (Selection) shall be made from the date of issue of this letter.

5. Those officers who could not be considered for promotion due to organizational constraints to select grade of Lieutenant colonel (as per earlier policy) will be provided protection of their seniority-vis-à-vis their own batch mates while being promoted to the select grade rank of Colonel.”

52. Thus, it appears that the rank of Lieutenant Colonel (Selection) was abolished and instead Colonel (TS) was introduced to be awarded on completion of 28 years of service. That apart, after completion of 13 years of commission service, all will get the rank of Lt. Col. The applicant was accordingly granted this rank from the cut-off date of 16.12.2004. Such being the position, the applicant could not be considered as special review (fresh) case for promotion to the rank of Lieutenant colonel (Selection) by No. 4 SB for administrative constraints, despite having got redressal from Central Govt. by way of expunction of ‘7’ point grading in his ACR of Jun/96-Mar 97 in the year 2012. Thus, his chance for restoration of lost seniority, if any, due to non-selection in 2004 and 2005 is also taken away. Therefore, in our considered view, it will neither be justified nor logical to lower down his batch seniority and he should retain his original seniority i.e. 1982 batch. The first issue is thus answered.

53. Now, coming to the second issue, admittedly the applicant was granted promotion as Colonel (Time Scale) wef 3rd Nov 2010 i.e. on completion of 28 years of commissioned service counting from his date of commission on 3rd Nov 1982, in terms of AVSC committee’s recommendations. He retired as such on 30 Sept 2012 on completion of 54 years of service and 4 years service as Lt. Col.

54. But before that he was considered by No. 3 selection board for promotion as Colonel (Selection) on four occasions, viz. Oct 06, Mar 07, Dec 07 and Apr 08. On first occasions he was deferred for inadequate ACR in the rank of Lt. Col and on subsequent occasions, he was not empanelled. On getting redressal by Central Govt. in June 2012 he was considered as special review (fresh) case in Dec 12 i.e. after his

retirement and here again he was not empanelled. We, however, find that he was treated as 1985 batch in all these considerations.

55. On going through the selection board proceedings as also the MDS (Member Data Sheet), we find that all ACRs of the applicant were considered by the board including that of Dec 93-Jan 94 and Apr-May 94. Admittedly, at that time the applicant was a 2nd Lt. physically though subsequently he was granted rank of Captain retrospectively. In all there were 13 ACRs- 2 as 2nd Lt., 4 as Major and 7 as Lt. Col. According to para 37 of reply of the respondents, in terms of MS Policy No. 0447/MS dt. 7th Oct 2002, all CRs earned after completion of 9 years of reckonable commissioned service are to be taken into consideration for promotion to the rank of Colonel by No. 3 SB. The applicant was granted commission notionally from 3rd Nov 1982 and therefore, 9 years therefrom comes to Nov 1991 when he had not physically joined TA and question of his earning any CR did not arise. He joined on 1.12.92 and his reckonable profile started then as per the respondents. However, admittedly, he was 2nd Lt. at that time though subsequently he was made Captain from Nov 1989 and Major from Feb 1996 on passing departmental examination. As per AVSC report introduced in April 2006 w.e.f. 16.12.04 (annexure-R3), it is noticed that the rank of 2nd Lt was abolished and first commission is in the rank of Lt. When the case of the applicant was first considered in Oct 2006 by No. 3 SB, the rank of 2nd Lt. having been abolished, in our view, the CR earned as 2nd Lt cannot and should not be taken into consideration as it would wholly unjust and unfair and would amount to discrimination.

56. In terms of MS policy letter dt. 4.1.2011 on the subject of “Conduct of Selection Board on quantification system”, the definition of “reckonable profile” has been provided in para 4(d), which is as follows:-

“Reckonable Profile: All CRs in reckonable profile being considered will be quantified. “Look-Two-Down” principle, by taking into the consideration of CRs earned in the present rank and pervious rank, will continue for No. 3 SB, No. 2 SB and No. 1 SB as hither-to-fore.....”

57. It is apparent that No. 3 SB can consider ACRs of the present rank i.e. Lt. Col and previous rank i.e. Major and not below that. 2nd Lt. is three ranks below further to Major i.e Captain, Lt. and 2nd Lt (since abolished). Therefore, considering the ACRs that were raised as 2nd Lt. cannot be considered by No. 3 SB as per this policy. However, this policy is of 2011 i.e. after introduction of quantification system in 2008-09 whereas the case of the applicant was considered in 2006-07. It is not made clear that whether after abolition of the rank of 2nd Lt. in 2006 April, there was any change in policy of 7th Oct 2002. Whatever may be the case, it is not disputed that based on these two ACRs as 2nd Lt., the applicant got promotion as Lt. Col and Col (TS). Therefore, even if there was any aberration, the same was wiped off as per settled legal position. Such being the position, we are of the view taking into account the ACRs as 2nd Lt. during the period Dec 92-Jan 93 and April-May 93, especially when the said rank was no longer there and made defunct, was irregular and illogical. That apart, he was considered as 1985 batch which is also not correct. Therefore, technically, all promotion boards where he was considered as a 1985 batch officer are invalid qua applicant since his actual batch seniority should have been 1982.

58. In view of the above, we are of the opinion, that the respondents should conduct a special review selection in respect of the applicant by considering his case by No. 3 SB by treating him as of 1982 batch and ignoring the ACRs as 2nd Lt. during the periods Dec 92-Jan 93 and April-May 93. In case he is found fit and recommended, all consequential benefits be extended to him.

59. So far as extended period of service up to 56 years, as claimed by the applicant, we are of the view that the respondent authorities should abide by rules and

allow the applicant any additional service, if permissible by rules and as a consequential benefit only in case he is promoted to Col (SG). We find that at page 50 of the OA the applicant has annexed an extract of rule regarding retirement age. So far as Lt. Col and Col are concerned, the age is “56 years or 4 years tenure whichever is earlier but not before 54 years of age”. Admittedly, the applicant has rendered 4 years tenure as Lt. Col and attained 54 years of age and therefore he was correctly retired on 30 Sep 2012. Moreover, he was not a Col (SG) when he retired.

60. We have not discussed the case laws cited by Mr Bhandari in para 35 above, as we have not gone into the merit of assessment and grading awarded to the applicant in respect of the impugned two ACRs as it is well settled principle of law that court or tribunal ordinarily cannot re-appreciate the assessment or grading awarded by the IO or RO. The court can interfere only when there is apparent illegality and allegation of bias is made against the reporting or reviewing officer.

61. In view of the foregoing discussions, we allow this application in part on contest, by issuing the following directions:-

- a) The applicant shall be treated to be belonging to 1982 batch for all promotion boards.
- b) The respondents shall conduct a special review in respect of the applicant by correcting his batch seniority to 1982 by a No. 3 Selection Board, within 90 days from the date of communication of this order, for his promotion to the rank of Colonel (Selection). The ACRs as 2nd Lt. for the periods Dec 92-Jan 93 and April-May 93 shall be ignored while considering him in the ibid special review No 3 SB for the reasons as discussed earlier.

- c) If the applicant is found fit and recommended for promotion by the board, he shall be given promotion as Colonel (Selection) from the date last person in his batch (1982 batch) got such promotion with consequential benefits.

- d) No costs.

62. Let original records be returned to the respondents (officer from the MS Branch) on proper receipt after resealing the envelopes.

63. Let a plain copy of the order duly countersigned by the Tribunal Officer be furnished to both sides on observance of due formalities.

(Lt. Gen. K.P.D.Samanta)
MEMER(ADMINISTRATIVE)

(Justice Raghunath Ray)
MEMBER (JUDICIAL)