

(2011) 05 DEL CK 0212

In the Delhi High Court

Case No : Writ Petition (C) 13443 of 2006

B.L. Sharma

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 11-05-2011

Acts Referred:

Citation : (2011) 05 DEL CK 0212

Hon'ble Judges : M.L. Mehta, J;A.K. Sikri, J

Bench : Division Bench

Advocate : Avni Singh and Raunak Jain, for the Appellant; Jyoti Singh Dinesh Yadav and Satya Saharawat for UOI, for the Respondent

Final Decision : Allowed

Judgement

A.K. Sikri, J.—Though the issue involved in this writ petition is a minor one which pertains to the adverse Annual Confidential Report recorded in the case of the Petitioner for the year 1996-97, the circumstances under which it arises has a long track record. Thus, to appreciate the controversy, it would be necessary to take note of all those relevant facts.

The facts unfolded in the writ petition are that the Petitioner herein was assigned the duties of Officer Commanding, E-Company, 5th Bn., CRPF and Sector Commander of "B" Sector, Rangampani in the Disputed Border Area of Assam & Nagaland. It was also one of the duties of the Petitioner to ensure preservation and protection of natural resources and national property including forest wealth/wood in his area of responsibility. It may not be out of place to mention here that illegal trade of timber was a prevalent business in the aforesaid area in which even Government servants were participating for their own vested interest. At times Petitioner herein was hinted by Mr. D.N. Chaudhary, the then Deputy Commandant Operations (retired as Second-in-Command) and Shri P.K. Biswas, the then Officiating Commandant (Presently working as Commandant, CRPF) that he should do something for himself and should also look after his seniors. However, the Petitioner ignored all these things thinking that the same has been

said in a lighter vein and has no real meaning. The Petitioner seized two truckloads of timber logs, which were coming from Wokha District of Nagaland. The Petitioner immediately informed the fact of seizing timber logs to Shri J. Rehman, Forester-1, Nowgaon Forest Range, Golaghat Forest Division. It is brought to the notice of this Court that Shri J. Rehman in his capacity of Forester-1 was in charge of entire forest property falling within jurisdiction of his Sector AB of Disputed Border Area of Assam & Nagaland including Rangamapani Sector. Shri J. Rehman reached at the CRPF location and personally verified the documents and papers of the trucks carrying timber. After being satisfied with the documents and papers produced, he directed the Petitioner to allow the aforesaid trucks to leave for their destination, and on his directions Petitioner allowed the trucks to leave from the CRPF Camp. During the entire episode of releasing the trucks carrying the timber Mr. D.N. Chaudhary, the then Deputy Commandant, Operations who was the superior officer of the Petitioner herein and who had come from Unit HQ was physically present at the Petitioner's CRPF location. It may not be out of place to mention here that Mr. Chaudhary, the then Deputy Commandant Operations was indeed happy with the lawful approach of the Petitioner herein and accordingly impliedly allowed the above mentioned proceedings to go on.

2. After about two months i.e. on 11th April, 1996 Mr. D.N. Chaudhary and Mr. R.K. Baswas, superior officers of the Petitioner came to the Petitioner's CRPF location and conducted search of his premises. A sum of Rs. 20,000/- (rupees twenty thousand only) in cash was recovered. The Petitioner explained that he had withdrawn this amount from his Saving Bank Account No. 9921 maintained with State Bank of India, Mehrauli on 21.11.1995, while he was coming back after spending his leave with his family at New Delhi. He also clarified that this money was withdrawn for purchase of a revolver and showed them the license which was granted by the Government for the purchase of revolver. His explanation, however, was not accepted. The Petitioner was placed under suspension. He was chargesheeted and departmental enquiry was conducted. The Enquiry Officer submitted his final report on 4.9.1999 exonerating the Petitioner in respect of one charge but found him partially guilty in respect of second charge only to the extent of "using a single vehicle in risky area in contravention of Commanders orders". On other counts he was exonerated. The Enquiry Report was accepted by the competent authority and on the part charge proved against the Petitioner withholding of increment for a period of two years without consultative effect was imposed upon him vide orders dated 25.5.2009. After exhausting the departmental remedies, the Petitioner filed writ petition 4407/2002 in this Court. This writ petition was allowed and the punishment imposed upon the Petitioner was quashed by this Court vide orders dated 11.11.2004. The Court directed the Respondent to take all consequential actions pursuant to the said order.

3. With this backdrop, we come to the issue of adverse confidential report. During the period when the Petitioner was in suspension and was facing

departmental enquiry, the ACR of the Petitioner was recorded for the period 1.4.1996 to 31.3.1997 and he was communicated the following adverse grading for this period:

You are an average officer, who needs constant guidance and watch over your work and keep your own comforts much above duties. Your integrity also has not been certified as you are placed under suspension and facing an enquiry for indulging in illegal gratification.

4. The Petitioner had made representation against the aforesaid ACR. This representation was decided by the Director General, CRPF on 22.11.1993 in the following manner:

in view of above, I have come to the conclusion that the integrity of the officer is -eligible- in accordance with para a (iv) of GOI, MHA O.M. No. 51/4/64-Ests (A) dated 21st June, 1965. Since the officer has also been exonerated from the charge of illegal gratification as stated above, the second part of the adverse remarks viz. your integrity also has not been certified as you are placed under suspension and facing an enquiry for indulging in illegal gratification" also needs to be expunged. Accordingly, I order for expunction of said remarks only from his ACR of 1996-97. Since the said adverse remarks has been expunged, I order that the integrity of the officer for the year 1996-97 may be certified. However, the remaining part of adverse remarks will remain unchanged.

5. Thus, the last component of the ACR was expunged and other adverse remarks were retained on the record.

6. After the writ petition filed by the Petitioner was allowed by this Court and the punishment imposed upon him was set aside, the Petitioner made another representation for expunging of the remaining adverse remarks. This was, however, rejected by the Director General, CRPF vide orders dated 10.1.2006. At this juncture present writ petition was filed seeking expunction of the remaining adverse remarks also.

7. We may point out at this stage that one ground of challenging the ACR is that it is the result of mala fides on the part of Mr. D.N. Choudhary and Mr. Biswas who with vindictive designs had caused the departmental enquiry held against the Petitioner and being inimical recorded the aforesaid ACR. However, not only these two officers are not impleaded as Respondents though mala fide attributed to them, the record produced by the Respondents disclosed that the ACR was not recorded by these officers and they had nothing to do with the same. When the learned Counsel for the Petitioner as well as the Petitioner, who was present in the court at the time of hearing were confronted with the aforesaid position, this ground of challenge was specifically given up.

8. Essentially, the grounds on which the recording of the adverse remarks in the ACR for the period in question is challenged, are the following:

(i) There is no material on record to form the basis of said adverse remarks.

(ii) The adverse remarks are vague and lack specific details. No memo or warning was ever issued or the Petitioner counseled by his seniors before the adverse remarks, in violation of the rules, were recorded.

9. Dilating on this proposition, Ms. Avni Singh, learned Counsel for the Petitioner argued that the adverse remarks are connected to the departmental enquiry initiated against the Petitioner which has already been quashed and set aside by this Court in W.P. No. 4407/2002 vide orders dated 11th November, 2004. It is further submitted that as a result of the departmental enquiry the Petitioner had been suspended on 11th October, 1996. Therefore, the period for which his performance was actually reviewed was only six months, i.e. from 1st April, 1996 to 11th October, 1996. She emphasized the fact that during this six month period, an office order dated 2nd April, 1996 had been issued in respect of the Petitioner by his superior officers as a result of which he had been kept under close watch and scrutiny and essentially relegated to a desk job. The Office order clearly stated that no work was to be given to the Petitioner nor any weapon or vehicle could be issued to him except with the permission of his superior officer. Therefore, it was inconceivable that the adverse remarks could be connected to anything other than the pending departmental enquiry. It was also submitted that the said adverse remarks are vague and do not contain a single instance supporting or substantiating the remarks, when it is well settled that while making adverse remarks details must be given. She referred to the judgment of the Apex Court in *Sukhdeo v. Commissioner, Amravati Division, Amravati and Anr.* (1996) 5 SCC 193, the Apex Court held:

When an officer makes the remarks he must eschew of making vague remarks causing jeopardy to the service of the subordinate officer, he must bestow careful attention to collect all correct and truthful information and give necessary particulars when he seeks to make adverse remarks against the subordinate officer whose career prospect and service were in jeopardy.

10. She also submitted that during his entire tenure in Rangamapani, the Petitioner was never given any memo, warning or guidance from his superior officers prior to the making of adverse remarks. There was absolutely no indication that adverse remarks were to be accorded to him in addition to being implicated in a departmental enquiry. She emphatically argued that the whole purpose of ACRs is to improve the performance of the officer in question and it cannot be used as a tool for fault-finding process. Therefore, giving necessary guidance beforehand in order to allow the officer to improve his performance is a must. However, no such thing was done in this instance and the Petitioner had no warning that adverse remarks were to be given to him for the period of 6 months during which he was relegated to a desk job.

11. Countering the aforesaid submissions, Ms. Jyoti Singh, learned Senior Counsel appearing for the Respondent submitted that orders dated 10.1.2006 passed by the Director General, CRPF were valid being performance based and not related to subject matter of the departmental enquiry. A preliminary

submission was made that this petition suffers from latches and delays. It was argued that the action of the Petitioner is highly belated and hints towards being motivated by ulterior motives as he had neither challenged the entry of adverse remarks in his 1996-97 till the enquiry officer's report nor did he challenge the order dated 22.11.2003 till the year 2010, that too when the current writ petition was amended subsequent of filing of the counter affidavit by the Respondents pointing out the said fact of no challenge to the orders passed by the Respondents.

12. On merits submission of Ms. Jyoti Singh was that the remarks that are now sought to be challenged by the Petitioner are the ones that are solely performance-based and regarding which only an immediate superior can hold any opinion. It is interesting to note that such remarks were never challenged till the year 2006, although the same pertained to the year 1996-97. Furthermore, the retention of such remarks has been upheld by the Appellate as well as by the Reviewing authorities vide their detailed and speaking orders.

13. She also contended that none of the officers, who initiated/reviewed the ACR, had been made a party nor the two DGs who decided the representations of the Petitioner. No allegations had been leveled against these officers in the channel of reporting. The remarks sought to be challenged were based on the performance and the Investigating Officer/Reviewing Officer is the authority to decide the same. The Petitioner's profile has always been "Average" to "Good" with few sprinklings of "Very Good" but have never been outstanding or excellent before the impugned ACR and hence the grievance of the Petitioner is misplaced.

14. We have considered the aforesaid submissions. In so far as objection of the Respondent on the maintainability of the petition on delay and latches is concerned, we do not find any substance therein. The sequence of events narrated above would disclose that even when the ACR was recorded in the year 1997, the issue had not become dead. The last portion of the ACR had direct nexus with the departmental enquiry which was pending against the Petitioner at that time. In fact, after the exoneration of most of the charges leveled against the Petitioner in the said departmental enquiry, the Director General, CRPF himself passed orders dated 22.11.2003 expunging last portion of the said ACR. At that time, the Petitioner had already filed the writ petition 4407/2002 in this Court challenging the departmental enquiry and the punishment imposed. In the said writ petition he had leveled specific allegations against Mr. D.N. Chaudhary and Mr. Biswas. Furthermore, the Petitioner was under the bona fide impression that these very officers had recorded his ACR as well. It was, therefore, but natural for him to wait for the outcome of the said writ petition as that would have direct bearing on his ACR also. After the decision in the writ petition he had made representation dated 25.7.2005 for expunging the adverse remarks in the ACR. This writ petition was considered and rejected vide orders dated 10.1.2006. The Petitioner approached this Court by present writ which was filed immediately after this rejection. In view of the aforesaid, we are of the opinion that the

Petitioner has duly explained the delay between the date of recording of the ACR till the filing of the petition. There is no delay or latches in any case that does not remain unexplained. This objection of the Respondent is thus rejected.

15. Now we proceed to consider the submission on merits of the case. We have already extracted the adverse remarks recorded in the ACR of the Petitioner. It has following four elements:

(i) The Petitioner is rated an average officer.

(ii) As per the Recording Officer, the Petitioner needed a constant guidance and watch over his work.

(iii) The Petitioner keeps his comfort much above the duties.

(iii) His integrity had not been certified as he was placed under suspension and facing enquiry for indulging in illegal gratification.

16. Fourth component stands expunged. In the opinion of the Recording and Reviewing Officer, the Petitioner was an average officer and who needed constant guidance and watch over his work. Further he kept his own comfort much above duties. No doubt, his superior officers who had seen his performance had a right to form their opinion about his work and conduct. It is they who have observed the Petitioner to be an average officer. However, at the same time, it is to be borne in mind that in their perspective grading that the Petitioner is an average officer is predicated on the belief that the Petitioner needs constant guidance and watch over his work. If that be so, the question arises as to whether during the entire year, the Petitioner was counseled about the same. Learned Counsel for the Petitioner has made a specific submission that the Petitioner was never given any memo, guidance and warning prior to the recording of adverse remarks. The counsel for the Respondent did not even advert to the same. Both the parties have filed their written submissions. Learned Counsel for the Petitioner had handed over the submission on 7.4.2011 during the course of arguments. On that day, the judgment was reserved and the counsel for the Respondent was also given time to file the written synopsis. These were filed on 8.4.2011. In these written submissions which have already been taken note above, there is not even refutation to the aforesaid submission which is not even adverted to.

17. When we take into consideration the judgment in M.A. Rajasekhar Vs. State of Karnataka and Another, where the Petitioner was foisted with remarks "does not act dispassionately when faced with dilemma", the Supreme Court set aside those remarks holding that the remarks must be pointed out with reference to specific instances in which he did not perform that duties satisfactorily so that he would have opportunity to correct his mistakes. Following observations from the said judgment is worth a quote:

It was found that his integrity was not doubted and his work also in all those respects was found to be satisfactory. Under those circumstances, the remark that he "does not act dispassionately when faced with dilemma" must be pointed

out with reference to specific instances in which he did not perform that duty satisfactorily so that he would have an opportunity to correct himself of the mistake. He should be given an opportunity in the cases where he did not work objectively or satisfactorily. Admittedly, no such opportunity was given. Even when he acted in dilemma and lacked objectivity, in such circumstances, he must be guided by the authority as to the manner in which he acted upon. Since this exercise has not been done by the Respondents, it would be obvious that the above adverse remark was not consistent with law.

18. Likewise, in *Sukhdeo Vs. Commissioner Amravati Division, Amravati and Another*, the Court emphasized the desirability of affording prior opportunity before recording the adverse remarks in the following manner:

In *State Bank of India etc., Vs. Kashinath Kher and others, etc.,*, this Court has held that the controlling officer while writing confidential and character roll report, should be a superior officer higher above the cadres of the officer whose confidential reports are written. Such officer should show objectivity, impartiality and fair assessment without any prejudice whatsoever with highest sense of responsibility to inculcate in the officer's devotion to duty, honesty and integrity so as to improve excellence of the individual officer, lest the officers get demoralised which would be deleterious to the efficacy and efficiency of public service. In that case it was pointed out that confidential reports written and submitted by the officer of the same cadre and adopted without any independent scrutiny and assessment by the committee was held to be illegal. In this case, the power exercised is illegal and it is not expected of from that high responsible officer who made the remarks. When an officer makes the remarks he must eschew of making vague remarks causing jeopardy to the service of the subordinate officer. He must bestow careful attention to collect all correct and truthful information and give necessary particulars when he seeks to make adverse remarks against the subordinate officer whose career prospect and service were in jeopardy. In this case, the controlling officer has not used due diligence in making remarks. It would be salutary that the controlling officer before writing adverse remarks would give prior sufficient opportunity in writing by informing him of the deficiency he noticed for improvement. In spite of the opportunity given if the officer/employee does not improve then it would be an obvious fact and would form material basis in support of the adverse remarks. It should also be mentioned that he had given prior opportunity in waiting for improvement and yet was not availed of so that it would form part of the record. The power exercised by the controlling officer is per se illegal. para 6 quoted portion.

19. This Court in the case of *Govind Jha EE (SG) v. Union of India (UOI) and Anr. W.P. (C) 3492/2006* decided on 02.04.2009 relied on the principle of law contained in the aforesaid judgment holding that such kind of adverse remarks should be based on essential material on record to prove the instances. We reproduce the following discussion in the said judgment which is relevant:

We have given our utmost consideration to the respective submissions with reference to the records produced before us. About the leave, though it is mentioned that the Petitioner is "habitual of going on leave very often", fact remains that apart from long leave due to the aforesaid illness, there are no other instances given by the Respondents on the basis of which it could be observed that he is "habitual of going on leave". In so far as the said long leave is concerned, the Respondents could not dispute that leave has since been regularized and therefore, he cannot be treated as "absent". Therefore, we are of the opinion that the remarks "he is habitual of going on leave very often" and in the following line use of the word "absent" is not based on any material and has to be expunged. The other sentence relating to his leave for about 280 days can be maintained after deleting the word "absent" as that would be only a matter of fact. However, while doing so it would also be better to write that this leave was duly sanctioned so that it is not perceived as adverse to the Petitioner.

20. In view of the aforesaid position of law, we are constrained to hold that there was no rationale for recording the ACR. Matter becomes worse when we examine the veracity of the remarks "keeps his own comfort much above duties". Such remark has to be on the basis of some overt act of the Petitioner. Not a single instance is cited even when the Petitioner specifically refuted the same. Except general and stereotype argument that the investigating officer/review officer had the authority to form an opinion which is performance based, nothing has come on record to justify the same.

21. When we take into consideration the attendant and over all circumstances, we feel constrained to form an opinion that the aforesaid adverse remarks were written at the time when the Petitioner was under suspension and facing the departmental enquiry and, therefore, these adverse gradings were influenced and blurred by those circumstances. At the cost of repetition, we state that this impression is because of the reason that no material worth the name has been brought on record to justify such remarks.

22. Accordingly rule is made absolute. This writ petition is allowed. The adverse remarks recorded for the period 1st April, 1996 to 31st March, 1997 as modified vide orders dated 22nd November, 2003 are expunged.

23. The Petitioner shall also be entitled to costs quantified @ Rs. 10,000/- .