

CASE NO.:
Appeal (civil) 1207 of 2003

PETITIONER:
AVM M.S. Brar, AVSM, VM

RESPONDENT:
Union of India & Ors.

DATE OF JUDGMENT: 03/09/2004

BENCH:
K.G. Balakrishnan & B.N. Srikrishna

JUDGMENT:
J U D G M E N T
WITH

CIVIL APPEAL NO. 1208 OF 2003

Union of India & Anr.

.. Appellants

Vs.

AVM M.S. Brar, AVSM, VM

.. Respondent

K.G. BALAKRISHNAN, J.

Both these appeals arise out of a common judgment passed on 11.7.2002 by the Delhi High Court in C.W.P. No. 2600 of 2002. Stated in brief, the facts of the case are thus.

The appellant in Civil Appeal No. 1207 of 2003 was commissioned in the Indian Air Force in 1964 and he was promoted to the rank of Air Vice Marshal in 1997. The retiring age of the officers of the rank of Air Vice Marshal was 56 years extendable upto 57 years. Later, it was raised to 57 years and 58 years respectively. According to the appellant, he had outstanding flying performance and was awarded Vayu Sewa Medal in 1986 and later the Ati Vishisht Sewa Medal in 1992. He was posted as Air Officer Commanding 2 Air Deference Control Centre at Jodhpur in 1997 and continued to hold this post till February 1999. He contended that he performed the task of shifting the Headquarters of SWAC from Jodhpur to Ahmedabad, for which he had worked day and night and gave a dedicated service. He also contended that during that time, the third respondent in Civil Appeal No. 1207, namely, the AOC-in-Chief, had some difference of opinion with the appellant. In February 2001, the appellant was considered along with six other officers for extension of service upto the age of 58 years and that except the appellant, all other officers considered along with him were granted extension of service upto the age of 58 years. Thereupon the appellant submitted a statutory petition under Section 27 of the Air Force Act against the denial of extension of service upto the age of 58 years. The appellant suspected that there must have been some adverse entries in his Confidential Register and he prayed for expunging those remarks. The appellant also suspected that the said third respondent must have been instrumental in making such adverse entries. The appellant submitted a representation to the Chief of Air Staff complaining of the denial of extension of service upto the age of 58 years. The appellant further suspected that he might have been denied consideration for promotion to the rank of Air Marshal due to the denial of service upto the age of 58 years. The appellant was informed by the Chief of Air Staff by letter dated 14.5.2001 that he had not been cleared for

promotion to the rank of Air Marshal. Against this denial the appellant submitted a statutory application under Section 27 of the Air Force Act, 1950. The appellant also filed Civil Writ Petition No. 3242 of 2001 against the denial of extension of service upto the age of 58 years. The appellant sought for quashing of the order dated 2.3.2001 denying grant of extension of service to the appellant. In June, 2001, the appellant filed another writ petition [No. 3807 of 2001] against the denial of promotion to the rank of Air Marshal. Though this writ petition was tagged with Civil Writ Petition No. 3242 of 2001, the earlier writ petition alone came up for hearing and by judgment dated 7.1.2002 Civil Writ Petition No. 3242 of 2001 was allowed and the learned Single Judge set aside the communication dated 2.3.2001 by which the appellant was denied extension of service upto the age of 58 years and also directed for reconsideration of the appellant's application for extension of service. In the writ petition, the respondent Union of India authorities contended that the appellant was considered for extension of service in accordance with the guidelines, but the extension was not approved by the authorities because of the remarks in his Annual Report for the period from 1.12.1997 to 30.9.1998 and also on the basis of the Appraisal Reports for the preceding five years. The respondent in the writ petition also contended that the remarks were negative and not adverse and, therefore, these were not communicated to the appellant. These pleas were not accepted by the learned Single Judge and ultimately the Writ Petition No. 3242 of 2001 was allowed with the following direction :

"For the foregoing reasons, the writ petition is allowed; the impugned communication is set aside and the rule is made absolute. The respondents are directed to communicate the remarks in question to the petitioner in terms of paragraph 33 of the AFO-50 and take a fresh decision on the question of grant of extension in the age of the petitioner. The said exercise shall be completed as expeditiously as practicable but not later than eight weeks from the date of this order. There will, however, be no order as to costs."

As the order denying extension of service to the appellant was set aside, the appellant made a request to permit him to join duty, but the respondent authorities did not permit him to attend the duty. The appellant moved a civil contempt petition praying for contempt action against the respondent authorities for disobeying the order of the court. The respondent authorities later filed a Letters Patent Appeal [No. 95 of 2002] against the order and judgment dated 7.1.2002 passed by the Single Judge. According to the appellant the respondent authorities deliberately got adjournments in L.P.A. and the request of the appellant to rejoin duty was rejected. The Division Bench was informed that the respondent authorities had already communicated the adverse remarks to the appellant as directed by the learned Single Judge. The appellant then filed a fresh writ petition [No. 2600 of 2002] challenging the order dated 1.3.2002 wherein he prayed for a writ of mandamus to quash the communication dated 1.3.2002 and also prayed for directions to the respondent authorities that the remarks of I.O. for the period 1.12.1997 to 30.9.1998 (ACR) should be communicated to him to provide him an opportunity of representation after complying with the order and judgment dated 7.1.2002 passed by the learned Single Judge. By the impugned judgment, the Division Bench held that the appellant had been deprived of his valuable rights and he had not been given a reasonable opportunity of hearing. However, the Division Bench observed that at this stage there could not be any direction to extend the service of the appellant and in the interests of justice the Division Bench imposed heavy cost on the respondent authorities which was quantified at Rs.50,000/-. This judgment of the Division Bench, insofar as the costs are concerned is challenged by the appellant-Union of India in Civil Appeal No. 1208 of 2003.

We heard Shri K.S. Bhati, learned counsel for the appellant and also the Addl. Solicitor General, Shri Raju Ramachandran. On behalf of the Union of India, it was urged that the appellant did not have the requisite grading. As per the guidelines, during the last preceding five years, not only the appellant should

have secured at least 3 gradings of 7, but also no grading below 6. The appellant's gradings from 1983 to 1988 are as follows :

- 1983	.. 7
- 1984	.. 7.4
- 1985	.. 7.5
- 1986	.. 7
- 1987	.. 5.3
- 1988	.. 7

It is pointed out that the appellant had been awarded below 6 grading for the year 1987 and therefore there could not have been any extension of service in his case. However, the appellant contended that the grading for the year 1987 is 5.3 in view of the adverse remarks for the year 1986 which were subsequently expunged by the High Court.

The appellant seriously contended that the remarks made against him were not communicated to him and as they were not communicated the authorities should not have acted upon the basis of those adverse remarks. The learned Single Judge in his judgment dated 7.1.2002 held that the remarks were adverse in nature and were required to be communicated to the appellant and by that judgment, the respondent authorities were directed to communicate the remarks in question and to take a fresh decision on that question after affording the appellant a reasonable opportunity of being heard. Ultimately, the Appraisal Report dated 21.2.2002 was communicated to the appellant. The Appraisal Report is as follows :

"\005 However, his professional knowledge and application are not commensurate with his seniority and appointment. He depends on his subordinates to the efficiency and effectiveness of his department. His conceptual ability and analytical skills are below the expectations to make any contribution. He could at best take up moderate workload of routine nature\005 but has limitations in being able to motivate his subordinates to any high degree. Lacking sufficient depth and confidence, he hesitates at times in directing briefings or chairing discussions\005 He is overweight and paunchy. This personality in 'senior' air rank would not be inspiring. His potential to head a senior management post is extremely limited."

This was communicated to the appellant and he received it on 21.2.2002. He was asked to submit his representation by 25.2.2002.

The Addl. Solicitor General appearing on behalf of the Union of India contended that the appellant did not seek any further time to submit his representation. The Division Bench was of the view that the appellant was not given sufficient opportunity of hearing and the conduct of the Union of India authorities was not appreciable. Nevertheless, the Division Bench ultimately held that by the decision in C.W.P. 3242/99, the question of extension of service to the appellant upto the age of 58 years has attained finality. However, the High Court directed payment of costs of Rs.50,000/- to be paid by the Union of India authorities as the appellant had not been given reasonable opportunity of hearing.

We are of the view that it was not justified in the circumstances of the case to order payment of costs. The appellant could not establish that there was any mala fides on the part of the Union of India authorities. Therefore, the direction to pay costs was not warranted. In the circumstances of the case, we set aside the direction to pay Rs.50,000/- as costs. As the other writ petition filed by the appellant seeking promotion to the post of Air Marshal is pending consideration by the High Court, we direct that the same may be considered and disposed of expeditiously.

Both the appeals shall stand disposed of accordingly. There will be no

order as to costs.

JUDIS