

(1999) 06 MP CK 0019
In the Madhya Pradesh High Court
Case No : L.P.A. No. 50 of 1997

Madan Pal Singh	Vs	APPELLANT
Union of India and others		RESPONDENT

Date of Decision : 29-06-1999

Acts Referred:

Citation : (2000) 2 MPLJ 326

Hon'ble Judges : A.K. Mathur, C.J; S.K. Kulshrestha, J

Bench : Division Bench

Advocate : K.P. Singh, for the Appellant; Indira Nair, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Mathur, C.J.

This L.P.A. is directed against the order passed by the learned Single Judge in W.P. No. 4969/1996, dated 5-12-1996, whereby the learned Single Judge has dismissed the writ petition and held that the statutory complaint with regard to supersession of the appellant was rejected on 3-1-1996 and as such the entries made in the A.C. Rs. for 1991- 1992 cannot be examined in the writ petition in 1996 while questioning supersession at the belated stage. Aggrieved by this order, the present L.P.A. has been filed by the appellant petitioner.

Brief facts necessary for disposal of this appeal are that the appellant petitioner was enrolled in the Corps Military service on 7-8-1994 and he earned all his promotion upto the rank of Havaldar. He has given details about his postings from time to time at various places. It is submitted that he qualified in the Non-Commissioned Officers Instructor's Course at C.M.P. Centre, Bangalore and was awarded "BY" Grading which is above average. It is alleged that he also qualified in the Platoon Commander's Course held from 30-8-1992 to 17-10-1992. It is alleged that from 1974 till 13-6-1994, he has been awarded above average except for the assessment in his A.C.R. for the year 1991-1992. It is alleged that the petitioner was posted to 4 "Indep" Armoured Brigade Provost Unit in August,

1991. At that time respondent No. 3 was his Commanding Officer. It is alleged that petitioner performed the duties of Coy Havaldar Major for about 2 months, to the entire satisfaction of his superior officers. It is alleged that petitioner was due for promotion as Naib Subedar from 1-3-1994. It is alleged that as per para 2 of Army Order 114/1997 which deals with the initiation of A.C.R. of Non-Commissioned Officers, the N.C.Os. should have above average reports. It is also pointed out that as per the circular of the Army dated 18-12-1985, promotion to the post of Naib Subedar is made on the basis of 3 out of 5 year's reports which should be above average. No report should be lower than average in the last three years and the officer should be recommended for promotion in the last three year's reports. It is alleged that Promotion Board of the petitioner held its meeting in 1994 and the petitioner was not informed about his supersession. It is alleged that when he came to know that the person junior to him was promoted, he submitted a statutory complaint on 13-6-1994 against his A.C.Rs. for 1991-1992 and also against his supersession. Copy of the same is filed as Annexure-P-4. He also placed on record the remarks of Col. Ram Singh who was the Commanding Officer of the petitioner. It is alleged that the statutory complaint was rejected by respondent No. 1 on 3-1-1996 (Annexure P-7). It is alleged that no performance counselling/adverse remarks were communicated to the petitioner as required by the Army Circular from time to time. It is also pointed out that assessment of Initiating and Reviewing Officer for the year 1991-1992 operated against the interests of the petitioner and respondent No. 3 and R.O. should have given performance counselling to the petitioner and they should have communicated the adverse remarks to him. Therefore, petitioner has challenged those remarks also and also prayed that his supersession be set aside.

The learned Single Judge dismissed the petition holding that the representation with regard to adverse remarks for 1991-1992 at this distance of time is belated and there is no illegality in his supersession and dismissed the petition in limine. Aggrieved against this order, the appellant petitioner has filed this L.P.A.

Reply has been filed by the respondents. In their reply, the respondents have pointed out that the case of the petitioner for promotion to the post of Subedar Major was considered on 26-3-1993, 17/18-3-1994 and 21-9-1995 and he was not found fit by the promotion Committee on the basis of the reports. The respondents have given the Gradings of the Petitioner right from 1985 to 1996 as under:

Year

Gradings

(a) 1985

3/R (High average/Recommended)

(b) 1986

2/R (Average/Recommended)

(c) 1987

2/R(Average/Recommended)

(d) 1988

3/R (High average/Recommended)

(e) 1989

4/R (Above Average/Recommended)

(f) 1990

4/R (Above Average/Recommended)

(g) 1991

2/R (Average/Recommended)

(h) 1992

2/NR (Average/Not Recommended)

(l) 1996

2/R (Average/Recommended)

(i) 1993

4/R (Above Average/Recommended)

(j) 1994

4/R (Above Average/Recommended)

(k) 1995

4/R (Above Average/Recommended)

For the year 1991, the appellant petitioner was rated as "Average/Recommended". For the year 1992, he was graded as "Average/Not Recommended". As per criteria obtaining in 1993, the petitioner appellant was considered and found not suitable. The grievance of the petitioner was that this adverse remark of 1992 was not communicated to him. Learned Counsel for the petitioner appellant has taken us through the Circular of the Army, and especially invited our attention to the memo issued by the Major General (Annexure P-6), dated 27-3-1992 in which it was emphasised by the Dy. Adjutant General that while giving the remarks, the Authority should keep in view the proper instructions which were issued and they should carefully demonstrate his performance. Careful scrutiny of such ACRs has revealed that the marks awarded for individual qualities, demonstrated performance, general write up indicating the weak/adverse remarks and outstanding reports and finally the over all

grading and recommendation/non-recommendation for promotion do not match each other and are found to be conflicting/contradictory. It is also pointed out that in the event of unsatisfactory performance and when the individuals are found to be deficient or lacking any of the good qualities or their performance is adjusted "below average", it is essential that periodical warnings are administered to them (in writing) and held on record before reflecting in adverse remarks/weak points in their Annual Confidential Reports.

It has been pointed out that in the year 1991-1992, the appellant petitioner was working under respondent No. 3. In 1992, he gave the remark "not recommended". Against this remark, and his supersession the petitioner appellant filed a statutory complaint and the matter was examined at the highest level, and his complaint was rejected. Therefore, the original remark which was given, remained intact. It is true that when adverse remarks are not communicated and they are acted upon then it does cause prejudice and breach of principle of natural justice. There is no two opinion that the remark "not recommended" was an adverse remark and it ought to have been communicated to the petitioner appellant by the Authorities. The criteria which were obtaining at that time in the letter dated 18-12-1985 contemplated that three out of 5 reports should be above average, no report should be lower than average in the last three years and the officer should be recommended in the last three reports. Therefore, it is apparent that "not recommended" has an adverse effect in promotion of an incumbent. Had it not affected the career of incumbent then it would not have mattered. But if it does affect the career of incumbent then it should be communicated.

In the present case, it is true that in the year 1992, A.C.R. of the appellant he was given "average", and he was not recommended for promotion which has materially affected his promotion. We would have interefered in the matter on account of breach of principles of natural justice, but for the fact that he had come to know the remarks in his A.C.R. for 1992 and made representation against it in his statutory complaint. He has especially mentioned that Major Sisodia had given the adverse remarks in 1992 A.C.R. and he had fallen a victim of his displeasure. This grievance having been examined at the highest level and the statutory complaint having been rejected by the Authorities, the adverse remarks remained intact. Therefore, after going through the record, it appears that the adverse remarks were not communicated to the petitioner, but he knew the contents of the remarks and represented in the statutory complaint by making a grievance about this remark, which was rejected. In this connection our attention was invited to the case of Major General I.P.S. Dewan Vs. Union of India (UOI) and Others, , wherein it is observed as under:--

"The aforesaid adverse remarks were made by the highest functionary in the Army hierarchy, viz., the Chief of the Army Staff. The remarks were based not upon mere observation but upon the report of a Court of Enquiry which was appointed to go into the circumstances in which the cases against Nanda were

mishandled. The Court of Enquiry held an elaborate enquiry wherein statements of the Officers concerned including the appellant were also recorded. The appellant knew fully well what was the Court of Enquiry about. It may be that the appellant was not formally charged and no regular enquiry as such was held but that was not necessary for making adverse remarks. Indeed adverse remarks, as is well known, can be made by the appropriate superior officer on the basis of mere assessment of the performance of the Officer and no enquiry or prior opportunity to represent need be provided before making such remarks unless, of course, the Rules so provide. The remedy available to the officer in such a case is to make a representation against such remarks to the appropriate authority or to adopt such other remedies as are available to him in law.

We are inclined to agree with the Learned Counsel for the respondents that the remarks complained of cannot be understood or interpreted as amounting to expression of "severe displeasure" within the meaning of the memorandum dated 5-1-1989 and hence it was not necessary to follow the procedure prescribed by it. They purport to be and are adverse remarks; there is no warrant for construing them as expression of "severe displeasure". Merely because the language used is strong, the adverse remarks do not cease to be adverse remarks. Be that as it may, it cannot be said that the principle of natural justice, viz., *audi alteram partem*, has been violated in this case, inasmuch as the appellant could, and did in fact, submit a statutory complaint against the remarks to the Central Government.

We are also satisfied on a perusal of the relevant record that the adverse remarks made by the Chief of the Army Staff against the appellant are based upon and consistent with the report of the Court of Enquiry regarding the responsibility of and the role played by the appellant in processing the cases against Nanda".

Before we close, it may be emphasised that it is the cardinal principle of law in service jurisprudence that before a man is considered for promotion, adverse material, including A.C.Rs. should be communicated to the incumbent so that he can make a representation and clarify the position. In the event of non-communication of the adverse remarks, consideration of the officer on the basis of adverse remarks would vitiate the whole selection process qua him. However in the present case appellant's representation against his adverse A.C.R. was rejected. Therefore, his adverse remarks remained intact. As such his consideration and supersession is not vitiated.

Hence there is no merit in this appeal and the same is dismissed.