
(2015) 02 RAJ CK 0055
In the Rajasthan High Court
Case No : Civil Writ Petition No. 4066/2000

Kailash Chandra Jat

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 12-02-2015

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2015) 02 RAJ CK 0055

Hon'ble Judges : Anupinder Singh Grewal, J.

Bench : Single Bench

Advocate : K.K. Shah, for the Appellant; D.P. Dhaka, Advocates for the Respondent

Final Decision : Allowed

Judgement

Anupinder Singh Grewal, J.—The petitioner through the instant writ petition has sought quashing of orders dated 07.05.1993 (Annexure-4), 27.03.1997 (Annexure-7), 09.11.1999 (Annexure-9) and 06.08.2010 (Annexure-12), whereby his representations against his supercession were rejected. He has further sought that he be promoted with effect from 13.02.1993 and his seniority be restored above respondent No. 4.

2. The petitioner joined the Border Security Force as Assistant Commandant on 05.10.1987. An Assistant Commandant has to complete six years of service to be eligible for promotion to the post of Deputy Commandant. A special DPC was conducted on 24.11.1992, wherein the criteria of six years of service was relaxed. The petitioner was not found eligible in this DPC owing to which promotion was accorded to others including respondent No. 4. The petitioner represented against his supercession on 15.03.1993, which was rejected vide order dated 07.05.1993 (Annexure-4). The next DPC was held on 17.11.1993 wherein the petitioner was not considered as he had not completed six years of service and as there was no relaxation of this criteria. Subsequently, the petitioner was promoted as Deputy Commandant on 16.06.1995 as per the DPC

conducted on 22.03.1995. The petitioner filed a representation on 30.01.1997 for restoring his seniority, which was rejected vide order dated 27.03.1997 (Annexure-7). The petitioner has further stated that he came to know in the year 1999 that he had been superceded due to ACR of the year 1991-92, which was recorded as "average". He filed his representation on 07.09.1999 stating therein that during the year 1991-92 he had served under three different Commanders but only one of them namely Shri M.S. Yadav, recorded the ACR for the entire year. This representation was rejected vide order dated 09.11.1999 (Annexure-9).

3. The petitioner thereafter preferred the instant writ petition in the year 2000. During the pendency of the petition, the petitioner was promoted as Commandant on 22.06.2000. The petitioner again submitted his representation on 27.11.2009 for restoration of his seniority, which was rejected on 06.08.2010 (Annexure-12). The petitioner thereafter amended the instant petition, to impugn the orders passed during pendency of the writ petition. The amendment was allowed vide order of this Court dated 07.05.2011.

4. Learned counsel for the petitioner has contended that he had worked under three officers during the year 1991-92 and hence, Shri M.S. Yadav, under whom he had worked only during the period 9th September, 1991 to 25th December, 1991, was alone not competent to record the ACR for the entire year. He has referred to the ACR's Procedure and Instructions 1991, issued by the Directorate General, Border Security Force, in support of this submission. He has further submitted that it was only in the year 1999 when he was posted at BSF headquarters that he came to know that the reason for his supercession in the special DPC held on 24.11.1992 was the "average" ACR for the year 1991-92 although this ACR has not been communicated to him till date. He had promptly filed a representation on 07.09.1999, which was rejected vide order dated 09.11.1999 (Annexure-9). He thereafter filed the instant writ petition.

5. Learned counsel for the petitioner also submitted that the ACR of the year 1991-92 although "average" in nomenclature had an adverse effect of denying him promotion as the bench-mark for promotion is "good" and hence, it should have been communicated to him. He has placed reliance on the judgment of the Hon'ble Supreme Court of India in Sukhdev Singh Vs. Union of India (UOI) and Others, and Dev Dutt Vs. Union of India (UOI) and Others, to contend that the ACR should have been communicated to him.

6. On the other hand, the learned counsel for the respondents stated that the representations of the petitioner were duly considered and rejected as they were without any merit. He further submitted that the petitioner himself had filled the ACR form for the year 1991-92 during the tenure of Shri M.S. Yadav. It is joint responsibility of the officer as well as initiating officer to fill the ACR during the relevant period. He also submitted that the petition is barred by limitation as it has been filed in the year 2000, while promotion has been sought with effect from 1992. Reliance has been placed upon the judgment of the Hon'ble Supreme Court of India in the case of P.S. Sadasivaswamy Vs. State of Tamil Nadu, . He

further contended that the scope for judicial review in service matters is extremely limited and cited the judgment of the Hon''ble Supreme Court in the case of State Bank of India and Others Vs. Ramesh Dinkar Punde, .

7. I have considered the submissions made by learned counsel for both the parties and perused the record.

8. The contention of the learned counsel for the respondents that the petition is barred by limitation is without any substance. The petitioner had been superceded vide DPC conducted on 24.11.1992 and he had promptly submitted his representation on 15.03.1993. He had also subsequently continued furnishing his representations when even though he had been promoted his erstwhile juniors continued to be senior to him. It is not disputed by the respondents that the petitioner learnt only in the year 1999, that he had been superceded due to "average" ACR in the year 1991-92. He thereafter filed his representation on 07.09.1999, on the ground that the aforementioned ACR had been recorded by only one officer although there were two others who had supervised his work during the relevant year. This representation was rejected by the authorities on 09.11.1999. He filed the instant petition in 2000. During the pendency of the petition, the petitioner was promoted and thereafter, he had also filed representation on 27.11.2009, for protecting his seniority and seeking promotion as Deputy Commandant from 1992 which was rejected on 06.08.2010.

9. Therefore, it is not a case that the petitioner had not taken any steps for raising his grievances before the authorities concerned. The judgment of the Hon''ble Supreme Court in P.S. Sadasivaswamy v. State of Tamil Nadu is clearly distinguishable on facts as in that case, the writ petition was filed in the year 1971, challenging promotion granted to another officer in 1957 on the basis of relaxation. In that factual backdrop, it was held that a person aggrieved by an order promoting his junior should file a writ petition within six months or at the most a year of such promotion. In the instant case, the petitioner has not challenged promotion given to his junior but he has claimed that the ACR of the year 1991-92 should not be taken into account as it cannot form the basis to deny him promotion. The petitioner came to know only in the year 1999, that he had been superceded due to the "average" ACR for the year 1991-92. This ACR has not been communicated to the petitioner.

10. The respondents have stated that being an "average" ACR there was no downgradation and hence it was not required to be communicated to the petitioner. The authority has to record reasons for downgrading in the personal file of the officer and the change is to be communicated to the officer in the form of advice only if there is downgradation in the ACR.

11. However, the instant ACR cannot in any manner be termed to be merely or innocuously "average" and not adverse in the nature. This ACR although "average" in nomenclature is, in fact, adverse inasmuch as the bench-mark for promotion is "good". It has had an adverse affect on the career of the petitioner

by denying him promotion in the DPC held in the year 1992 as the rest of his service record is stated to be "good" or "very good". Only if this ACR had been communicated to the petitioner could he have made a representation for its upgradation to "good".

12. The Hon^{ble} Supreme Court had taken different views regarding the communication of the ACRs. This aspect was referred to a larger bench and it has now been settled by the judgment of the Hon^{ble} Supreme Court in the case of Sukhdev Singh Vs. Union of India (UOI) and Others, wherein it has been held that every entry in the ACR of public servant must be communicated. The relevant observations are reproduced hereunder:--

"3. Subsequent to the above two decisions, in the case of Dev Dutt v. Union of India and others, this Court had an occasion to consider the question about the communication of the entry in the ACR of a public servant (other than military service). A two Judge Bench on elaborate and detailed consideration of the matter and also after taking into consideration the decision of this Court in U.P. Jal Nigam and principles of natural justice expounded by this Court from time to time particularly in A.K. Praipak v. Union of India; Maneka Gandhi v. Union of India; Union of India v. Tulsi Ram Patel; Canara Bank v. V.K. Awasthy and State of Maharashtra v. Public Concern for Governance Trust concluded that every entry in the ACR of a public service must be communicated to him within a reasonable period whether it is poor, fair, average, good or very good entry. This is what this Court in paragraphs 17 and 18 of the report in Dev Dutt at page 733:

In our opinion, every entry in the A.C.R. of a public servant must be communicated to him within a reasonable period, whether it is a poor, fair, average, good or very good entry. This is because non-communication of such an entry may adversely affect the employee in two ways : (1) Had the entry been communicated to him he would know about the assessment of his work and conduct by his superiors, which would enable him to improve his work in future (2) He would have an opportunity of making a representation against the entry if he feels it is unjustified, and pray for its upgradation. Hence non-communication of an entry is arbitrary, and it has been held by the Constitution Bench decision of this Court in Maneka Gandhi v. Union of India (supra) that arbitrariness violates Article 14 of the Constitution.

Thus it is not only when there is a benchmark but in all cases that an entry (whether it is poor, fair, average, good or very good) must be communicated to a public servant, otherwise there is violation of the principle of fairness, which is the soul of natural justice. Even an outstanding entry should be communicated since that would boost the morale of the employee and make him work harder.

4. Then in paragraph 22 at page 734 of the report, this Court made the following weighty observations:

It may be mentioned that communication of entries and giving opportunity to represent against them is particularly important on higher posts which are in a

paramedical structure where often the principle of elimination is followed in selection for promotion, and even a single entry can destroy the career of an officer which has otherwise been outstanding throughout. This often results in grave injustice and heart-burning, and may shatter the morale of many good officers who are superseded due to this arbitrariness, while officers of inferior merit may be promoted. 5. In paragraphs 37 and 41 of the report, this Court then observed as follows:

We further hold that when the entry is communicated to him the public servant should have a right to make a representation against the entry to the concerned authority, and the concerned authority must decide the representation in a fair manner and within a reasonable period. We also hold that the representation must be decided by an authority higher than the one who gave the entry, otherwise the likelihood is that the representation will be summarily rejected without adequate consideration as it would be an appeal from Caesar to Caesar. All this would be conducive to fairness and transparency in public administration, and would result in fairness to public servants. The State must be a model employer, and must act fairly towards its employees. Only then would good governance be possible.

In our opinion, non-communication of entries in the Annual Confidential Report of a public servant, whether he is in civil, judicial, police or any other service (other than the military), certainly has civil consequences because it may affect his chances for promotion or get other benefits (as already discussed above). Hence, such non-communication would be arbitrary, and as such violative of Article 14 of the Constitution.

6. We are in complete agreement with the view in Dev Dutt particularly paragraphs 17, 18, 22, 37 and 41 as quoted above. We approve the same.

7. A three Judge Bench of this Court in Abhijit Ghosh Dastidar v. Union of India and others followed Dev Dutt. In paragraph 8 of the Report, this Court with reference to the case under consideration held as under:

Coming to the second aspect, that though the benchmark every good is required for being considered for promotion admittedly the entry of good was not communicated to the appellant. The entry of "good" should have been communicated to him as he was having every good in the previous year. In those circumstances, in our opinion, non-communication of entries in the ACR of a public servant whether he is in civil, judicial, police or any other service (other than the armed forces), it has civil consequences because it may affect his chances for promotion or get other benefits. Hence, such noncommunication would be arbitrary and as such violative of Article 14 of the Constitution. The same view has been reiterated in the above referred decision relied on by the appellant. Therefore, the entries good if at all granted to the appellant, the same should not have been taken into consideration for being considered for promotion to the higher grade. The respondent has no case that the appellant had ever

been informed of the nature of the grading given to him.

8. In our opinion, the view taken in Dev Dutt that every entry in ACR of a public servant must be communicated to him/her within a reasonable period is legally sound and helps in achieving threefold objectives. First, the communication of every entry in the ACR to a public servant helps him/her to work harder and achieve more that helps him in improving his work and give better results. Second and equally important, on being made aware of the entry in the ACR, the public servant may feel dissatisfied with the same. Communication of the entry enables him/her to make representation for upgradation of the remarks entered in the ACR. Third, communication of every entry in the ACR brings transparency in recording the remarks relating to a public servant and the system becomes more conforming to the principles of natural justice. We, accordingly, hold that every entry in ACR poor, fair, average, good or very good must be communicated to him/her within a reasonable period.

9. The decisions of this Court in Satya Narain Shukla v. Union of India and others and K.M. Mishra v. Central Bank of India and others and the other decisions of this Court taking a contrary view are declared to be not laying down a good law."

13. It is, thus, patent that the non-communication of the "average" ACR of the petitioner during the year 1991-92 has caused grave injustice to him. This sole ACR is the very basis for denying promotion to the petitioner in 1992.

14. There is no denying the fact that scope for judicial review in service matters is quite limited. The learned counsel for the respondents has relied upon the judgment of the Hon'ble Supreme Court in the case of State Bank of India and Others Vs. Ramesh Dinkar Punde, . However, this judgment is also clearly distinguishable as it pertains to disciplinary proceedings, which were set aside by the High Court although there was clinching evidence against the respondent therein who being a Bank Manager had got overdrafts sanctioned to defaulter in violation of the prescribed norms.

15. Judicial review in service matters is permissible to correct errors, which have resulted in violation of principles of natural justice or manifest miscarriage of justice. The Court cannot shut its eyes if a case of grave miscarriage of justice is made out and an officer has been unfairly treated jeopardizing his career. The record has been produced which substantiates the aforementioned averment of the petitioner that during the relevant year 1991-92, he had served under three officers and only one officer whom he had served for only 90 days recorded his ACR.

16. It is apt to examine the instructions of Border Security Force ACRs Procedure and Instructions 1991. The relevant paras are reproduced hereunder:--

"12. As and when the Initiating/Reporting Officer is transferred after seeing the work of his subordinates for a minimum period of 90 days or the officer to be reported upon is transferred after having served under a particular Initiating/

Reporting Officer for a minimum period of 90 days, the part Confidential Report will be initiated by the Initiating/Reporting Officer. It should be written at the time of transfer and it must be ensured by the Reviewing Officer, that, the Reporting Officer leaves on transfer after initiating the part Confidential Reports. The officer who is to write a report should ensure, that, the officer whose report is to be written is relieved only after his part Confidential Report has been initiated. As a result of this ruling, there may be more than one part Confidential Report in addition to the Annual Confidential Report in respect of a member of the Force. Such reports should be written at the time of the transfer or immediately thereafter and not deferred till the end of the year."

"23. The officers writing the Confidential Reports should carefully observe the work and conduct of those under their control and provide required training and guidance wherever necessary. The annual confidential report should be based on the result of such observations."

"26. The report should neither contain any assessment pertaining to a period prior or subsequent to the reporting period, nor should the assessment be based on a single or isolated instance. If the Initiating/Reporting Officer has insufficient personal knowledge about an officer, he should not hesitate to say so and should not endorse any part of the report. It is the responsibility of the Initiating/Reporting Officer to counsel and guide the officer as well as to inform him of his shortcomings, when noticed, throughout the reporting period. This obligation of duty should not be deferred to the time of initiation of Annual Confidential Report, so that adverse remarks, if any, do not come as a surprise to the officer reported upon. Initiating/Reporting Officer is responsible for any delay in initiation of ACRs."

"29. In case an ACR/PCR cannot be initiated on an officer, due to any reason, the Initiating/Reporting officer will be responsible to forward Non-initiation Certificate, in the proforma, given below, to the Reviewing Officer duly filled in for onward submission to final accepting authority."

17. A conjoint reading of these instructions indicates that it is the responsibility of the Initiating Officer as well as the Reporting Officer to initiate the Part Confidential Report as well as the Annual Confidential Report. It is also the responsibility the Initiating and reporting officers to point out shortcoming of the officer before recording the ACR as he should not be taken by surprise later when the ACR is recorded.

18. The learned counsel for the respondents has relied upon O.M. No. 12/2/84-PP dated 17th December 1986 issued by the Department of Personnel and Training, wherein it is mentioned that the performance appraisal is meant to be a joint exercise between a Government Servant reported upon and the Reporting Officer. Para 2.2 of the O.M. is reproduced hereunder:--

"The Reporting Officer, at the beginning of the year has to set quantitative/Physical targets in consultation with each of the Government servants, whose

reports he is required to write. Performance appraisal is meant to be a joint exercise between the Government servant reported upon and the Reporting Officer. While fixing the target priority should be assigned item-wise taking into consideration the nature and the area of the work. The APAR is initiated by the Government servant to be reported upon himself, who gives a brief description of his duties, specifies the targets set for him wherever applicable, achievements against each targets, the shortfalls, if any, constraints encountered and areas where the achievements have been greater." 19. The instructions of the BSF Directorate cannot be brushed aside as they are meant for the officers of the Border Security Force. Even assuming that there is lapse on the part of the petitioner for not submitting his Part Confidential Report to the other officers, who had supervised his work in the year 1991-92, he alone could not be penalized for it. The Initiating/Reporting Officers cannot be absolved of their responsibility.

20. Upon perusal of the record, which has been furnished by the respondents during the course of hearing, it is evident that the case of the petitioner has been dealt with in an unreasonable manner. The record does not indicate that the petitioner was informed about any shortcoming in his work and conduct in this period. In the grading system applicable to BSF officers marks in the range of 50-60 are graded as "average", while marks within 61-75 are graded as "good". In the petitioner's ACR for the year 1991-92, 59 marks have been awarded by the Initiating Officer while 60 marks have been given by the Reporting Officer. He has fallen short by only 1 mark as 61 marks would be graded as "good" which is bench-mark for promotion. The petitioner has been awarded only 2 out of 5 points in physical fitness and stamina although record indicates that the petitioner was selected as best shot and participated in shooting competition as part of Kashmir Frontier team.

21. It is also noteworthy that the petitioner had been posted in Jammu and Kashmir in the year 1991-92 and overall command of his unit was under the Army. Major General, who is the Divisional Commander, has in fact recorded in his aforementioned ACR in the year 1991-92 that his performance has been highly satisfactory and he has been recommended for promotion. The petitioner has also been awarded several commendation certificates and in fact under his supervision a special Naka was laid, which resulted in killing of two militants and seizure of huge quantity of arms, ammunition and explosives. The Initiating Officer has remarked that he should get more experience of field and high latitude eventhough where he is posted is not in the hand of the officer reported upon. Therefore, these are a few illustrations which would certainly require consideration by the competent authority.

22. By not communicating the ACR, the petitioner has been denied the opportunity to know what is against him and to plead his case including that for upgradation of the ACR. The officers, who have served in Jammu and Kashmir to safe-guard the national security deserve to be treated in a fair manner otherwise

there would be heart burning and their morale would be shattered. This is least that is expected from the higher authorities.

23. A bare perusal of the impugned orders reveals that the orders dated 07.05.1993 (Annexure-4) and dated 27.03.1997 (Annexure-7), are non-speaking and do not contain any reason whatsoever. The order dated 06.08.2010 (Annexure-12) only states that as the petitioner himself did not submit his PCRs (Part Confidential Reports) for the other periods in the year 1991-92, Mr. M.S. Yadav, who had supervised his work for more than 90 days initiated his ACR for the year 1991-92. The impugned orders deserve to be set aside as the non-communication of the ACR to the petitioner has denied him opportunity to present his case. Only when the officer learns what is against him can he effectively plead his case.

24. It is stated in the reply that the representation of the petitioner dated 01.02.2011 is under examination of the Ministry of Home Affairs as it has been submitted to the Secretary Ministry of Home Affairs. The learned counsel for the respondents submitted that the authorities are awaiting the outcome of the instant petition before taking a final decision on the representation.

25. Therefore, it would be in consonance with the mandate of the Hon"ble Supreme Court in the case of Sukhdev Singh v. Union of India and Ors that the petitioner be communicated the ACR of the year 1991-92 to enable him to file representation. As I have already noticed there are several aspects which require serious consideration by the competent authority.

26. In view of the above, the petition is allowed and the impugned orders are set aside. The ACR of the petitioner for the year 1991-92 shall be communicated to him and he will be at liberty to file representation thereagainst which shall be decided in accordance with law. The petitioner shall also be considered for promotion from the date his juniors were promoted.