FORM NO – 21

(See Rule 102 (1)

ARMED FORCES TRIBUNAL, KOLKATA BENCH

APPLICATION NO: OA 4 OF 2014

THIS 27th DAY OF AUGUST, 2014

CORAM: Hon'ble Mr. Justice Raghunath Ray, Member (Judicial)

Hon'ble Lt. Gen. K.P.D. Samanta, Member (Administrative)

IC-46298N Lieutenant Colonel Mukul Dev
Son of Late S.Dayal,
Presently posted at HQ DG, NCC,
West Block IV, R.K.Puram, New Delhi

……Applicant

-Vs-

1. Union of India, Service through the Secretary,
Ministry of Defence, South Block,
New Delhi-110 011

2. The Chief of Army Staff,
Army Headquarters, Integrated HQ of M/o Defence (Army)
Defence Headquarters, PO: New Delhi – 110 011

3. Military Secretary, Integrated HQ of M/o Defence (Army)
Defence Headquarters, PO: New Delhi – 110 011

4. Adjutant General, Integrated HQ of MOD (Army)
Defence Headquarters, PO New Delhi- 110 011

5. Shri Ram Subhag Singh,
Joint Secretary (O/N), 198-B, South Block
Ministry of Defene, New Delhi-11

6. Brig VC Chitravanshi,
Jt. JAG, JAG's Deptt.
Integrated HQ of MOD (Army)

7. IC-45765 Col (TS) Jatinder Singh,
AJAG, JAG's Deptt.
Integrated HQ of MoD (Army),
DHQ PO New Delhi-110 011

……..Respondents

For the petitioner: Mr. Rajiv Mangalik, Advocate

For the respondents: Mr. Mintu Kumar Goswami, Advocate

O R D E R

Per Hon'ble Lt. Gen. K.P.D.Samanta, Member (A)

This is yet another round of litigation by Lt. Col Mukul Dev, presently posted at HQ DG, NCC, New Delhi, challenging the order dt. 10 Jan 2014 (annexure-A2) issued by the Central Govt. whereby his statutory complaint against alleged illegal/irregular recording of punishment of 'reprimand' awarded to him in a summary trial held in Apr 2001 has been rejected. He has also raised grievance for his non-selection for promotion to the rank of Colonel by the No. 3 Selection Board as special review(fresh) case as communicated to him vide orders dated 26 Dec 2012 and 14 Aug 2013 (annexure-A1).

2. The case has a checkered history. It appears that the applicant has been filing multiple petitions being aggrieved mainly by his non-promotion to the rank of Colonel despite being much senior and all his batch mates have already been promoted to that rank much earlier. It is, therefore, necessary to set out very briefly the facts leading to the filing of this original application u/s 14 of AFT Act, 2007.

3. The applicant was commissioned in the Indian Army as 2nd Lt. on 20 Aug 1988 in the Regiment of Artillery. During the course of service, he obtained LLB degree in 2003 and applied for Inter Arms Transfer (IAST) to JAG branch in the year 2005. Such transfer was permissible up to the rank of Major but the applicant in the meantime became a Lt Col in his own arm, Artillery. However, his prayer for transfer to JAG Branch was approved by the competent authority. According to the applicant, his induction into the JAG branch was not viewed favourably by those officers of the JAG branch who were directly recruited and they were resisting and delaying his posting to JAG branch. The applicant had to

approach the Hon'ble Delhi High Court for the purpose and ultimately he was posted to JAG branch in a criteria appointment as AJAG, HQ Central Command in Feb 2008. The applicant has attributed the real cause of his non-promotion to the perennial rivalry between direct recruit JAG officers and transferee officers like the applicant. We need not go into the details of such instances which according to the applicant, would go to show the kind of resistance he had to face in the JAG branch for which he has blamed respondents 5 to 7, who have been arrayed in this proceeding as private respondents. However, the applicant officer, being of 1989 batch seniority, was considered for promotion to the rank of Colonel by No. 3 Selection Board on a number of occasions as per rules, but he could not be recommended. Even on the basis of earlier directions of this Tribunal when his reckonable profile was revised, he was also considered as special review case but again he could not be recommended.

4. On the last occasion in Dec 2012, when he was considered by No. 3 SB as special review (fresh) case of 1989 batch, he was not recommended, and the applicant came to know on enquiry that his non-promotion could have been due to a wrong entry in his service dossier in respect of a punishment of 'reprimand' that was said to have been awarded to him on 17 Apr 2001, while he was in Artillery posted in 80 Field Regiment at Madukarai (Tamil Nadu); but was attached to 2/8 Gorkha Rifles located at Thiruvananantapuram, Kerala. At that point of time he was a Major in the Regiment of Artillery. He was summarily tried u/s 84 of Army Act by the GOC, HQ 54 Infantry Division, located at Secunderabad, on two charges framed u/s 63 of Army Act. According to the applicant, he was acquitted in both the charges, but as it appears, he was acquitted only in respect of first charge but was found guilty in respect of second charge for which he was awarded punishment of 'reprimand' on 17 Apr 2001. It is this punishment which, according to the applicant, has been entered into his service dossier illegally without proper authority and without publication of Part II order, which has resulted in his non-promotion. More so, as submitted by the applicant's advocate Mr. Manglik, such illegal and improper entry in the dossier would have influenced the mind of the members of the promotion board thus to the detriment

of the applicant. Mr. Manglik has emphatically submitted that his client could not have lost out on comparative merit especially with his revised profile; but, perhaps due to non-recommendation of the board members being coloured by the said illegally inserted punishment entry in his dossier.

5. The applicant had earlier filed an OA before this Tribunal being OA 34 of 2013 challenging this entry into his service dossier. However, it was noticed that no statutory complaint was filed by the applicant against such entry as required under the rules; therefore, the Tribunal disposed of the said OA by an order dated 15.5.13, by directing the respondents to treat the said OA as a statutory complaint and to decide the same on merit within a specified time frame. In compliance to the said direction, the respondents have since disposed of the ibid statutory complaint by the impugned order dated 10 Jan 2014 (annexure-A2) by way of rejecting the complaint. It is this order which has been challenged by the applicant in the instant OA with a prayer to quash the same to that extent that it states that the punishment entry 'reprimand' was a valid entry. That apart, the applicant has prayed for quashing/expunction of the impugned entry of the award of punishment of "Reprimand' by the GOC, 54 Infantry Div on 17 April 2001 from his service documents and also for reconsideration of his case by No. 3 SB as a special review (fresh) case as a sequel to removal/expunction of the aforesaid entry.

6. The respondents 1 to 4 have resisted the application by filing a reply affidavit denying all allegations of the applicant on all material points. Similarly, respondents 5, 6 and 7 have also filed separate reply affidavits contesting the case in which they have also denied the allegation of the applicant as has been raised against them individually.

7. We have heard Mr. Rajiv Manglik, ld. adv. for the applicant and Mr. Mintu Kumar Goswami, ld. adv. appearing for the respondents including the private respondents extensively.

8. Mr. Goswami has raised preliminary objections on two counts. His first ground is that this Bench has no territorial jurisdiction to entertain this application since the applicant is presently posted at Delhi. He contends that the cause of action for grievance of the applicant as ventilated in this OA, had arisen in

2001 when he was posted in Tamil Nadu and attached to a unit at Kerala and the summary trial, based on which the impugned entry of 'reprimand' has been recorded, was held at Secunderabad. Therefore, this Bench has no territorial jurisdiction to adjudicate the matter. His further contention is that the provision 'last posting' occurring in rule 6 of AFT (procedure) Rules cannot be used as a tool to file an application before this Bench in respect of grievance which occurred long back in a place not falling within the territorial jurisdiction of this Tribunal.

9. The second point raised by Mr. Goswami is that the applicant by seeking relief to quash the entry of 'reprimand' in his service dossier has essentially challenged the summary trial itself that was held against him u/s 84 of Army Act for offence punishable u/s 63 of Army Act. Unless the summary trial is quashed, the punishment that was awarded on its basis cannot also be interfered with. He has very vehemently argued the theory of "base and superstructure". His argument is that the base or foundation for the entry impugned is the summary trial; therefore, unless the base is interfered with, the super-structure that was built upon it, i.e. the punishment, cannot also be gone into. Mr. Goswami points out that the definition of 'service matter' as provided in Sec 3(o) (iii) of AFT Act, does not include summary trial not amounting to dismissal from service. Here, the punishment awarded is 'reprimand' and not 'dismissal'. Therefore, it is not a 'service matter' which can be adjudicated by this Tribunal in an application filed u/s 14 of the Act.

10. Refuting the contentions of Mr. Goswami, it is argued by Mr. Manglik that this Bench has territorial jurisdiction to entertain this application in terms of rule 6 (1) of AFT (Procedure) Rules. He has pointed out that on earlier occasions also, the respondents took similar ground to resist admission of the applications filed by the same applicant and ultimately, they implemented the order passed in such applications. Therefore, this point cannot again be raised by them.

11. So far as other objection regarding definition of 'service matter' is concerned, Mr. Manglik has pointed out that Hon'ble Allahabad High Court at Lucknow has clearly held that service matter also

includes summary trial where even lesser punishment than dismissal has been awarded. However, he has very emphatically submitted that in this proceeding, the applicant is only challenging the illegal entry in his service record and not the summary trial. Therefore, there is no bar in entertaining this application with regard to wrong recording in service dossier which surely is a service matter.

12. On the question of preliminary objections, we may observe that by our order dt. 5.2.14, both the objections now raised by the respondents have been dealt with in detail. It was made very clear that this application was being admitted only with regard to the grievance of the applicant for promotion and illegal entries in the service records, which are within the purview of this Tribunal to adjudicate. It also appears that subsequently, the respondents filed an application seeking leave to appeal before the Hon'ble Supreme Court against this order dt. 5.2.14 u/s 31 of the AFT Act, which, however, was refused on the ground that no appeal would lie against interlocutory orders. In such view of the matter, the objections as raised by the respondents stand settled.

13. We may now come to the merit of the case i.e. whether the entry of punishment 'reprimand' that has been recorded in the service dossier of the applicant is in order or not; and if not, whether such entry can be taken into consideration by No. 3 Selection Board while considering the case of promotion of the applicant to the rank of Colonel.

14. Mr. Manglik has submitted that entries in service records/dossier are made as per procedure laid down in SAO 4/S/1988 (Annexure-A12). As per Para 13 of the ibid SAO it is stipulated that all entries in the service records are to be made mandatorily on the authority of Part II orders with exemption certain cases. In Para 27 of the said SAO it is made clear that publication of Part II order is mandatory in respect of punishment awarded. According to the Mr. Mangalik, without the authority of Part II order no entry could be made in service record at the time when the applicant was awarded this punishment i.e. in Apr 2001. However, such punishment entry could also be made on the authority of Central Government only, because at that time delegation of power to the Army HQ was not there. Such

delegation in respect of certain matters has been made by the MOD notification dated 3rd Aug 2001, a copy of which is produced before us.

15. It is stated by the applicant that he came to know that even though no Part II order was ever published in respect of the punishment of 'reprimand' that was said to have been awarded to him in summary trial held in April 2001, an entry was made in his service dossier on the basis of Note/letter No. C/06270/SSC/237/AS/DV-2 dt. 7 June 2001 initiated by Directorate of Discipline and Vigilance (DV-2) of Army HQ, a copy of which was endorsed to MS Branch. It is specifically pointed out that no copy of the summary trial documents or Part II order was available in the concerned section i.e. MP-6E, which is the custodian of service records of officers.

16. Mr. Mangalik has emphatically argued that DV Directorate had no authority to initiate such entry at that point of time; as per ibid SAO 4/S/1988, it was only on the basis of a Part II order that such entry could have been made. However, it could also be made on the direction of the Central Govt. which is not the case here. Subsequently, however, on the authority of delegation of power as indicated above, SAO 4/S/1988 was amended by AO 22/MP/2002 (annexure-A13) wherein for the first time; as per Para 15 of the ibid AO, apart from part II order, authority to make punishment entry in the service dossier was also vested with the DV Directorate. Mr. Manglik explains that if the DV directorate had such authority earlier, then there would have been no reason to vest such authority on DV directorate in the amended AO as per Para 15 thereof. Thus, the authority of Central Govt. was delegated to DV Directorate for the first time in 2002. Therefore, the entry that was made on the basis of June 2001 note/letter from DV-2 was clearly illegal and irregular especially in the absence of any Part II order. He contends that since no Part II order was published in respect of the impugned punishment, which is mandatory, therefore, it has to be presumed that no such punishment was ever awarded against the applicant and the contention of the applicant that he was acquitted of both the charges leveled against him in the said summary trial as was intimated to him at that point of time, is to be treated as correct.

In such circumstances, according to the ld. adv., the entry that was made in the service dossier of the applicant with regard punishment entry of 'reprimand' cannot be taken into consideration or acted upon and ought to have been ignored by the No. 3 SB while considering his case for promotion.

17. Ld. adv. for the applicant has drawn our attention to annexure-A16 which is a note by respondent No. 6 dt. 18 Nov 2013. In this note at Para 2(b) the said respondent has given an interpretation contrary to the text of the ibid SAO 4/S/1988 by suggesting that the expression 'etc.' as appearing in Para 13 of the ibid SAO would also include DV Directorate apart from Central Govt. and therefore, such entry was quite legal and regular. According to the ld. adv., respondent No. 6 was biased against the applicant as both respondent nos. 6 and 7 are direct recruit JAG officers and are presently posted at the Army HQ and are privy to offer advice to the JAG and on his behalf to the MoD. These officers are trying to harm the applicant and to deny him his due promotion since he is a transferee officer and does not belong to the JAG branch from inception.

18. Mr. Mangalik, therefore, urged that the illegal entry should, therefore, be ignored and quashed and the respondents be directed to reconsider the case of the applicant for promotion by way of a special review (Fresh) board based on revised profile by ignoring the wrong entry of 'reprimand'.

19. Mr. Goswami, ld. adv. has drawn our attention to various averments made in the counter affidavit and has submitted that the entry was made correctly and no illegality or irregularity was committed in making the entry as alleged. The respondents have admitted that the entry of punishment of 'reprimand' awarded to the applicant by GOC, 54 Infantry Division on April 17, 2001 has been entered in the applicant's dossier on the authority of DV Directorate letter dated 7th June 2001; and that the said entry made in the dossier of the applicant was legitimate and in conformity with Para 13 of SAO 4/S/88 and Para 15 of 22/2002. It is also not disputed that no Part II order was published in this regard.

20. For better appreciation, Para 13 of SAO 4/S/88 is quoted below:-

"Entries in Record of Service (IAFZ-2MI)

> 13. All entries in IAFZ-2041 are recorded on the authority of Part II orders except the following ones which are made on the authority of Gazette of India Notifications, Government letters, Course Reports, Medical Board proceedings (AFMSF-15A) **etc.** as the case may be :-
>
> (a)Commission confirmation;
> (b) Substantive promotions
> (c) Extension of Service
> (d) Service Examinations i.e. Part A, B, C and D
> (e) Result of course notified in general course reports by the concerned School of Instruction.
> (f) Honours and awards
> (g) Medical category
> **(h) Summary awards under Army Act Sections 83 and 84.**

21. By referring to clause (h) of Para 13 reproduced above, it is argued by Mr. Goswami that publication of Part II order is not mandatory in respect of "summary awards u/s 83 and 84". Therefore, the contention of the applicant that the entry was made without any supporting documents is not correct because other relevant documents were forwarded to the concerned MP-6 and MS branches as required. It is further pointed out that Para 8 of the ibid SAO 4/S/88 clearly stipulates that letters from AG's Branch/DV Directorate pertaining to disciplinary and administrative actions will be kept with the record of service maintained by AG Org 9(M).

22. It is further pointed out by Mr. Goswami that the word 'etc.' occurring in Para 13 has been purposely used to include all contingencies which are not specifically mentioned in the examples given therein. The term 'etc' is to be read *ejusdem-generis*.

23. It is further contended by Mr. Goswami that it is not correct to say that because of the entry of 'reprimand' in service dossier that he could not be recommended by the No. 3 SB. On the contrary, the selection board took into consideration number of factors such as ACRs, course reports, honours and awards and also disciplinary background. It is submitted that the case of the applicant was considered fairly and impartially in accordance with policy in vogue.

24. Mr. Goswami also represented respondents 5 to 6 even though they have been impleaded in private capacity and against whom the applicant has made various allegations of bias and vindictiveness.

Mr. Goswami has very vehemently refuted all these allegations and has submitted that they have done their duty impartially and gave their legal advice within the parameters of law, as per their own understanding.

25. We have given our anxious consideration to the submissions of both parties and have gone through various documents/circulars brought to our notice. We have also gone through the original records including the selection board proceedings that have been produced before us by the respondents for our perusal only.

26. At the outset, we must say that we are not inclined to agree with the contention of the applicant that factually no punishment of 'reprimand' was awarded to him in the summary trial that was held against him u/s 84 of Army Act on two articles of charge punishable u/s 63 of the said Act. The applicant has stated that as was communicated to him verbally at that time, he was acquitted of both the charges. However, the case of the respondents is that he was found not guilty in respect of first charge while guilty as regards the second charge. As it appears from the copy of the charge sheet at page 51 of the OA that the second charge was to the effect that the applicant while at Madukkarai on 14 June 99 issued a certificate to the proprietor of M/s Tech Solar Appliances, Coimbatore confirming the test result of the Inverter manufactured by the said Coy was found to be satisfactory though he knew that the said statement was incorrect. As stated, the applicant was found guilty of this charge and was awarded the punishment of 'reprimand' in the ibid summary trial held u/s 84 of Army Act.

27. As per applicant's own admission, he filed a writ petition being WP No. 2116 of 2001 before the Hon'ble Madras High Court being aggrieved by his prolonged attachment and delay in finalization of the said proceeding. The said writ petition was dismissed by an order dt. 18.4.2001. It will be useful to reproduce the said order as under:-

> "The petitioner has challenged the proceedings of the 4th respondent in letter no. 110/1/A (MD) dated 14.6.2000 and the charges framed under the tour notes of the GOC in ref. No. 104/05/TNM/GS (SD) dated 11.12.2000 intimated against the petitioner.

2. When this writ petition is taken up for hearing the learned counsel for the respondents submitted that the petitioner has been reprimanded by the court master (sic martial) on 17.4.2001. In view of the above, the learned counsel for the respondents submitted that nothing survives in the writ petition to be decided on merits.

3. Recording the above statement, this writ petition is dismissed giving liberty to the petitioner to challenge, if any, adverse orders are passed in future. No costs. Consequently, WMP No. 2886 and 2887 of 2001 are also dismissed."

28. This order was passed in presence of ld. counsel for both parties on 18.4.01 i.e. on the following day the punishment was awarded on 17.4.01. Therefore, it cannot ordinarily be said that the applicant was not aware of the fact that he was awarded punishment of 'reprimand' in the court martial (loosely used instead of summary trial). The applicant has, however, tried to explain that he was not present at the station and therefore had no knowledge about this order and subsequently on coming to know about the order; he obtained a copy after contacting his counsel.

29. We may now come to the main controversy that in the absence of Part II order, such punishment could not have been recorded in the personal service dossier of the applicant affecting his promotional prospect. At the outset we observe that at the time in 2001 when the applicant was punished and the entry of 'reprimand' was made in his service record, the operative policy in vogue was SAO 4/S/1988 and not AO 22/MP/2002. We have already quoted above, Para 13 of SAO/4/S/1988 which relates to entries in record of service. Now, so far as publication of Part II order is concerned, the guidelines are also given in this SAO from Para 14 onwards. Para 27 of these guidelines relates to 'court martial and summary disposal" which reads as follows:-

"Court martial and Summary Disposal:

27. The following details will be included in part II order:

a) The date, place and type of trial
b) Charge
c) Plea
d) Findings
e) Award
f) Confirmation (where applicable)
g) Date and place of promulgation and by whom promulgated

h) Period of suspension or arrest (close/open), if any.

30. Ld. adv. for the applicant has referred to this Para to contend that even in respect of summary disposal, Part II order is mandatory. Since no Part II order was published, therefore, such punishment could not have been entered into the service record of the applicant, especially when no authority was vested with the DV Directorate of Army HQ at that particular point of time to initiate such recording. Ld. Advocate further contends that the fact that the DV Directorate had no authority would be clear from amendment of this SAO by subsequent AO 22/02/MP (annexure-A13). In Para 15 of this amended policy, the DV directorate was vested with such authority for the first time after delegation of power in 2001 as already stated above. Para 15 is quoted below for ease of understanding:-

"Entries in Record of Service (IAFZ-2041)

15. All entries in IAFZ-2041 are recorded on the authority of Part II orders except the following which are made on the authority of Gazette of India Notifications, Government letters, Course Reports, Medical Board proceedings (AFMSF-15A), **Discipline and Vigilance Directorate letters (disciplinary cases) etc.** as the case may be :-

(a)Commission confirmation;
(b) Substantive promotions
(c) Extension of Service
(d) Service Examinations i.e. Part A, B, C and D
(e) Result of course notified in general course reports by the concerned School of Instruction.
(f) Honours and awards
(g) Medical category
(h) Summary awards under Army Act Sections 83 and 84."

31. It is clear from the above, that authority of DV Directorate has been recognized by the ibid order of 2002 in the matter of entries (disciplinary cases) in record of service which was not there earlier. It is for this reason that ld. adv. for the applicant has contended that the entry that was made earlier on the authority DV Directorate letter dt. 7th June 2001 is required to be quashed in the interest of justice since it has been issued by an authority that was evidently not competent to do so. Moreover, it has adversely affected the applicant's career and promotion.

32. It is also pertinent to note here that in Para 29 of the ibid policy, publication of Part II order has been mandated only in respect of "Court Martial" and not for "Summary Disposal" as was there in the

earlier SAO. Therefore, if the version of the ld. adv. for the applicant is accepted, then in view of this Para, it can also be argued, (in fact it is submitted by the respondents) that in respect of 'summary disposal', publication of Part II order was not necessary.

33. Ld. adv. for the applicant has referred to reg. 584 of Regulations for the Army, Vol. II which provides for publication of Part I and Part II orders. We, however, find from sub-para (c) thereof that Part II orders will be issued on matters affecting a soldier's pay, service and records. Several items have been indicated and one such item is "other punishments affecting pay, rank or seniority". Therefore, Part II order is necessary where punishments affect pay, rank or seniority. In the case of the applicant, however, the punishment of 'reprimand' would not perhaps have any such effect. Therefore, as contended by the respondents, Part II order is not necessary in this case.

34. We also find that Reg. 617 of the said Regulations provides that every case in which an officer has been awarded a summary punishment under Army Act Sections 83 and 84, will be reported to the AG, Army HQ by the commanding officer of the officer concerned through the authorized channels for inclusion in conduct sheet of the officers. We are of the view that by implication, the AG's Branch (DV Directorate), once intimated by the CO, should have abided by the extant rule (SAO 4/S/1988) and sent the details to the MoD for necessary action for publication of gazette notification and instructing for necessary entry in the service records after ascertaining the legality of the trial proceedings. That would have been the actual abidance of the said SAO in letter and spirit.

35. Be that as it may, the respondents have referred to Para 8 of the SAO/4/S/88. This relates to documents which should be kept in service records- IAFZ-2041. It will be relevant to quote this Para:-

> "*Maintenance of Other Documents with Record of Service (IAFZ-2041)*
>
> *8. In addition to the documents mentioned at Para 7 above, the following documents and papers will also be kept with the IAFZ-2041 maintained at Org 9 or MPRS(O), AG's Branch :-*
>
> *(a) Annexure to IAFZ-2041 (Appendix C)*

(b) ***Letters from AG's Branch (Discipline and Vigilance directorate) pertaining to disciplinary or administrative action, if any.***
(c) ***
(d) ***
(e) ***
(f) ***
"

36. It, therefore, appears that even in the SAO/4/88, it is clearly provided that letters from AG's Branch (DV Directorate) pertaining to disciplinary or administrative action, may be included in the service records. That by no means suggests in any way that authority to order recording of such punishments into the officers' dossier has been delegated to the DV Directorate. Admittedly, the action that was taken against the applicant by way of holding summary trial u/s 84 of Army Act was a disciplinary action and, therefore, letters in that connection received by the DV Directorate from the CO of the affected officer should have been honestly forwarded to MoD who were the competent authority to examine all such issues and effect their entry into the officer's dossier/service record through proper authorized documentation. Mr. Goswami, however, submits that there was no infirmity in the action of the respondents. Even if Part II order was not published, the fact of the punishment of 'reprimand' awarded to the applicant does not get obliterated. Otherwise also, even if it is held that such entry could not have been made without Part II order, the error can always be rectified by publishing the Part II order subsequently. Thus, considering the matter from all angles, Mr. Goswami is of the view that the recording of punishment of 'reprimand' in the service dossier of the applicant is not illegal, more so when fact of such punishment cannot be doubted.

37. We observe from the MoD file (48545/Stat/SC/1227/AG/DV-4B) submitted in original before us where the said statutory complaint (OA 34/2013) was analysed, the MoD did discuss the factual aspects and also legality of the summary punishment that resulted in award of 'reprimand' to the applicant on 17 Apr 2001. They have also concluded that the punishment of 'reprimand' was indeed awarded. They have also made two observations while analyzing the trial proceedings; although they do not directly

contribute to the legality or otherwise of the entry made in his dossier/service records, which is the main prayer of the ibid OA /Statutory Complaint. Nevertheless, it may be noted as a background that the MoD did observe that prosecution witnesses were not called in the said summary trial; at least records to the effect that they were called and made deposition were not there. The second observation by the MoD, though inconclusively left out, is on the fact whether the trial was held on a Form 1 or Form 2. As per records in the original case file ibid, it was observed that Form 1, charge sheet, consent certificate and conduct sheet of the applicant were sent to MS-4 vide DV Directorate letter No C/06270/SC/237/AS/DV-2 dated 07 June 2001; whereas what is available in record as seen in the original file is a photo-copy of the Form-2, which has been disputed by the applicant. Both these issues (physical presence of prosecution witnesses during trial and their deposition; and whether Form 2 or Form 1 was used during the recording of trial) were also observed and recorded as grey areas in the JAG review report (HQ 21 Corps letter dated 22120/7/JAG/01 dated 09 May 2001) prepared by the D JAG 21 Corps in whose supervisory jurisdiction (HQ 54 Infantry Division) the said summary trial was held.

38. We are of the view that had the entry of disciplinary award of 'reprimand' been made by the MoD, which was the competent authority in accordance with Para 13 of SAO 4/S/1988, they would have first gone into the legalities of the summary trial and examined all documents before publishing a gazette notification or endorsing the entry of punishment resulting out of such trial into the service record of the officer. The observations that have now come to light regarding non appearance of prosecution witnesses during the trial would need analysis by the competent authority and if they are fully satisfied that the summary trial proceedings were flawless and legal, then only the entry can be reflected in the officer' dossier/ service records by such competent authority as prescribed by rules (SAO 4/S/1988). It is quite evident that the DV Directorate was not competent to order (vide their letter dated 7th June 2001) entry of the said punishment of 'reprimand' into the service record of the applicant. We are thus inclined to quash Army HQ DV directorate letter dated 7th June 2001 on the ground that they

were not competent to issue such an order. Therefore the consequential entries in the service records regarding the said punishment cannot be considered to be valid and hence no effect of the same can be given in the applicant's promotion boards.

39. In view of the discussion made above it is quite conclusive that the entry of 'reprimand' made into the applicant's dossier/service record is not valid since the authorities (AHQ DV Directorate), who initiated it, were not competent to do so. The MoD, while rejecting the said statutory complaint appears to have overlooked this aspect basing such a major departure from rules by relying on the misplaced interpretation of the word '*etc*' in Para 13 of the SAO 4/S/1988. Therefore we are inclined to quash the rejection order of the MoD (impugned order) only to that effect where they have concluded that the aforesaid entry of 'reprimand' was valid.

40. That takes us to the other facet of argument advanced by the ld. adv. for the applicant by referring to Para 4.34 of the application and by drawing our attention to a policy letter dt. 14 Sep 1979 (annexure-17) where it has been mandated that punishment of 'reprimand' or 'severe reprimand' is not a disciplinary award and its ill effect withers away with passage of time. For better understanding, the said policy letter issued by AG's Branch is quoted below:-

"

EFFECT OF PUNISHMENTS ON CAREER/PROMOTIONS; OFFICERS

1. Reference Para 92 of the Minutes of Army Commanders Conference – 19 to 23 Jun 79.

2. The effect of the punishments of 'Reprimand', "Severe Reprimand' in the career and promotion of an officer and the instruction pertaining to review of such punishments are clarified in the succeeding paragraphs.

3. The award of a "Reprimand' or 'Severe Reprimand' does not by itself debar an officer from being considered and approved for his promotion to the next acting/substantive rank. Such punishments are not viewed in isolation but are taken into account along with the officer's overall record of service. It is not the disciplinary award as such but the nature and gravity of offence and the length of service of the officer when the offence was committed which

really matter e.g. offences pertaining to loss of identity cards, drunkenness and moral turpitude are viewed differently even though the punishment awarded may be that of "Reprimand' or 'Severe Reprimand'. All the ill-effect of an award withers away with passage of time and the quality of ACRs earned by the officer. (*emphasis supplied by us*)

4. ** *** *** *** "

41. It is submitted on behalf of the applicant that the impugned punishment entry of 'reprimand' which is in the nature of minor punishment, was awarded to the applicant long back in April 2001 while he was a Major in the Regiment of Artillery. Now that long years have elapsed and in the meantime, he was further promoted as Lt. Colonel. Further, he is no longer in Artillery and has been permanently transferred to JAG Branch in 2008; and his promotion as Colonel is also in that Branch. The duties and responsibilities in JAG branch are completely different having no nexus with those of the Regiment of Artillery. Under such circumstances, by taking into consideration such vintage punishment entry, his future cannot be ruined by denying him his due promotion, especially when his batch mates (1989 batch) have already been promoted as Colonel much earlier and are also now eligible for further promotion as Brigadier. He is, thus, placed in a very awkward and ignominious position as compared to his batch mates for no fault of his own.`

42. The question of effect of adverse entry in the ACR/service records earned in remote past on future promotion as also in the matter of compulsory retirement in civil employment has been considered by the Hon'ble Apex Court in a catena of decisions. Since in the instant case, we are concerned only with recording of punishment entry and its effect on promotion, we will consider only those decisions which are relevant for our purpose.

43. We may straightway come to the two-judge decision of the Hon'ble Apex Court in the case of **Badrinath –vs- Govt. of Tamil Nadu & Ors**, (2000) 8 SCC 395, as relied on by the applicant, because in that judgement past decisions of the Apex Court on the subject were also considered in detail. In that case the Hon'ble Apex Court has formulated in all six questions for consideration in the context of the subject matter of the case. We are, however, concerned with question No. (3), which is as under:-

"(3) Whether very old remarks made before the appellant's earlier promotion to selection grade could be relied upon strongly even though the sting in them had faded? (These matters related to the question of 'fairness' in the matter of consideration of an officer for promotion under Article 16 and as to the manner to which 'adverse remarks' can be taken into consideration). "

In Para 40 of the ibid judgement, it has been observed as under:-

"40. Unless there is a strong case for applying the *Wednesbury* doctrine or there are mala fides, court and Tribunals cannot interfere with assessments made by the Departmental Promotion committees in regard to merit or fitness for promotion. But in rare cases, if the assessment is either proved to be mala fide or is found based on inadmissible or irrelevant or insignificant and trivial material and if an attitude of ignoring or no giving weight to the positive aspects of one's career is strongly displayed, or if the inference drawn are such that no reasonable person can reach such conclusions, or if there is illegality attached to the decision, then he powers of judicial review under Article 226 of the Constitution are not foreclosed. "

44. The Hon. Apex Court considered the earlier decision of that Court in **State of Punjab –v- Dewan Chuni Lal**, (1970) 1SCC 479 where while considering the question whether the adverse remarks prior to the date of crossing efficiency bar could be relied upon, it was inter alia held that "confidential repot earlier than 1944 should not have been considered at all inasmuch as the office was allowed to cross the efficiency bar in that year." Later on a thee-judge Bench of the Hon'ble Supreme Court in the case of **J.D.Srivastava –vs- State of MP**, (1984) 2 SCC 8, considered the same issue. There it was observed that reference on very old adverse remarks relating to the earlier part of an officer's career are "not quite relevant" and that it would be an act bordering on perversity to dig out old files to find out some material to make an order against an officer (vide Para 50 in **Badrinath's** case (supra). The following observations in Para 7 of **JD Srivastava's** case are significant:-

"It is true that in the early part of his career, the entries made do not appear to be quite satisfactory. They are of varied kind. Some are good, some are not good and some are of a mixed kind. But being reports relating to a remote period, they are not quite relevant for the purpose of determining whether he should be retired compulsorily or not in the year 1981, as it would be an act bordering on *perversity to dig out old files* to find out some material to make an order against an officer"

45. The matter was also subsequently considered by the Hon'ble Apex Court thread bare in a three-judge Bench decision in **Baikuntha Nath Das –vs- Chief District Medical Officer**, (1992) 2 SCC 299. In that case apart from considering the effect of un-communicated adverse remarks in promotion, has also considered the question of the relative strength of old remarks and also relevant of remarks made before an earlier promotion. Para 34(iv) where the principles have been enumerated is relevant:-

> "34(iv) The Government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter – of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/character rolls, both favourable and adverse. *If a government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority*."

46. In this context, we may also reproduce here the relevant observation of the Hon'ble Apex as in Para 51 of **Badrinath (**supra) case, as under:-

"…… In that case, the three Judge Bench overruled two earlier judgements of this Court. One of them is **Brij Mohan Singh Chopra –vs- State of Punjab** {(1987) 2 SCC 188}. There were two separate points emanating from the two-judge judgement in **Brij Mohan Singh Chopra** case (supra). They were referred to by the three-judge Bench **Baikuntha Nath Das** (1992) 2 SCC 299 as follows :- (SCC p. 310, para 23)

> "23(1) It would not be reasonable and just to consider adverse entries of remote past and to ignore good entries of recent past. If entries for a period of more than 10 years' past are taken into account it would be an act of digging out past to get some material to make an order against the employee……"

The Hon'ble Supreme Court after considering all relevant decisions on the issue has summarized the principles arrived at in Para 58 of the judgement which are as follows:-

> "58. From the above judgments, the following principles can be summarized:
>
> (1) Under Article 16 of the Constitution, right to be 'considered' for promotion is a fundamental right. It is not the mere 'consideration' for promotion that is important but the consideration must be 'fair' according to established principles governing service jurisprudence.

(2) Courts will not interfere with assessment made by Departmental Promotion Committees unless the aggrieved officer establishes that the non-promotion was bad according to *Wednesbury* Principles or was it mala fides.

(3) Adverse remarks of an officer for the entire period of service can be taken into consideration while promoting an officer or while passing an order of compulsory retirement. But the weight which must be attached to the adverse remarks depends upon certain sound principles of fairness.

(4) If the adverse remarks relate to a distant past and relate to remarks such as his not putting his maximum effort or so on, then those remarks cannot be given weight after a long distance of time, particularly if there are no such remarks during the period before his promotion. This is the position even in cases of compulsory retirement, compulsory retirement.

(5) If the adverse remarks relate to a period prior to an earlier promotion they must be treated as having lost their sting and as weak material, subject however to the rider that if they related to dishonesty or lack of integrity they can be considered to have not lost their strength fully so as to be ignored altogether.

(6) Un-communicated adverse remarks could be relied upon even if no opportunity was given to represent against them before an order of compulsory retirement is passed."

47. The issue has again been considered by the Hon'ble Supreme Court in the case **Pyare Mohan Lal –vs- State of Jharkhand,** (2010) 10 SCC 693 and then in the case of **Rajasthan State Road Transport Corporation –vs- Babu Lal Jangir**, (2013) 10 SCC 551. Although these decisions are in the context of compulsory retirement but they have also dealt with the "*washed off theory*" in respect of past adverse remarks and their effects on promotion as well. It will be relevant the observations of the Hon'ble Apex Court in **Rajasthan SRTC** (supra) which also considered **Pyare Mohan Lal'**s case (supra), **Badrinath** and also **Baikuntha Nath** cases (supra) including all previous cases on the subject:-

"19. If one were to go by the dicta in **Badrinath** Case, obvious conclusion would be that even if there are adverse remarks in the service career of an employee they would lose there effect, when that employee is given promotion to the higher post and would not be taken into account when the case of that employee for compulsory retirement is taken up for consideration, except only those adverse entries in the confidential reports of that employee which touch upon his integrity. Thus, **Badrinath** case interprets principle (iv) in Para 32 of **Baikunth Dass** to mean such adverse

remarks for the period prior to promotion, unless they are related to dishonesty, would be substantially weekend after the promotion.

20. This interpretation given in **Badrinath** case, which was the judgment rendered by two member Bench, has not been accepted by three member bench of this Court, subsequently, in **Pyare Mohan Lal v. State of Jharkhand and Ors**. (2010) 10 SCC 693. After discussing various judgments, including the judgments referred to by us hitherto, the Court clarified and spelled out the circumstances in which the earlier adverse entries/ record would be wiped of and the circumstances in which the said record, even of remote past would not lose its significance. It is lucidly conceptualized under the head "Washed Off Theory" as follows:

> "*WASHED-OFF THEORY"*
>
> "19. **In State of Punjab v. Dewan Chuni Lal** MANU/SC/0497/1970 : AIR 1970 SC 2086, a two-Judge Bench of this Court held that adverse entries regarding the dishonesty and inefficiency of the government employee in his ACRs have to be ignored if, subsequent to recording of the same, he had been allowed to cross the efficiency bar, as it would mean that while permitting him to cross the efficiency bar such entries had been considered and were not found of serious nature for the purpose of crossing the efficiency bar.
>
> 20. Similarly, a two-Judge Bench of this Court in **Baidyanath Mahapatra v. State of Orissa and Anr**. MANU/SC/0051/1989 : AIR 1989 SC 2218, had taken a similar view on the issue observing that adverse entries awarded to the employee in the remote past lost significance in view of the fact that he had subsequently been promoted to the higher post, for the reason that while considering the case for promotion he had been found to possess eligibility and suitability and if such entry did not reflect deficiency in his work and conduct for the purpose of promotion, it would be difficult to comprehend how such an adverse entry could be pressed into service for retiring him compulsorily. When a government servant is promoted to higher post on the basis of merit and selection, adverse entries if any contained in his service record lose their significance and remain on record as part of past history. This view has been adopted by this Court in **Baikuntha Nath Das** (supra).
>
> 21. However, a three-Judge Bench of this Court in **State of Orissa and Ors. v. Ram Chandra Das** MANU/SC/0613/1996 : AIR 1996 SC 2436, had taken a different view as it had been held therein that such entries still remain part of the record for overall consideration to retire a government servant compulsorily. The object always is public interest. Therefore, such entries do not lose significance, even if the employee has subsequently been promoted. The Court held as under:
>
> > "Merely because a promotion has been given even after adverse entries were made, cannot be a ground to note that compulsory retirement of the government servant could not be ordered. The evidence does not become inadmissible or irrelevant as opined by the Tribunal. What would be relevant is whether upon that state of record as a reasonable prudent man would the Government or competent officer reach that decision. We find that selfsame material after promotion may not be taken into consideration only to deny him further promotion, if any. But that material undoubtedly would be available to the Government to consider the overall expediency or necessity to continue the

> government servant in service after he attained the required length of service or qualified period of service for pension. (Emphasis added)"
>
> This judgment has been approved and followed by this Court in **State of Gujarat v. Umedbhai M. Patel** MANU/SC/0140/2001 : AIR 2001 SC 1109, emphasising that the "entire record" of the government servant is to be examined.
>
> 23. In Vijay Kumar Jain (supra), this Court held that the vigour or sting of an entry does not get wiped out, particularly, while considering the case of employee for giving him compulsory retirement, as it requires the examination of the entire service records, including character rolls and confidential reports. `Vigour or sting of an adverse entry is not wiped out' merely it relates to the remote past. There may be a single adverse entry of integrity which may be sufficient to compulsorily retire the government servant."

21. Stating that the judgment of larger Bench would be binding, the washed off theory is summed up by the Court in the following manner (*Pyare Mohan Lal case*- para 24:

> "In view of the above, the law can be summarised to state that in case there is a conflict between two or more judgments of this Court, the judgment of the larger Bench is to be followed. More so, the washed off theory does not have universal application. It may have relevance while considering the case of government servant for further promotion but not in a case where the employee is being assessed by the Reviewing Authority to determine whether he is fit to be retained in service or requires to be given compulsory retirement, as the Committee is to assess his suitability taking into consideration his "entire service record".

22. It clearly follows from the above that the clarification given by two Bench judgment in bis not correct and the observations of this Court in **Gurdas Singh** to the effect that the adverse entries prior to the promotion or crossing of efficiency bar or picking up higher rank are not wiped off and can be taken into account while considering the overall performance of the employee when it comes to the consideration of case of that employee for premature retirement.

23. The principle of law which is clarified and stands crystallized after the judgment in Pyare Mohan Lal v. State of Jharkhand and Ors.; 2010 (10) SCC 693 is that after the promotion of an employee the adverse entries prior thereto would have no relevance and can be treated as wiped off when the case of the government employee is to be considered for further promotion. However, this 'washed off theory' will have no application when case of an employee is being assessed to determine whether he is fit to be retained in service or requires to be given compulsory retirement. The rationale given is that since such an assessment is based on "entire service record", there is no question of not taking into consideration an earlier old adverse entries or record of the old period. We may hasten to add that while such a record can be taken into consideration, at the same time, the service record of the immediate past period will have to be given due credence and weightage. For example, as against some very old adverse entries where the immediate past record shows exemplary performance, ignoring such a record of recent past and acting only on the basis of old adverse entries, to retire a person will be a clear example of arbitrary exercise of power. However, if old record pertains to integrity of a person then that may be sufficient to justify the order of premature retirement of the government servant."

*** *** ***

48. The legal position that emerges in respect adverse remarks recoded in remote past has been very clearly brought about by the Hon'ble Apex court as summarized in Para 23 (quoted above) in **Rajasthan SRTC case** (supra) which may be reiterated once again for ease of understanding as under :

> 'After the promotion of an employee the adverse entry or punishment entry recorded much prior thereto would have no relevance and can be treated as "*wiped off*" or "*washed away*" when the case of the Govt. employee is to be considered for further promotion. However, if such remark touches on honesty, integrity or moral turpitude then of course such adverse entry can be considered when entire record is taken into account as per rules/policy guidelines. However, this principle as has been enumerated by the Hon'ble Apex Court mainly covers civilian employees in Govt. offices. So far as army personnel are concerned, their service conditions are different from civilians, therefore, it is to be considered by the appropriate authorities as to whether similar principles may also be made applicable to army personnel for their promotion without, however, compromising with service discipline and operational requirements or efficiency etc..'

49. In this context, we may also take note of the fact that the service span of army personnel is much less as compared to civilians and therefore, the chance of promotion is also very limited which is still lesser at higher ranks which have pyramidal structure. Therefore, due care and caution is to be taken by the selection boards while considering their case for promotion. This is particularly necessary because the service span of army personnel is not fixed but depends on ranks. In other words, in lower ranks, the service span is less while it is more in higher ranks. Thus, if an individual is promoted to higher rank his retirement age is also increased. Thus by non promotion, the army personnel are made to suffer in two ways –firstly they are not promoted and as such they lose higher pay and perks and consequently pensionary benefits and secondly, their length of service/age of retirement is also curtailed.

50. In that view of the matter, we are of the considered opinion that the respondents 1 and 2 should consider the legal position on "*washed-off-theory*" in respect of past adverse entries, as set out above and take a conscious decision with regard to its applicability in army services as well for equity

and also in the interest of natural justice, keeping in view their own policy decision dt. 14 Sep 1979 (quoted above) enumerating the principle of *withering away* of the remark of 'reprimand' or 'severe reprimand', as the case may be, by passage of time. In the instant case the applicant appears to have been punished for an act prejudicial to good order and military discipline charged under AA Section 63 by a summary trial and not by any court martial. No specific charge of moral turpitude or such serious offence was proved that could have resulted in more severe punishment. The board must consider the effect of passage of time and the applicant's appraisals on record thereafter in JAG Branch. The ratio of the ibid decisions must be considered by those who decide the fate of officers in promotion boards.

51. In order to strengthen our views further with regards to ***withering impact*** of such decade old punishment entries we also rely on the ratio of a recent judgement (unreported) of the PB, AFT, New Delhi dated 13 May 2014 (OA 140/2013) in the case of **Lt Col AK Singh EME vs Union of India and Ors**. It is a similarly placed case, where the applicant Lt Col AK Singh was punished through a summary trial by the GOC 15 Infantry on three charges for omissions under AA Section 63 by award of 'severe reprimand' in 1995. This punishment entry stood on his way when he was considered for promotion to the rank of Col (TS) in 2008 and he was denied such promotion. In Para 8 of the ibid judgement the hon'ble division bench of PB, AFT has clearly brought out that a punishment awarded in 1995 cannot cast a long shadow up to 2008. It will be relevant to quote the following Para 8 of the ibid judgement, since its ratio is squarely applicable in the present case:-

> "8. We have examined the scope of the disciplinary award and its circumstance, and have found that at no stage was there any impediment or restraint on the authority to proceed against the officer related to moral turpitude or gross negligence or any other aspect of commission by the officer, while considering and framing the charges against him. This has been confirmed repeatedly in Court. It is clear that this has not been done. Despite the claims of the respondents, the charge-sheet only records 'omissions' under AA 63. Where disciplinary proceedings have been concluded against the officer (i.e. with the award of Severe Reprimand) and an action has been crystallized, no long shadow can be cast from 1995 to 2008 based on allegations, that find no mention in documents, ***"Quod initio non valet, tractu temporis non valet".*** The consequent performance of the officer as viewed on the MDS, does not in way

substantiate any consequent manifestations of infirmities in the officer. ……..” (Underlining has been done by us for emphasis)

52. So far as the present applicant is concerned, we have already noted that he was awarded the ibid punishment of ‘reprimand’ long back in Apr 2001 in a summary trial while he was in the rank of a Major in the Regiment of Artillery. The charge that was stated to be proved against him is that he had issued a certificate to certain contractor regarding qualify of Inverter supplied by them. The competent authority (GOC 54 Infantry Division) and his CO, it appears, did not consider the charge to be that serious and that is why only the punishment of ‘reprimand’ was awarded. Notwithstanding such adverse entry, he was given promotion as Lt. Colonel on merit while serving in Artillery. Thereafter, he was permanently transferred to JAG Branch. He has been denied promotion to the rank of Colonel at least on three considerations as also on two special review after change of reckonable profile either as per court decision or by getting redress from Central Govt. His batch mates have already been promoted much earlier and are also eligible for next promotion as Brigadier. In such circumstances, by passage of time the relevance of the adverse entry recoded more than a decade back has lost its string and should be deemed to be washed off. In such view of the matter, we are of the considered opinion that his case should be reconsidered by No. 3 SB as special review case on changed profile treating the aforesaid entry as being wiped off.

53. In the result, the application is allowed on contest in part to the extent of following directions:-

1) Army HQ DV Directorate letter No. C/06270/SC/237/AS/DV-2 dated 07 June 2001 directing MP-6 (AG Branch) with copy to MS-4 (MS Branch) to enter the punishment of ‘reprimand’ into the applicant’s dossier is quashed since DV Directorate of AHQ at that point of time was not competent to pass such order. Consequentially the rejection order of the statutory complaint dated 10th Jan 2014 (annexure-A2 to the OA) is quashed only to that extent where the MoD has held the said punishment entry as valid.

2) The respondents are directed to consider the case of the applicant as special review (fresh) case for promotion to the rank of Colonel in the ensuing No. 3 Selection Board, ***de hors*** of any disciplinary implications linked to the '**reprimand'** awarded to him on 17 April 2001 in the rank of a Major and by way of ignoring the punishment entry of 'reprimand', in view of his subsequent promotion to Lt. Col., treating the same as ***wiped off***.

3) Compliance to our ibid directions shall be done at the earliest but not later than 60 days from the date of pronouncement of this order.

4) Respondents 1 and 2 are also directed to consider issuing suitable guidelines as deemed appropriate for the selection boards on this issue in the light of legal position enumerated above. Such guidelines should be applicable to all service personnel-- officers, JCOs and NCOs in the matter of consideration of their promotions.

5) OIC, Legal Cell, HQ, Bengal Area, is directed to forward a copy of this order directly to Respondent No 3 (MS Branch) to ensure no delay in compliance.

6) No costs.

54. The original records be returned to the respondents on proper receipt.

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

(LT. GEN. K.P.D.SAMANTA)
Member (Administrative)

(JUSTICE RAGHUNATH RAY)
Member (Judicial)