

[SEE RULE 102(1)]**ARMED FORCES TRIBUNAL , KOLKATA BENCH****APPLICATION NO : O. A NO. 44 OF 2013****ON THIS 30TH DAY OF JUNE 2015**

CORAM : **HON'BLE JUSTICE DEVI PRASAD SINGH , MEMBER (JUDICIAL)**
HON'BLE LT GEN GAUTAM MOORTHY, MEMBER (ADMINISTRATIVE)

IC-40543P COL P.C. JENA, Son of Shri Sridhar Jena presently posted as Senior Quality Assurance Officer (Armaments), Hastings, Kolkata residing at Flat No.5, 30 Belvedere Road, Alipore, Kolkata – 700 027

.....Applicant

-VS-

1. Union of India service through
The Secretary, Govt of India, M/o Defence,
DHQ, New Delhi-110001
2. The Chief of the Army Staff,
Through Adjutant General,
IHQ of MOD (Army)
DHQ P.O. New Delhi - 110001
3. The Secretary,
Ministry of Defence,
Deptt. of Defence Production,
South Block,
New Delhi – 110 011
4. The Director General Quality Assurance,
Ministry of Defence,
Deptt of Defence Production,
South Block
New Delhi – 110 011
5. Director MS-19
Military Secretary Branch,
IHQ of MOD
South Block,
New Delhi – 110 011

.... Respondents.

For the Applicant : Mr Subhash Chandra Basu, Advocate
Mr. S.K. Choudhury, Advocate

For the respondents : Mr. Sandip Kumar Bhattacharyya, Advocate

ORDER**PER Justice Devi Prasad Singh, MEMBER (Judicial)**

1. The instant application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 (in short, 'Act') for setting aside the order dated 21st January, 2013 passed by Military Secretary's Branch of Army HQ, New Delhi and the Figurative Assessment of '7' in 'Integrity' in ACR of 1996-97 with consequential benefit for restoration of seniority followed by constitution of Selection Board to promote him further at higher post retrospectively as per his turn and in order of seniority.
2. Against the entry in the ACR from June 1996 to May 1998 the applicant has submitted non-statutory complaint on 31st July 1997 with the allegation that the entire assessment of the I.O. was harsh and subjective. Partial relief was granted by the GOC-in-C and figurative Assessment of IO was expunged. The applicant submitted statutory complaint to Government of India on 2nd June 1998 stating that the entire assessment done by Brig A.K. Pandey, R.O. be considered as the Assessment of I.O. The Statutory Complaint was rejected by Government of India dated 16-7-1999 with the finding that the relief granted in pursuance of non statutory complaint was well considered, hence reiterated.
3. On 2-9-2002 the applicant was permanently seconded to DGQA and thereafter was promoted to the rank of Lt Col on 3rd September 2002. On 22nd October 2004 again the applicant submitted a statutory complaint against CRs from June 1993 to May 1994 and from June 1996 to May 1997 with certain new facts (Annexure A9). The application was rejected by the Government of India. Hence the applicant submitted 3rd statutory complaint on 23rd October, 2010 with the prayer that figurative assessment of '7' in integrity be expunged (Annexure A10). The third statutory complaint was held to be non-tenable. In the meantime, the applicant was promoted to the rank of Col from April 2012.

4. Thereafter, the applicant submitted the 4th statutory complaint against the CR from June 1996 to May 1997 against the alleged figurative assessment of '7' for 'Integrity' as contained in paragraph 11(h) as given by the IO be expunged being subjective and due to lack of inter-consistency and after expunction the seniority of the Applicant be restored to his original date of seniority of 12th June 1982. By the impugned order dated 21-1-2013, the 4th statutory complaint of the applicant has been held to be untenable under RA Para 364(b) MS Branch.

5. Being aggrieved the present application under the Act has been moved to set aside the order dated 21st January 2013.

6. The learned counsel for the applicant while assailing the impugned order submits that the IO has acted in a very arbitrary and with high handedness manner while granting figurative assessment of '7' in the CR for the period of 6/96 to 5/97. The submissions of the applicant's counsel is that the figurative assessment was given by the IO without any verbal or written counseling and the rejection of the statutory complaint dated 12th September, 2012 is in contravention to Regulations for the Army (RA) para 364 (b) and violative of RA para 364(j) is not sustainable. It is a clear case of non application of mind with intention to ruin the applicant's service career, which is malicious, unjust and illegal. The learned counsel for the applicant further submitted that the statutory complaint dated 12th September, 2012 was submitted by the applicant after detection of fresh facts and hence permissible in terms of RA Para 364(b). While pressing for the relief, the submissions of the of the learned counsel for the applicant is that the applicant's service career has been unblemished and that is why he has been promoted from time to time and grant of figurative assessment '7' is based on unfounded facts. His further submissions is that in spite of rejection of applicant's statutory application vide order dated 16-7-1999 followed by order dated 2002, the subsequent statutory complaint (supra) do not suffer from any impropriety or illegality. His further submission is that the integrity should be '9' or '0' and may not be regarded as '7'.

7. On the other hand, the learned counsel for the Union of India submitted that time and again the Selection Board has considered the applicant's case and found him not fit, hence denied the promotion. The further submission of the learned counsel for the respondents is that entry with regard to integrity is based on overall profile of the applicant and the figurative grading was average assessment and cannot be presumed to be subjective and inconsistent, which should not go through the process of judicial review. The assessment of a person is done keeping in view the overall conducts, performance, honesty, fairness etc. and on the basis of which figurative assessment is given. It is not correct to say that integrity may be granted '0' or '9'. Since the performance of a person depends upon various facts and evaluation of service career done by the superior officers and it may be accorded to the extent of appreciation of conduct and performance.

8. However, preliminary objection is raised by respondent's counsel that the applicant filed WP 153 of 2006 in Delhi High Court, which was transferred to Principal Bench Registry as TA No.354 of 2009. The TA No.354 of 2009 has been dismissed by the Principal Bench by an order dated 11-1-2010. The judgement has been placed on record by an affidavit dated 23-6-2014 by the applicant himself to defend his action. On 23-6-2014 when the issue was raised by the respondents, it is submitted by the respondents that while filing the OA, it was incumbent on the part of the applicant to declare with regard to the previous litigation and particulars of the same, i.e. the date of decision of the TA by the Principal Bench but it has been brought on record almost after a lapse of a year. Since objection is raised by the respondents counsel, it shall be appropriate to consider the maintainability aspect of the OA as argued by respondents counsel and defended by the learned counsel for the applicant.

9. The applicant while preferring the OA has claimed the following reliefs :

“ (a) An order quashing and/or setting aside the MS-19, MS Branch, Army HQ, New Delhi Order vide their letter No.36501/3838/Arty/98/MS-19 dated 21 Jan 2013.

(b) An order directing the Respondents to expunge the Figurative Assessment of '7' in Integrity by the IO in CR 1996-97.

(c) An order directing the Respondents to grant the restoration of seniority lost due to the No 4 Promotion Board held in Army.

(d) An order directing the Respondents to hold all promotion Boards for the Petitioner back dated as it should have been in DGQA, as per his turn that was with the Officers of the Seniority of 12 Jun 1982.

(e) An order directing the Respondents to grant all consequential benefits to the Applicant in terms of prayer of 8(a) to 8 (d) made herein above.

(f) An order directing the Respondents to produce/cause production of all relevant records.

(g) Any other order or further order/orders as to this Hon'ble Tribunal may deem fit and proper.”

10. From the relief relates to quashing/setting aside of impugned order dated 21-1-2013 by which statutory complaint has been held to be not maintainable under Para 364(b) of the Defence Service Regulations. It shall be appropriate to reproduce the contents of the impugned order :

"36501/3838/Arty/98/NS-19

21 Jan 2013

MILITARY SECRETARY'S BRANCH
MS-19
STATUTORY COMPLAINT : IC-40543P
COL P.C. JENA, ARTY

1. Refer your note No.A/94829/TO/DGQA/Adm-4 dated 05 Oct 2012
2. IC-40543P Col PC Jena, Arty has submitted a statutory complaint dated 12 Sep 2012 against CR for the period 1996-97.
3. The Competent Authority in the Ministry of Defence has declared the statutory complaint of the officer untenable under DSR Para 364(b).
4. The officer may please be informed accordingly.

Sd/- RK Sabrawal
 Dy Dir
 DAMS-19"

11. Para 364(b) of the Defence Service Regulations are reproduced as under :

"Statutory Complaints – (b) Number and Extent – An officer has the right to complain to the Central Government JCOs and OR can complain to the COAS in the first instance. In case they are not satisfied with the decision of COAS, they may complain to the Central Government whose decision shall be final. The right can be exercised only once. A second complaint to these authorities will be allowed only if fresh facts and circumstances have come to light necessitating reconsideration of the case."

12. From the factual matrix of record it appears that the applicant's first statutory complaint was decided vide order dated 2-6-98, a copy of which has been filed as Annexure A-8 to the OA. Annexure A-8 while dealing with the applicant's statutory complaint dated 2-6-98 held that the prayer of the applicant to set aside the entire assessment of the IO has been looked into on the basis of relevant records, the relief granted in response to non-statutory complaint dated 31-7-97 is reiterated , the rest of the CR meshes well with overall profile of the applicant. Hence, the CR does not call for any interference. Accordingly, it was rejected.

13. The learned counsel for the applicant has relied upon the cases reported in **1970 AIR 2086 (State of Punjab vs Dewan Chuni Lal), Writ Petition (Civil) No.419 of 2000 (Biswanath Prasad Singh vs State of Bihar and Ors), Appeal (Civil) 868 of 2007 (S.T. Ramesh vs State of Karnataka & Another)**. We have considered the arguments advanced by the learned counsel for the applicant and perused the records. From the perusal of the records it is seen that the applicant had been an upright officer and fought for the country and retaliated the terrorists at Pakistan Border. He was involved in firing of the Launcher personally and effectively and got the positive result. The service career of the applicant seems to be bright.

14. While submitting the first statutory complaint, the applicant had compared the impugned CR with previous years CRs. He possesses bright service record with an entry of 9 points and also pointed out that there is dissimilarity and mismatch between Box Grading and Pen Picture. He also referred about the annoyance of the CO on seeking Cdr's interview on Refusal of leave. He also submits that the Character Roll entry is suffering not only from arbitrariness, but also suffers from malice of law. We quote here the relevant portion of the statutory complaint :

“(b) Likely Reasons for Low Gradings

(i) Annoyance of the CO on Seeking Cdr's Interview on Refusal of Leave

(aa) My annual leave was planned in August-September 96, after the completion of permanent move of the unit scheduled in July 96. Due to unavoidable reason, the unit could not move till end September 96. In between my father suffered a paralytic attack in August 96, for which I requested for Annual Leave verbally as well as in writing in the Officers Leave Request Register, which was refused. I accepted this refusal as a disciplined person, though my father was in bad shape and no one was to look after him since no brothers are young and studying.

(ab) On 25 September, 96, during a routine check it was discovered that my son had gone blind in one eye and had a deteriorating effect on the eye sight in the other. At that time my wife was staying with my son away from me. I again requested for my annual Leave to get treatment for my son and also to look after my father. I was refused again for which I had sought interview with CO (IO) vide my personal application letter No.40453/Pers/A dated 26 September 96 and apprised him of the mental trauma that I was undergoing due to son's blindness and father's illness. I requested the CO to grant me leave so that I could look after my sick father and son. On his refusal again, I requested him to grant me

Cdr's interview. On hearing this request, he got annoyed and threatened me to ruin my career or words to that effect. However, he sanctioned my part of annual leave without granting Cdr's interview.

- (ii) Misunderstanding in Exchange of Married Accommodation Mutually. On move of unit to Gwalior from J&K CO, Col. A. Bhatnagar (IO) wanted a particular accommodation to be allotted to him, but was not allotted the same in his turn. As my wife is working and was posted at 4 Air Force Hospital Kalaikonda and my posting was due, I never wanted a married accommodation at Gwalior. This fact was well known to the CO. However, my name was forwarded to Station Headquarters during my Annual Leave without my knowledge for the married accommodation, alongwith my field seniority certificate. I was surprised when this married accommodation was allotted to me. The CO then asked me to exchange the married accommodation mutually by applying to Station Headquarter. I had to disagree to the proposal as I would have lost my field seniority in next station on my posting if I had taken over the married accommodation and exchanged the same later with CO (IO)".

15. For convenience, the order dated 16-7-1999 passed by the Ministry of Defence, Government of India on the statutory complaint is reproduced as under :

"No.PC-36501/3838/Acty....MS/Compls/467/SC/D(MS)

Government of India
Ministry of Defence

New Delhi, dated 16th July 1999

ORDER

Maj P.C. Jena (IC-40543P), Arty had submitted a statutory complaint dated 2nd June 1998 to the Central Government against CR 6/96-5/97. The officer has inter alia, brought out in his complaint that assessment in CR 6/96 – 5/97 has been made by the IO on grounds of bias and subjectivity due to personal difference with the IO. He has, therefore, requested that the entire assessment of the IO be set aside.

The complaint of Maj P.C. Jena has been examined in the light of the record profile, relevant records and analysis/recommendations of AHQ. It is observed that after redress which has already been granted to him on his Non-Statutory Complaint dated 31st July, 1997, the rest of the CR meshes well with overall profile of the officer. The impugned CR, therefore, does not merit any further interference.

The Central Government, therefore, rejects the Statutory Complaint dated 2nd June, 1998 submitted by Maj P C Jena, (IC-40543P), Arty, against CR 6/96 – 5/97".

16. A perusal of the order passed in response to the statutory complaint dated 16-7-99 seems to be cryptic and the order was issued without application of mind. Prima facie it does not seem to be lawful and justified. While deciding the first statutory complaint, the competent authority should have applied their mind to the allegation with regard to the facts and circumstances of the applicant's contention instead of reiterating the findings recorded by the appropriate authority while deciding the statutory complaint.

17. Now it is well settled proposition of law that while deciding an issue whether administrative or quasi judicial, the authority while adjudicating the dispute or passing an order should pass a speaking and reasoned order vide **AIR 1991 SC 537 (Kumari Srilekha Vidyarthi vs State of U.P), 1995 (2) SCC 480 Life Insurance of India vs Consumer Education Research Centre, 1991 (Supple) 1 SCC 414 State of West Bengal Vs Atul Krishna Shaw , AIR (1993) SC 1407 Krishnaswamy vs. Union of India, 2003 (5) SCC 437 Secretary, Ministry of Chemicals and Fertilizers vs Union of India.** While explaining the reason in Krishnaswami case the Hon'ble Supreme Court has observed that the rule of law requires that any action or decision of a statutory or public authority must be founded on the reason stated in the order or borne-out from the record. The Court further observed that "reasons are the links between the material, the foundation for these erection and the actual conclusions. They would also administer how the mind of the maker was activated and actuated and there rational nexus and syntheses with the facts considered and the conclusion reached. Lest it may not be arbitrary, unfair and unjust, violate Article 14 or unfair procedure offending Article 21." It means that it shall be obligatory when considering any appeal of a subordinate authority to decide an issue in keeping the pleading and grounds raised on record, and in case not agreed, it shall express its own opinion along with the reason. Apart from passing the reasoned and speaking order, the authority has been conferred with the power to decide the statutory complaint and pleadings contained therein as he was possessing the status of Appellate Authority, and has the right to review. Accordingly, it was the duty of the statutory authority to record its own

finding on the basis of statutory complaint as submitted by the applicant. Further, it was incumbent on the part of the statutory authority concerned to scrutinize the original order about the entries made in the CR dossier and thereafter should have passed a speaking and reasoned order.

18. However, there appears to be legal hurdle with regard to the decision on merit. An objection has been raised by Mr. S.K. Bhattacharyya, the learned counsel for the respondents during the course of hearing on 3rd April, 2014 that the issue in question has already been decided in TA 354/2009, which has not been brought on record. Thereafter, the applicant on 23-6-2014 has brought the final order of the Tribunal on record. A perusal of the order shows that in earlier Writ Petition, which later on was transferred to the Armed Forces Tribunal in which the applicant had made prayer for setting aside the entries made in the ACR of the year 1993-94 and 1996-97. The relevant portion of the order of the Tribunal in the aforesaid T.A No. 354 of 2009 is reproduced as under :

“6. The applicant contends that since partial redress had been given to him in the ACR for 1996-97 vide letter dated 24.1.1998 (Annexure P-4) the whole ACR should be set aside as the whole assessment is interlinked to the pen picture and low box grading. He had cited the Hon'ble Supreme Court Judgment in the case of Maj AK Sinha vs UOI (Civil Appeal No.4603 of 2001). During course of the arguments the respondent has filed a number of judgments on record to support his contention of which are **Maj Aroon Kumar Sinha vs. UOI & Ors (2001) 6 SCC 235, Col Narender Singh vs UOI & Ors W.P.(C) No.7196 of 2005, UOI & Ors Vs M. Bahadur Singh, Civil Appeal No.4482 of 2003** delivered on **22-11-2005, Maj Satya Prakash Bharadwaj vs UOI & Anr WP (C) No.3025 of 1994** delivered on **20-4-2007** and **Lt Col. T.S. Tomar vs UOI & Ors W.P. (C) 18971 of 2006** delivered on **3-11-2008**. The relief sought is not admissible. Petition is suffering with long delay and latches. He also contended that promotion to a selection rank it is not only on ACRs alone but also a number of other facts such as war/operational reports, course reports, ACR performance in command and staff appointments, honors and awards, disciplinary background. Selection/rejection is based on comparative merit within the batch as evaluated by Selection Board. It was also contended that some allegations has been made against the reporting officer but they have not been made parties to the application. The contents of the 1993-94 ACR was well within the knowledge of the applicant. On the basis of the aforesaid submission a prayer was made to dismiss the petition.

7. On the basis of aforesaid submissions a prayer was made to quash the order dated 18-5-2006 rejecting his statutory complaint and to set aside the ACRs for the year 1993-94 and 1996-97 with all consequential benefits including direction for notional consideration for the rank of Lt Col with his batch mates as he had already been promoted to Lt Col on 22-12-2003.

8. The respondents in their counter affidavit have stated that the petitioner was considered thrice by the different promotion boards in August 1999, February 2001 and September 2002 but was not empanelled on the basis of his overall profile. It was also stated that all statutory complaints filed by the applicant against the ACRs and supersession have been rejected after due consideration by the Government of India. The present application is suffering from long delay and laches and is liable to be dismissed on these grounds alone. It was also submitted that selection/rejection by a promotion board is based on the overall profile of an officer and comparative merit within his batch but thrice the officer was not empanelled for promotion based on his overall profile. A submission was made to dismiss the application.

10. We have heard the arguments at length and we had gone through the citations submitted by the respondents and perusal of the records and perused the confidential report dossiers of the officer and found that his ACRs for the year 1993-94 and 1996-97 match his previous and subsequent profiles. The applicant has represented against 1993-94 ACR in the year 2005 after a very long period of 12 years. Considering submission placed in this respect we are not convinced by the applicant. His plea does not warrant any interference in the impugned order. The case is dismissed. No orders as to costs”.

19. From the aforesaid final order of the Tribunal, there appears to be no room of doubt that the applicant had impugned the ACR entries, which were earlier the subject matter of dispute before the Tribunal in the aforesaid T.A. for the same cause of action. It is well settled proposition of law that where a matter is decided on merit by passing a speaking and reasoned order by a competent court, no second application/petition may be entertained on the same cause of action as it shall be barred by constructive res judicata.

20. The Tribunal has been conferred with some power to decide the matter which the High Court have been exercising under Art.226 of the Constitution. All cases relating to Armed Forces Tribunal have been transferred to Tribunal under the Act. Since the applicant has raised the issue before the Delhi High Court and it was later on transferred to the Principal Bench of the Tribunal, which was registered as T.A. and since the controversy has been decided by passing a final order on 11-1-2010 by the Principal Bench of the Tribunal, the present O.A. seems to be not maintainable. Section 11 of Code of Civil Procedure provides that where any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit shall be barred by the principles of res judicata.

21. The Hon'ble Supreme Court in **AIR 2005 SC 626 (Bhanu Kumar Jain vs Archana Kumar)** held that the doctrine of res judicata debars a court from exercising its jurisdiction to determine the lis if it has attained finality whereas the doctrine of issue estoppels is invoked against the party. If such issue is decided against him , he would be stopped from raising the same in the latter proceedings. In a case reported in **JT 1996 (3) SC 64 (Singhai Lal Chand Jain v. Rashtriya Swayam Sevak Sangh, Panna)** the Hon'ble Supreme Court has held that where the Sangh has been duly represented in the previous court proceedings and were litigating bona fidely which resulted in failure cannot be allowed to lay any objection in execution or to plead guilty of decree hence doctrine of res judicata applies

22. In view of above, the present OA for the same cause of action (supra) seems to be not maintainable. Accordingly, it is not necessary to enter into the merit of controversy. The case law cited by the applicant's counsel, which deals with the merit of the controversy with regard to entry in the ACR are not required to be elaborately discussed.

230. Accordingly, the OA is dismissed with no order as to costs.

(LT GEN GAUTAM MOORTHY)
MEMBER (ADMINISTRATIVE)

(JUSTICE DEVI PRASAD SINGH)
MEMBER (JUDICIAL)

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