
(2019) 12 GAU CK 0003
In the Gauhati High Court
Case No : Writ Petition (C) No. 5758 Of 2015

Janglun Singson

APPELLANT

Vs

Union Of India And 5 Ors

RESPONDENT

Date of Decision : 20-12-2019

Acts Referred:

Constitution Of India, 1950 — Article 226

Citation : (2019) 12 GAU CK 0003

Hon'ble Judges : Kalyan Rai Surana, J

Bench : Single Bench

Advocate : T Kalita

Final Decision : Allowed

Judgement

1. Heard Mr. G. Goswami, learned counsel for the petitioner as well as Mr. K.K. Parashar, learned CGC for the respondent.

2. By this writ petition filed under Article 226 of the Constitution of India, the petitioner has assailed the adverse entry in the Annual Performance Assessment Report (APAR) of the petitioner for the period from 01.04.2013 to 31.03.2014 which had the effect of downgrading his APAR from "outstanding" to "very good".

3. In the writ petition it is projected that the petitioner is a direct recruit BSF officer of the year 1995 batch. After successful completion of his training he was posted as Assistant Commandant, BSF. At the relevant point of time, after getting promotion, he was holding the post of Second-in-Command (2IC for short) of 61 Bn BSF, the post he was holding as on the date of filing of the writ petition. In the writ petition it is projected that two incidents had taken place near the area of operation of the 61 Battalion BSF in course of anti-naxal operation in Odisha. The first incident occurred on 16.11.2013, when an information was received that an informal meeting of the naxals was convened with the civilians in village Badapada which is stated to be 16 kms away from the camp. At the relevant point of time, it is projected that the Battalion Commander

was on leave from 30.10.2013 to 08.12.2013 and accordingly, the petitioner had to head the operation. However, the State police disappeared from the point of start of operation and in view of the direction contained in Memo No.11-18015-48/10-SA (NM) issued by the Government of India, Ministry of Home Affairs, Naxal Management Division dated 03.08.2010 to the effect that for any naxal operation, the force may have a ratio of 1:3 between the State Police Force and CPMF. Accordingly, on being informed of the absence of the State Police, the petitioner had called off the combing operation.

4. It is also projected in the writ petition that without any meeting was held by the Naxals on 16.11.2013, nor there was any untoward incident on the said date. Thereafter, in a separate incident on 19.11.2013, two BSF informers, namely, Laxmi Khora and Satirao Hantal were shot dead in another village named Beliguma which is situated 2-3 kms from the Badapada camp.

5. Referring to the APAR annexed to the writ petition, it is projected that the Director General, BSF had visited the Badapada camp after the incident and based on wrong reporting by the Assistant Commandant, namely, Shri Priyank, the DG, BSF in his Tour notes dated 17.12.2013 made an adverse remark against the petitioner. Accordingly, based on the said Tour note, the reviewing authority had made a note in the APAR and also noted therein that there was no notable achievement was made by the petitioner during the period, as such the petitioner was graded as "Very Good" officer.

6. It is stated that the said remark amounted to downgrading of the petitioner because his reporting officer had given a remark of "Outstanding". It is projected that the accepting authority had numerically reduced the grade of the petitioner from 8 points to 7.85 points and by deducting 0.4 point from the overall score of the accepting authority had given score of 7.45 points out of 10 points as overall grade to the petitioner in his APAR.

7. The learned counsel for the petitioner has submitted that after the adverse remark in the APAR for the period ending on 31.03.2014 was communicated to the petitioner vide letter dated 05.09.2014, he had submitted a representation through proper channel wherein it was highlighted that the DG, BSF had been given wrong information by Shri Priyank, Assistant Commandant and he had also explained the reason for calling off the said operation and had narrated that the BSF informer was killed on 19.11.2013 which was an unrelated incident and moreover he had also informed the authority about the notable achievement during the 96 days period during which he had officiated the unit and it was brought to the notice of the authorities that for operation led on 21.02.2014, he was awarded the IG's CC, while he was acting as an operational Commander. Accordingly, a representation was made to expunge the adverse remark from the APAR of the petitioner.

8. It is submitted that by a letter dated 26.11.2014, the Commandant, 61 Battalion, BSF had recommended for expunging the adverse remark against the

petitioner in APAR. However, by an order dated 11.03.2015, issued on behalf of the Special DG, BSF, Assistant Commandant, the representation submitted by the petitioner was rejected. Thereafter, the petitioner had submitted a representation before the Director General, BSF. However, on the ground that second representation/ appeal was not provided for to the competent authority after disposal of the first representation, the request made vide second representation was not acceded to.

9. It is further submitted that for the herein before described incident, the Deputy Inspector General, THQ-SHQ-BSF, Malkangiri had issued an advice dated 11.02.2014 and accordingly, it is submitted that the said advice is a lesser form of an adverse entry in the ACR of the petitioner and accordingly, it is submitted that a further adverse entry in the APAR was un-called for. It is also submitted that the tour notes by the DG, BSF was based on incorrect facts because the said authority had referred to the incident of killing of the BSF informer on 16.11.2013 whereas those two informers were shot dead on 19.11.2013 outside the area of operation scheduled on 16.11.2013.

10. By referring to the comments of the Commandant, 61th, Battalion, BSF dated 26.11.2014, it is submitted that the lady informer was offered accommodation in the vicinity of THQ-Chitrakonda and COB, Janbai keeping in view of the threat posed by the naxals, but she had refused to avail secured accommodation and continued to remain in her village. Accordingly, it is submitted that the said lady informer had taken a risk at her own peril and for the said single incident, the APAR of the petitioner ought not to have been downgraded.

11. In support of his submissions, the learned counsel for the petitioner has placed reliance on the following cases:

- 1) Pawan N. Chandra Vs. Rajasthan High Court and another, (2009) 17 SCC 770,
- 2) T.N. Godavarman Thirumulpad Vs. Union of India and ors, (2009) 17 SCC 772,
- 3) P.K. Shastri Vs. State of M.P. and ors., (1999) 7 SCC 329,
- 4) Dharmarathmakara Rai Bahadur Arcot Ramaswamy Mudaliar Educational Institution Vs. Educational Appellate Tribunal and another, (1999) 7 SCC 332,
- 5) M.A. Rajasekhar Vs. State of Karnataka and another, (1996) 10 SCC 369,
- 6) N. Rajarathinam Vs. State of T.N. and another, (1996) 10 SCC 371.

12. Per contra, the learned CGC has referred to the affidavit-in-opposition filed by the respondents No.1 to 6 and it is submitted that at the relevant point of time, the petitioner was performing the duties of the Commandants of 61 Battalion BSF from 30.10.2013 to 08.12.2013 in the absence of the unit Commandant who was on leave.

13. It is submitted that the concerned unit was deployed for anti-naxal town

(AOI) duties with its tactical Head Quarters (THQ) at Chitrakonda, Malkangiri, Odisha and information was received on 16.11.2013 by the Company Operating Base (COB), Badapada about the presence of Naxalites, near village Dudhappli, which was at a distance of 16 kms from the North east side of COB, Badapada and accordingly, the Coy Comdr. had planned an operation along with the available police representative but before the operation could be launched, the police representatives had left COB, Badapada for Chitrakonda, P.S. and accordingly, the Coy Comdr., COB, Badapada informed the petitioner about it and the petitioner had directed the Coy Comdr. to abandon the search. Accordingly, no operation could be launched for anti-naxal operation despite having confirmed information about the presence of naxal group in the area. Thereafter, on 19.11.2013 at about 21:45 hours the sentries of COB, Badapada heard the sound of firing at Baliguma village and immediately, the concerned operation unit of 55 persons under the command of Shri Priyank, Assistant Commandant went to the place of occurrence and during search, dead body of two persons were found alongwith the letter of Bhartiya Communist Party Maovadi was recovered in which it was mentioned that "she was an informer and hence has been sentenced to death". In the search conducted on 19.11.2013 and 20.11.2013 live rounds and anti-fire case of 7.62 mm SLR were found from the operational area.

14. It is further submitted that on getting the information the DG, BSF visited the area of operation on 04.12.2013 to 05.12.2013 and got first hand information of the incident and during the inspection, Shri Priyank, Assistant Commandant, Coy Comdr. gave truthful account of the incident.

15. Accordingly, the learned CGC has justified the overall downgrading of the numeric grade of the petitioner by deducting 0.4 from the overall score and granting of 7.45 marks as overall grade by the Accepting authority.

16. It is further submitted that the decision by the Reviewing and Accepting authority to downgrade the APAR of the petitioner from "Outstanding" to "Very good" was on the basis of the various parameters, one of which was the petitioner had not taken any initiative to secure the presence of civil police personnel to continue the search operation and accordingly, it is submitted that the abandoning of the search operation was detrimental to the interest of the anti-naxal operation resulting in the death of two BSF informers.

17. The learned CGC has submitted that the competent authority of the BSF well-considered decision to downgrade the APAR of the petitioner from "Excellent" to "Very good" and the competent authority had rejected the representation/ appeal by the petitioner based on sound decision and accordingly, it is submitted that the prescribed procedure was adopted and followed by the respondents in the appropriate manner.

18. It is also submitted that no fundamental and statutory right of the petitioner has been violated and, as such the petitioner is not entitled to any relief in this

writ petition.

19. Perused the materials available on record, it would be very relevant to refer to the directions contained in memo No.11-18015/48/10-SA (NM) issued by the Government of India, Ministry of Home Affairs, Naxal Management Division dated 03.08.2010 regarding provisioning of State police component to undertake the joint operation in LWE affected State. The said memo is quoted below:

Sub: Provisioning of State Police component to undertake joint operation in LWE affected States.

As per instructions, issued vide Fax Message No. R-3429/SS (IS) 2010 dated 07.05.10, it was clarified that as far as possible a 1:2 ratio of strength between the State police and CPMF should be maintained. It was also amplified in this message that if 100 men are involved in an operation then the State Police component should be at least 33 men.

2. However as per field inputs from various LWE affected States, this practice is being found to be impractical for anti naxal operations based on real time information and at times joint operations are not being undertaken since the State Police is not in a position to provide the desired complement.

3. Therefore keeping in view the operational requirements, the revised instructions in this regard will be as under;

(a) For any planned operation the force may have a ratio upto 1:3 between the State Police Force and CPMF.

(b) To ensure timely action, it is the Filed Commandants and District SPs who should plan and execute the operations. The progress of operations should be closely monitored by the Regional CRPF IG (Ops) and he should keep the Force HQs informed of the important development.

(c) Most major incidents against the security personnel in the recent past have taken place due to lapses by team leaders and non-adherence to laid down SOPs. Hence, there is an urgent need to educate junior leaders and men about Do's and Don'ts. Senior operation-Officers of CPMF i.e. DIGs must also spend more time with men and conduct detailed briefings on a regular basis. Commandants of the operational Bns should move in their AOR more frequently and also participate in operations of importance. In many cases, the commandants are maintaining their Bn Tac HQs at a distance from the area of deployment, sometimes over 100-125 kms away. This needs to be reviewed immediately. They should also be told to camp more frequently with their Coys.

20. As per the visit note of the DG, BSF dated 17.12.2013, the relevant issue No.3(e) in respect of the incident is as follows:

3(e). It was informed that one lady source of BSF was killed on 16th Nov in a village barely 2 Kms from COB Badapada. The prior information was provided to the Unit Commandant and the Coy Cdr Badapada had also planned for

conducting the operation. However, at the last moment Commandant did not let the operation be conducted on the plea that the Police rep was not made available to the Coy. Consequently, we not only lost a precious lady source but also an opportunity to inculcate a sense of security to the local population as well as effective deterrence to the Naxals. I directed that all sources be protected. In such situations, the Commandant must liaise with the SP to resolve the deadlock. If any such situation develops in future, the operation may even be conducted without a Police rep. IG (Spl Ops) must extend all necessary assistance to the family members of the Lady Source, for at least one year.

21. In the APAR for the period from 01.04.2013 to 31.03.2014 as annexed to the affidavit-in-opposition by the respondent, in the present report dated 10.04.2014 at part-2 thereof in the box containing self-appraisal by the petitioner, he has specifically mentioned that he had been awarded IG's CC for the operation conducted on 21 February 2014 which was commanded by him.

22. It appears that the reporting/ initiating authority had accepted the contents of the self-appraisal by the petitioner contained in part-2 of the APAR.

23. In part-1 of the said APAR, it is mentioned that the petitioner had received IG's CC. As per the para-9 of part-3 of APAR, his integrity was found beyond doubt by the IO, RO and AA. The subsequent para between 9 and 11 is found to be numbered as 8 and in respect of pen picture of the officer reported upon by the reporting officer and in the concerned box, it has been mentioned as follows: "A hardworking and professionally competent authority who has discharged all his duties assigned in an outstanding manner" and para-11 thereof the petitioner was given the overall grade of 8.49. Review remarks are contained in part-4 of the APAR and the Reviewing authority has made the following remark "I agree with the remark of the reporting officer. However, there is no notable achievement made by the officer during the period. I grade him as a very good officer."

24. In para-2 thereof relating to difference between the remarks of review officer with the assessment made by the reporting officer has made the following remark "There is no outstanding achievement by the officer during the period. Hence, I grade him as a very good officer."

25. Accordingly, for para-11, the overall grade of the petitioner was scaled down from 8.49 to 7.85.

26. In para-6 of the said APAR, the accepting authority agreed with the remark of the reviewing authority by giving the following comment "I agree with RO". The officer has been found wanting in initiative on some occasion, which have led to operational fiasco."

27. In para-2 thereof, the reason assigned in is as follows: during one of his tenure as Offg. Comndt., he faulted to give timely decision which resulted in the killing of two civilians and valuable sources of BSF. This has been adversely

commented in DG tour note also. The officer needs to be quick in taking operational decisions to avoid loss of life and set back to the force. In attributes at 6(a) to 6(d) he was given a score of 7 only, thus deducting 0.4 from overall score and as per the para-3 of part-6 and overall grade on the score of 1-10 was given as 7.45.

28. On receipt of the communication of the APAR, the petitioner had submitted a representation against the adverse remark to the HQ-SPL-DG (east) through proper channel.

29. In respect of the said representation, the commandant, 61 Bn, BSF gave a strong recommendation to expunge the remark. However, on behalf of Special DG, BSF (Eastern Command) the said representation of the petitioner was rejected by order dated 11.03.2015 by holding that the accepting authority had rightly assessed the overall period of the officer and the grading in the APAR for the period of 01.04.2013 to 31.03.2014.

30. The cognizance of the second representation is not taken by the Court as such a measure is not provided for in the extent rules.

31. It is seen from the APAR that the accepting authority had heavily relied in the DG tour note in making his comments and to accept the downgrading of the petitioner from "Excellent" to "Very Good". Apparently, the DG tour report as quoted herein before is found to be factually incorrect because he has mentioned that the lady source of BSF was killed on 16.11.2013.

32. As per the statements made in the affidavit-in-opposition filed by the respondents No.1 to 6 on 23.11.2016, it is specifically mentioned in para-3 (ii) that the operation was abandoned by the petitioner on 16.11.2013 and it is on 19.11.2013 at about 21:45 hours that the sentries of COB, Badapada heard sound of firing from Belliguma village and on the same day in a search operation, dead body of the lady was recovered near her house in the said village and the dead body of another person was recovered approx. 100 m at the outskirts of the same village. Therefore, the Court has no option but to accept the projection made by the learned counsel for the petitioner that the then Coy Comdr., namely, Shri Priyank had given wrong information to the DG, BSF which is noticed from para-3 of the tour note as quoted above.

33. It is further seen that in para-9 of part-1 of the APAR, there is an entry to the effect that the petitioner had been awarded IG's CC as his medal/ decoration and in part-2 of the APAR, the petitioner had made a comment that he was awarded the IG's CC for the operation conducted on 21.02.2014 which was within the period of the APAR i.e. 01.04.2013 to 31.03.2014. Therefore, the remarks contained in part-1 of part-4 of the APAR relating to review wherein the review authority had held that there is no notable achievement by the petitioner during the period is not sustainable. Similarly, the remark in para-2 of part-4 to the effect that there is no outstanding achievement by the petitioner during the period is not found sustainable.

34. It is further seen that while the representation submitted by the petitioner the Special DG, BSF (Eastern Command) who is the competent authority to expunge the adverse remark in APAR, in his order dated 11.03.2015 did not take cognizance of the fact that the note at para-3(e) of the DG, BSF tour note contained erroneous date of incident because no killing had taken place on 16.11.2013. the said competent authority is found to have failed to appreciate that the remarks at part-4 as mentioned herein before was also incorrect and contrary to the entries made in para-9 of part-1 and part-2 that the petitioner was awarded IG's CC for the operation on 21.02.2014 which is within the period of the said APAR.

35. Accordingly, the Court is constrained to hold that while disposing of the writ petition of the petitioner by the impugned order dated 11.03.2015, the competent authority i.e. the Special DG, BSF, East and Command had not taken note of the herein before referred anomalies. The said authority has also not taken note of the fact that in light of the notification No.11-18015/48/10A-SA (NM) dated 03.08.2010 issued by the Government of India, Ministry of Home Affairs, Naxal Management Division. However, the petitioner could have carried out the search operation in the absence of the police personnel from the state police. No record has been produced by the respondent to show that in a situation where the State police goes back to the point of start of the operation to the P.S, what procedure is mandated to be followed by the concerned Battalion to carry out the search operation. It is seen that on a solitary note of the DG, BSF an adverse note against the petitioner has been taken. However, there is no finding as to how the killing incident on 19.11.2013 is linked to the failure of search operation on 16.11.2013.

36. In view of the above, the Court is of the unhesitant opinion that in the impugned order dated 11.03.2013, the competent authority i.e. the Special DG, BSF (East and Command) has failed to apply his judicial mind and had mechanically approached the said representation and it appears that the said authority had failed to appreciate the achievement of the petitioner by securing a medal/ decoration of IG's CC while referring to the comments by the reviewing officer and the reporting/ initiating authority as provided in the APAR, and the said authority has also failed to take note that the Tour note of the DG, BSF does not reflect the correct account of unfortunate killing of two BSF informers.

37. Accordingly, by setting aside impugned order No.1026/PS/downgrading/ JS/ SDG(EC)/ 15/97-100 dated 11.03.2015 passed by the Special DG, BSF (East and Command), the matter has been remanded back for a reconsideration of the representation dated 28.10.2014 submitted by the petitioner for expunging an adverse remark in the APAR for the period of 01.04.2013-31.03.2014.

38. Needless to say that while passing the order afresh, the said authority shall not be influenced by the impugned order dated 11.03.2015.

39. However, the said authority shall pass the order by taking note of the herein

before referred order under Memo No.11-18015-48/10-SA (NM) dated 03.08.2010 by the Government of India, Ministry of Home Affairs, Naxal Management Division.