

(2019) 02 DEL CK 0382

In the Delhi High Court

Case No : Civil Writ Petition No. 9417 Of 2017

HC (Min) Jai Prakash

APPELLANT

Vs

Union Of India & Ors

RESPONDENT

Date of Decision : 21-02-2019

Acts Referred:

Constitution of India, 1950 — Article 226
Border Security Force Act, 1968 — Section 40

Citation : (2019) 3 AD(Delhi) 351

Hon'ble Judges : S.Muralidhar, J;Sanjeev Narula, J

Bench : Division Bench

Advocate : A.K. Trivedi, Naveen Kumar, Saroj Bidawah

Final Decision : Dismissed

Judgement

SANJEEV NARULA, J

1. The present petition under Article 226 of the Constitution of India impugns the decision of the Respondents for not promoting the Petitioner from the rank of HC (MIN) to ASI (MIN) in Border Security Force (BSF).

Brief Facts

2. The Petitioner was enrolled as direct entry HC (MIN) with BSF on 26th March 2011 as an OBC candidate. During the course of his service, his APAR has been assessed/graded by the Respondents for the period from 1st April 2011 to 31st March 2016 as under:

S.No

Period of Assessment

Grading

Remarks

1.

01-04-2011 to 31-03-2012

Good

2.

01-04-2012 to 31-03-2013

V. Good

3.

01-04-2013 to 05-12-2013

V. Good

4.

06-12-2013 to 31-03-2014

V. Good

He is laborious but requires more supervision.

5.

01-04-2014 to 31-03-2015

V. Good

6.

01-04-2015 to 03-08-2015

V. Good

7.

04-08-2015 to 31-03-2016

Good

He needs constant guidance to improve.

3. As per APAR procedure and instruction-2012, the APAR for the period from 6th December 2013 to 31st March 2014 was communicated to the Petitioner on 08/2014 and likewise APAR for the period from 14th May 2015 to 31st March 2016 including the overall grade was communicated to the Petitioner on 2nd July 2016 under acknowledgement. The Petitioner submitted a detailed representation dated 14th July 2016 and requested the Competent Authority to reconsider his case and upgrade him from "good" to "very good" in respect of APAR-2015-16. The representation was examined by the Commandant (Competent Authority) and vide order dated 20th July 2016, his request for up-gradation of the grading was declined.

4. The Departmental Promotion Committee (DPC) for promotion to the post of ASI (MIN) was constituted on 6th January 2016 and a supplementary DPC was constituted in October, 2016. The Petitioner's name was not considered in the said DPC on account of lack of vacancies. Thereafter, a seniority list was prepared and the name of the Petitioner appeared at serial No. 114. A DPC was convened on 24th March 2017 wherein the Petitioner along with all eligible HCs (MIN) were considered but he was not promoted to the post of ASI (MIN). This decision of the Respondents was intimated to the Petitioner vide order dated 18th April 2017, which is impugned in the present petition. The Petitioner also issued a legal notice dated 24th April 2017. This notice evoked no response and as a result, he then submitted a representation dated 12th May 2017 seeking an interview with Director General, BSF with regard to his non consideration for promotion. The aforesaid legal notice and the representation were found unmerited and rejected vide order dated 17th August 2017, which is also a subject matter of challenge in the present petition.

Submissions

5. Learned counsel for the Petitioner argued that the action of the Respondents ignoring the claim of the Petitioner for the post of Assistant Sub Inspector (MIN) is illegal, unjust and arbitrary. He submitted that the Petitioner was neither communicated the advisory remarks for the APAR year 2013-14 nor the adverse remarks for the 2015-16 and this failure on the part of the Respondents deprived the Petitioner from making any effective representation. He urges that the Petitioner has worked hard with sincerity and has received good commendation from the Director General of BSF. The Petitioner also received cash rewards on account of his sincerity, honesty and hard work. According to him, the grant of cash rewards during the relevant period of assessment i.e. 2015-16, contradicts the remarks given by the Respondents. Learned counsel strongly urged that the DPC has failed to take into consideration the aforesaid aspects and rejected the candidature of the Petitioner solely on the ground of advisory remarks endorsed in APAR for the year 2013-14 and adverse remarks in APAR for the year 2015-16, which according to him ought to have been ignored. In support of this submission, he cites the instance of another Constable (Heera Lal) and states that the said Officer was issued a charge sheet under Section 40 of the BSF Act on the charge of "an act prejudicial to good order and discipline of the force" and was awarded the punishment of "reprimand" vide order dated 21st November 2015. He states that Heera Lal was at serial No. 36 in his seniority list and has been promoted to the post of ASI (MIN) w.e.f. 1st April 2017 in the same DPC held on 24th March 2017 that declared the Petitioner as unfit for promotion. The submission is that, since DPC ignored the aforesaid serious charge in the case of Heera Lal, the Respondent ought to have also ignored the adverse remarks given to the Petitioner that are of lesser gravity. Learned Counsel also argued that the order dated 17th August 2017 was erroneous as the same is based on consideration of irrelevant facts and instances that has nothing to do with his promotion.

6. Per contra, learned counsel for the Respondents argued that the full APAR including the overall grade was provided to the Petitioner against proper receipt and his representation for upgradation of APAR was duly considered but the Petitioner was not found merited. She further submitted that the DPC held on 24th March 2017 has assessed the suitability of the Petitioner and adjudged him as "unfit" due to inconsistent record of service which includes the advisory remarks endorsed in the APAR for the year 2013-14 and adverse remarks for the year 2015-16. The DPC proceeded in a fair and impartial manner and applied uniform yardstick and norms to all the candidates. She further urged that the present petition does not impugn the rejection of the representation dated 14th July 2016 and only challenges the decision of the DPC. In case the Petitioner was aggrieved with the decision on his representation, he ought to have made further representations to higher Authorities against the adverse remarks and since he did not do so, it would amount to accepting the decision of the representation. Further, the decision of DPC, cannot be held to be arbitrary and in view of the limited scope of judicial interference, there is no cogent ground for interfering with the view taken by DPC regarding the suitability of the petition. She also distinguished the case of Heera Lal and urged that his performance was consistent throughout and there were good and sufficient reasons to ignore the punishment dated 20th November 2015 and the advisory remarks endorsed in his APAR.

Analysis and Findings

7. In order to narrow down the controversy that arises for consideration in the present petition, it would be apt to first note the prayer clause in the present petition which reads as under:

"(a) Quash and set aside the Impugned Order dated 18/04/2017 and 17/08/2017 and Declare the whole action of the respondents as illegal, unjust, arbitrary and against the judicial pronouncements on the subject for treating the alleged Advisory remarks in APAR for the year 2013-14 and Adverse remarks in APAR for the year 2015-16, despite the fact that the same is not adverse as the overall performance of the petitioner has been graded as Very Good.

(b) To set aside the alleged Advisory Remarks in APAR for the year 2013-14 and alleged Adverse Remarks in APAR for the year 2015-16 which have never been communicated to the petitioner.

(c) Direct the Respondents constitute the Review DPC for promotion to the post of ASI(MIN) for the year 2016-17 and thereafter consider the case of petitioner for promotion to the post of ASI(MIN) wef the date his juniors has been promoted and consequently the petitioner may be entitled for all consequential benefits including fixation of his seniority, pay and allowances for the intervening period.

(d) Direct the respondents to produce the relevant records i.e. CRs and DPC proceedings dated 24/03/2017 etc before this Hon'ble Court for the relevant year.

(e) Any other relief which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

(f) Award Cost;"

8. From the above, it becomes evident that the grievance of Petitioner is two-fold. Firstly, he assails the decision of the Respondents declining to upgrade his APAR. Consequently, he also questions the decision of the DPC declaring him unfit for the promotion to the post of ASI (MIN).

9. Before we ponder over the facts of the case, we have to be conscious of the fact that it is no longer *res integra* that the scope of judicial review on the aforesaid two aspects is limited. The Supreme Court in a catena of decisions has held that the Courts normally do not sit as a Court of appeal to gauge the APAR/ACR and the assessment made by the selection committees regarding suitability of the officers for promotion on the basis of their service records.

10. The first contention raised by the Petitioner regarding the non-communication of the APAR is not correct. The Respondents have provided full APAR to the Petitioner along with the remarks. This becomes evident from the acknowledgement receipts given by the Petitioner while receiving the APAR. The said acknowledgement reads as under:

"ACKNOWLEDGEMENT

I have received my APAR /PPAR for the period /year 06/12/2013 to 31/03/2014 including the grading awarded to me.

a) I have nothing to represent against the grading /General remarks awarded to me.

b) I want to represent against the same.

Place: Mathura

Dated ... 08/2014

Signature: SD/-

Regt.No.: 110900113

Rank : HC (Min)

Name : Jai Parkash

Coy : HQ

Unit /HQ : 165 Bn BSF"

"APAR 2015-16 ACKNOWLEDGEMENT RECEIPT

1 Regt. No. 110900113 Rank HO (Min) Name Jai Parkash Unit /HQ 32 Bn BSF certify that I have seen /read my full Annual /Part Performance Assessment

Report (APAR/PPAR) for the period from 14-08-2015 to 31-03-2016 includes the overall grade and assessment of integrity in the office of the Commandant being accepting authority of my APAR.

I am also well aware of new provision of APAR that in case no representation of above APAR is submitted to accepting authority within fifteen days from the date of its disclosure, the APAR will be treated as final.

SD/-02/07/2016.

Signature :

Regt. No. : 110900113

Rank : HC (Min)

Name : Jai Parkash

Unit /HQ : 32 Bn BSF"

11. In fact, in the representation dated 14th July 2016, Petitioner makes a specific reference to the remarks given by the Respondents. The relevant portion of the representation reads as under:

"(n) In the year 2015-16 during the period from 14/08/2015 to 31/03/2016 shri Krishna Kumar Bisnoi Head Clk of Bn has narrated "He needs constant guidance to improve" in the APAR and has also narrated me as a "good" Head constable. But I do not agree with the same. In the light of appreciation letter of Director and duties carried out by me inside the Bn and outside of Bn, it is comparatively very less. Sir, in the year 2015-16 for the period from 14/08/2015 to 31/03/2016, I had worked hard, to earn the outstanding grading result of which DGCR and commandant had rewarded with cash award of Rs. 300/- to me. But initiative Authority has, graded me as "Good" in the APAR , and has not carried out the assessment as per my performance. In view of the above I would like to request to kindly assess me in accordance with my performance so that there will not be any hindrance to get MACP and promotion."

12. Therefore, the contention of the Petitioner regarding the non-communication of the adverse remarks is contradicted by the record before us. Further, the representation of the Petitioner with respect to upgrading his grade from "Good" to "Very Good" was rejected vide order dated 20th July 2016. Concededly, the Petitioner did not make any further representation against the said decision. Thereafter, the DPC was held for the promotions to the post of ASI (MIN) for the vacancy year 2017-18. The DPC took into consideration the service records of the Petitioner including the APARs for the five preceding years and to assess his suitability for promotion. DPC is not merely guided by the overall grading recorded in the APAR but also makes its own assessment on the basis of several other factors. In fact DPC is required to make an overall assessment of the performance of each candidate by adopting the same standards, yardstick and norms. In the present case, the decision of the DPC is conveyed by the

Respondents in the impugned letter dated 18th April 2017, stating the following reasons:

FHQ BSF (Pers-Staff) vide their signal no. R/3125 dated 12 APR' 2017 has intimated that representation from HCs (Min) seeking for not promoting them to the rank OF ASI (Min) by the DPC for the vacancy year 2017-18 are being received by this HQ in this regard, it is to inform that the DPC held on 24/03/2017n for empanelment of HC(min) for promotion to the rank of ASI (Min) for the vacancy year 2017-18, has assessed complete records of service viz, Good/Bad characteristics earned during the period under consideration and APARs for the proceeding five years of all eligible HCs (Min) foe their empanelment and promotion to the rank of ASI (Min).

2. After assessing complete records of service, the DPC has adjudged 22 HCs (Min) including you as "UNFIT" due to reasons as mentioned below:

S.No

Regt. No. & Name

Unit /HQ

Remarks

1.

110900133 Jai Prakash

32 BN BSF

Due to inconsistent records of service i.e.. Advisory remarks endorsed in APAR 2013-14 and Adverse remarks endorsed in APAR 2015-2016

13. The decision of of DPC held on 24th March 2017 is thus based on the complete records of service even on good/bad characteristics earned during the period in consideration i.e. five years preceding the date of consideration. DPC has noted that there is inconsistent record of service i.e. advisory remarks endorsed in APAR 2013-14 and adverse remarks endorsed in APAR 2015-16. These remarks cannot be overlooked or disregarded. As stated above, the representation of the Petitioner has been rejected and conveyed to the Petitioner vide order dated 20th July 2016 and therefore the decision of the DPC cannot be said to be arbitrary or unreasonable. The decision of the suitability of the candidature of the Petitioner was to be assessed on the basis of the APARs in question and the same contain adverse as well as advisory remarks endorsed for the APARs in the year 2013-14 and 2015-16. The Petitioner has not raised any challenge to the method and procedure followed by DPC while assessing the suitability of the Petitioner. In absence of any violation, while undertaking a judicial review under Article 226 of the Constitution of India, we have to be guided by the consistent view taken by the Supreme Court that that evaluation made by expert Committee, should not be easily interfered with by the Courts

which do not have the necessary expertise to undertake the exercise that is required for such performance (UPSC v. L.P. Tiwari (2006) 12 SCC 317 and UPSC v. K. Raja (2005) 10 SCC 15). In view of the admitted position that the APARs do carry adverse and advisory remarks, we find no good reason to interfere with the decision of the DPC. Now coming to the second aspect which is whether there is any infirmity in the decision of Respondents in declaring to upgrade the grading in the APAR for the years 2015-16. As noted above, on this aspect as well, the scope of our interference is restricted. Here again, there is no procedural infirmity on the part of the Respondents. As noted above the APARs were duly communicated to the Petitioner. The Supreme Court in Union Public Service Commission v. M. Sathiya Priya AIR 2018 SC 2790 and M.V Thimmaiah v. UPSC 2008 2 SCC 119 has held that Courts normally do not sit as Court of appeal to assess ACRs. The Respondents have also pointed out that since the time Petitioner reported at 32 battalion BSF, he did not take interest in official work despite counselling him by senior Officers of the Unit from time to time and he did not make any improvement in his behaviour. The Respondents have in their counter affidavit given details of the written warnings and advisory issued to the Petitioner, which reads as under:

"a) Written Warning issued vide letter No. 1731-32 dated 11 Sep 2015 for overstaying 01 day on 02.09.2015.

b) Written warning issued vide letter No. 60-61 dated 01 March 2016, for making unnecessary pressure on the department through media for posting to 25/95 Battalions BSF/Delhi wherein he submitted an application dated 07.11.2015 to Director General and copy of same was endorsed to "AAJ TAK NEWS GREATER NOIDA" and mentioned that he will reach in their office on 17.11.2015 at 0930 hrs.

c) On 21.12.2015, during the interview, he was advised by Commandant to avoid unnecessary correspondence. From the above, it may be seen that he was rewarded for the good work done. But on the other side, he has been WARNED in writing for two times and once advised for overstaying leave, violating channel of correspondence and writing repeated applications and leveling baseless allegations, against dealing hand/officers, higher HQs."

14. The Respondents have thus explained the circumstances under which the adverse remarks were endorsed on the APAR. We would thus like to refrain ourselves from examining the circumstances and the reasons for recording such adverse remarks by the Respondents. The evaluation of APAR is based on several critical aspects which are required to be looked into by the Inspecting Officer. There is well established methodology that has been evolved for grading the Officers. This Court cannot delve into this aspect while exercising its jurisdiction under Article 226 of the Constitution of India unless the facts of the case indicate any glaring inconsistencies and circumstances that compel us to do so. The present case is not one where we feel that the assessment is arbitrary or capricious. Although the Petitioner has claimed parity with another Officer i.e.

Heera Lal, but the Respondents have explained the circumstances under which the punishment awarded to Heera Lal was ignored and the same appears to be justifiable and probable. Assessment of each Officer will depend on the assessment and evaluation in their respective APAR and parity cannot be claimed as a matter of right. Certain amount of play in the joints has to be accounted for in the decision making of DPC and there cannot be any straight jacket formula that can be applied to each and every case. There is no bias or mala fide which has been urged by the Petitioner and we find that there is no arbitrariness in the process of the assessment by the DPC in the present case.

15. Thus, having regard to the facts and circumstances of the present case, we find no ground or reason to interfere with the decision of the Respondents and accordingly the present writ petition is dismissed with no orders as to cost.