
(2002) 09 DEL CK 0261
In the Delhi High Court
Case No : C.W.P. No. 3404 of 2000

Nb. Ris. Balwan Singh

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 25-09-2002

Acts Referred:

Constitution of India, 1950 — Article 16, 33

Citation : (2002) 09 DEL CK 0261

Hon'ble Judges : S.B. Sinha, C.J.; A.K. Sikri, J

Bench : Division Bench

Advocate : C.P. Singh, for the Appellant; Sanjay Jain, for the Respondent

Judgement

S.B. Sinha, C.J.

The petitioner in this writ petition has inter alias prayed for issuance of an appropriate writ, order or direction directing the respondents to set aside the endorsement made by the Reviewing Officer (in short, "RO") in the Annual Confidential Report (in short, "ACR") of the year 1996 and by both Initiating Officer (in short, "IO") and RO in the ACR of the year 1998 and to direct them to promote him to the rank of Risaldar as per his original seniority.

2. The petitioner entered the Army Service in the year 1974. He attended Junior Leaders Course in the year 1998 and also imparted instructions in the same Academy to the young Officers and Junior Commission Officers (JCOs). His promotion to the rank of Risaldar was due. Allegedly, he was superceded in the year 1999, as he was found ineligible. Therefore having regard to the criteria as regards good ACRs. The grading in the ACRs of the petitioner from 1994 to 2000 admittedly was in the following terms :-

Year IO (Initiating Officer) RO (Reviewing Officer) 1995 7 7 1996 7 5 1997 7 7
1998 5 4 1999 7 7 2000 7 7

From a perusal of the aforementioned grading, it appears that both for the years

1999 and 2000, he received "7" and "7" by IO and RO.

3. Mr. Singh, the learned counsel appearing on behalf of the petitioner, would contend that having regard to decision of the Apex Court in U.P. Jal Nigam and others Vs. Prabhat Chandra Jain and others, , it was incumbent upon the respondent to give the petitioner warning and/or counseling so as to improve his performance, but as the same has not been done, the impugned orders must be held to be bad in law. In this connection, our attention has been drawn to various circular letters operating in the field. The learned counsel would contend that only in one year, i.e., 1998 the petitioner was adjudged below the benchmark on this ground alone he was admittedly not promoted, despite his being senior to others.

It is not in dispute that the cases of those, whose ACRs were found below the benchmark, had not been promoted. The same had also not been communicated to the petitioner.

The learned counsel would contend that from various documents, it would appear that the competent authorities have recommended the case of the petitioner for promotion, but neither the same had been taken into consideration nor the petitioner had been granted any relief.

The learned counsel in support of his contention has relied upon Supreme Court Advocates-on-Record Association and another Vs. Union of India, ; Sedu Ram (Havildar) Vs. The Chief of Army Staff and Others, ; and A.S. Saharan (Brig.) Vs. Union of India and Others, .

According to the learned counsel, the services of the petitioner had also not been extended for extraneous considerations.

4. Mr. Jain, the learned counsel appearing on behalf of the respondents, on the other hand, would submit that the petitioner did not exercise his willingness for extension of his services and, Therefore, a Draft Part II Order was prepared, which, however, had not been implemented. Relying on or on the basis of decision of the Apex Court in Union of India and Others Vs. R.P. Yadav, , the learned counsel would submit that once he has exercised his option and the same being final, he cannot resile there from.

The learned counsel would not contend that the promotion policy is solely dependent on ACRs. For the said purpose, only the provisions of the Army Rules or Orders are required to be taken into consideration. If any remark is not adverse, the same is not required to be communicated.

The learned counsel would submit that the decision of the Apex Court in U.P. Jal Nigam's case (Supra) will have no application in the case of Army personnel as has been held by a Division Bench of this Court in Lt. Col. Krishan Chand v. Union of India and Ors. 1996 V AD (DELHI) 199.

5. The questions, which, thus, arise for consideration in this writ petition are :-

1) Whether having regard to decision of the Apex Court in U.P. Jal Nigam's case (Supra) before any down-grading in ACR of the petitioner was carried out, he was entitled to a warning and/or counseling?

(2) Whether in the facts and circumstances of the case, the petitioner had wrongly been denied the extension of service?

6. It appears that certain Army Orders have been issued on or about March, 1990, which are in the following terms :-

"23. Initiation of a CR may be delayed up to a maximum period of 60 days (29 Feb 01 Mar) beyond the due date in the following circumstances:-

(a) It is not possible to initiate normal or early report as above.

(b) JCO does not complete 90 days of physical service under the initiating officer thought the latter was posted on or before 02 Oct.

(c) Reviewing officer has assumed the appointment on or after 19 Oct.

24. In case a JCO does not complete minimum period of 90 days physical service under any initiating officer and whose early/delayed CR also cannot be initiated, the next superior officer under whom the JCO has rendered 90 days physical service during the reporting year, will initiate the report. In such a case, the officer initiating the CR becomes the initiating officer and the officer superior to him in the chain of command becomes the reviewing officer.

Dispensing with initiation of CRs.

25. When an early normal/delayed CR cannot be initiated as the JCO has not physically served under any officer for 90 days including delayed period, the initiation of Cr on such JCO may be dispensed with after getting approval of the OIC Records. A suitable note to this effect will be kept in the CR dossier of the concerned JCO by the Record Officer and the concerned unit informed."

However, it appears that certain administrative instructions had also been issued in relation thereto.

7. The petitioner after having been denied promotion made several representation. The Commandant in his recommendations of March, 2002 stated thus :-

"Recommendation of present RO IC-3598 IN COL NS BAWA COMDT 86 ARMD REGT

1. The JCO has put up a complaint against ACRs for the year 1996-1998.

2. On scrutiny of the JCO's ACRs for the period for which he has complaint, it is seen that this ACR for the year 1998 was an average one which restricts him to be promoted to the next rank. The important aspect of consideration to the complaint of the JCO is that an above average JCO is being written off for

promotion based on the average report which could be on account of subjectivity by the IO, specially when the IO has not even warned the indl. not cancelled him on his weaknesses. Details of all previous ACR gradings of the individual in the rank of Naib Resaldar are as under :-

Ser. No. Year ACR Grading Name of Unit

IO RO

(a) 1994 7 9 86 Armed Regt.

(b) 1995 7 7 86 Armed Regt.

(c) 1996 7 5 A & E Regt.

(d) 1997 7 7 A & E Regt.

(e) 1998 5 4 A & E Regt.

3. Having observed the functioning of the JCO for the past five months, I feel that the JCO is competent, motivated and professionally sound. This is also borne out by his course gradings and previous ACR gradings which have been mostly above average. His not being promoted would deprive the Regt. of a capable Resaldar and would not be in the interest of the Regt. or the service. I Therefore strongly recommended that his case be considered and redress granted by the competent authority."

8. Yet again the Officer-in-Charge Records, on a statutory complaint made by the petitioner, had made the following recommendations:-

"RECOMMENDATIONS OF OFFICER-IN- CHARGE RECORDS ON STATUTORY COMPLAINT SUBMITTED BY JC-236086Y NB RIS BALWAN SINGH OF 86 ARMOURED REGIMENT 1. JC-236086y Nb Ris Balwan Singh of 86 Armoured Regiment was posted on ERE to Armt and Eleces Regiment at Armoured Corps Centre and School on 04 May 95.

2. The details of ACRs earned by him while serving with ERIs unit are as under:

Year IO RO

1996 7 (R) Lt. Col. U. Malik 5 (R) Col. HS Dhaliwal

1997 7 (R) Lt. Col. U. Malik 7 (R) Col. HS Dhaliwal

1998 5(R) Lt. Col. DP Singh 4 (R) Col HS Dhaliwal

3. The complainant came up for promotion to the rank of Risaldar against a vacancy became available on 01 Jan 99 as per his seniority but could not be prompted since he was lacking ACR criteria. The ACR criteria for promotion to the rank of Risaldar is as under:

(a) Last three repots will be considered

(b) All three reports should not be less than "High Average"

(c) The individual should be recommended for promotion in all three reports.

4. While going through the ACR for the years 1997 and 1998, it is seen that the JCO was assessed "Above Average" in 1997 both by IO and RO, but in the ACR for the year 1998, the JCO has been assessed as "High Average" and "Average" by IO and RO respectively, which clearly shows that there was a drop in performance of the JCO during the year 1998 for which some counseling should have been given.

5. It is seen from the pen picture of the ACR of 1998 at page 7 that the JCO was never advised/counseled to maintain efficiency, in case of drop in performance. Therefore, Armoured Corps Records is of the opinion that the year 1998 lacks objectivity, hence recommended to be expunged.

6. His case for promotion be reviewed afresh to avoid miscarriage of justice."

9. Major Harinder Singh also in the month of March, 1999 made the following recommendation:-

"1. The JCO's complaint is against ACRs for the period 1996-1998 while he was serving in A&E Regt, ACC&S.

2. The service of the JCO in the sqn has been above average. He has been the mainstay of the sqn in professional as well as administrative matters and has set an example of motivation and inspiration to his comrades. His performance has been undoubtedly of a very high order. His not being promoted will deprive the unit of a capable Risaldar. It is strongly recommended that the case be considered and redress granted within the rules."

10. Recommendation has also been made by Lieutenant Colonel U. Malik (Retd.) on or about 09.03.2000, which is as follows:-

"NO JC - 23686 Y Nb. Ris. Balwan Singh of 86 AR was serving under me in TTSE from Dec. 95 to Apr. 97. His services in TTSE were above average. His work was outstanding. His supersession will deprive his unit of a capable Risaldar. It is strongly recommended that the JCO be granted redressal and promoted to the Rk. Of Risaldar."

11. It appears to be really strange that in the year 1998 IO gave him 5 marks, whereas the RO reviewed the said marks and awarded him only 4 marks, but no reason has been assigned therefore.

As noticed hereinbefore, it is evident that the high-average grading for the last three ACRs is a must for consideration for promotion because of his performance. It has also been seen that even in the years 1999 and 2000 he has been graded high average.

12. The representation by the petitioner had been rejected by a laconic order. It is not clear from the records as to whether even the recommendations of the

higher authorities had also been taken into consideration while passing the said orders or not.

13. Recording of ACRs play an important part in the service career of the employees. A great care and caution is required to be taken in relation thereto, as the career of a person can be made or marred by a causal approach of the IO or the RO. In this view of the matter, submission of Mr. Jain to the effect that the decision of the Apex Court in U.P. Jal Nigam's case (Supra) would not be relevant in the context of Army personnel cannot be accepted.

14. In U.P. Jal Nigam's case (Supra) , the Apex Court has clearly held:-

"We need to explain these observations of the High Court. The Nigam has rules, whereunder an adverse entry is required to be communicated to the employee concerned, but not downgrading of an entry. It has been urged on behalf of the Nigam that when the nature of the entry does not reflect any adverseness that is not required to be communicated. As we view it the extreme illustration given by the High Court may reflect an adverse element compulsorily communicable, but if the graded entry is of going a step down, like falling from "very good" to "good" that may not ordinarily be an adverse entry since both are a positive grading. All that is required by the authority recording confidentials in the situation is to record reasons for such downgrading on the personal file of the officer concerned, and inform him of the change in the form of an advice. If the variation warranted be not permissible, then the very purpose of writing annual confidential reports would be frustrated. Having achieved an optimum level the employee on his part may slacken in his work, relaxing secure by his one-time achievement. This would be an undesirable situation. All the same the sting of adverseness must, in all events, not be reflected in such variations, as otherwise they shall be communicated as such. It may be emphasized that even a positive confidential entry in a given case can perilously be adverse and to say that an adverse entry should always be qualitatively damaging may not be true. In the instant case we have seen the service record of the first respondent. No reason for the change is mentioned. The downgrading is reflected by comparison. His cannot sustain. Having explained in this manner the case of the first respondent and the system that should prevail in the Jal Nigam, we do not find any difficulty in accepting the ultimate result arrived at by the High Court."

15. This aspect of the matter has recently been considered by a Full Bench of this Court in CWP No. 350 of 2001 titled J.S. Garg v. Union of India and Ors. decided on 16.08.2002 wherein it was held :-

"The learned Tribunal, in our opinion, committed a serious misdirection in law in so far as it failed to pose unto itself a right question so as to enable it to arrive at a correct finding of fact with a view to give a correct answer. The question, which was posed before the learned Tribunal was not that whether the petitioner had been correctly rated by the DPC? The question, as noticed hereinbefore, which arose for consideration before the learned Tribunal as also before us was to

whether having regard to the decision of the Apex Court in U.P. Jal Nigam and Ors. (Supra) as also Rule 9 of The CPWD Manual the concerned respondents had acted illegally in not communicating his "fall in standard".

16. Yet again in Sedu Ram's case (Supra), a learned Single Judge of this Court inter alia observed:-

"7. It is well settled that uncommunicated "adverse remarks" cannot be the basis for considering the Government servant for the purpose of promotion. He should have been given an opportunity to explain and on the facts and circumstances of this case when there was no even a warning, the Commandant, the third respondent had acted for reasons best known to him in down grading the petitioner to "Average" and not communicating the same to the petitioner."

17. In State of U.P. v. Yamuna Shankar Misra and Anr. 1997 (2) SLJ 121, relying on its earlier decision in T. Ramegowda Vs. R. Krishnamurthy and others, , the Apex Court observed :-

"3. In T. Ramegowda Vs. R. Krishnamurthy and others, , this Court underlined the need to writ confidential reports objectively, fairly and dispassionately in a constructive manner either commenting/ downgrading the conduct, character, efficiency or integrity of the officer in that behalf. It is stated in para 11 that from the year 1973-74 the performance of the duty by the appellant therein was consistently as "satisfactory", "fair" except for the year 1987-88 in which year he dropped down suddenly as an average or below average teacher. In that behalf it was held that "when he was a responsible teacher and he had cordial relations with the student community, and was taking pains to impart lessons to the students, would it be believable that he avoids to take classes and drops down "if not watched"? When anterior to or subsequent to 1987-88 he was a man of ability and of integrity, the same whether would become below average only for the academic year 1987-88 without discernible reasons, it would speak volumes on the objectivity of assessment by the reporting officer i.e. the Principal. This conduct is much to be desired. This case would establish as a stark reality that writing confidential reports bears onerous responsibility on the reporting officer to eschew his subjectivity and personal prejudices or proclivity or predilections and to make objective assessment. It is needless to emphasize that the career prospects of a subordinate officer/employee largely depends upon the work and character assessment by the reporting officer. The latter should adopt fair, objective dispassionate and constructive commends/comments in estimating or assessing the character, ability, integrity and responsibility displayed by the officer/employee concerned during the relevant period for the above objectives if not strictly adhered to in making an honest assessment, the prospect and career of the subordinate officer being put to great jeopardy. The reporting officer is bound to lose his credibility in the eyes of his subordinate and fail to command respect and work from them. The constitutional and statutory safeguards given to the government employees largely became responsible to display callousness and disregard of the discharge of their duties and make it

impossible to the superior or controlling officers to extract legitimate work from them. The writing of the confidentials is contributing to make the subordinates work at least to some extent. Therefore, writing the confidential reports objectively and constructively and communication thereof at the earliest would pave way for amends by erring subordinate officer or to improve the efficiency in service. At the same time, the subordinate-employee/ officer should dedicate to do hard work and duty; assiduity in the discharge of the duty, honesty with integrity in performance thereof which alone would earn his usefulness in retention of his service. Both would contribute to improve excellence in service ..."

18. In view of the fore-going authoritative pronouncements, we are of the opinion that the learned counsel is not correct in contending that decision of the Apex Court in U.P. Jal Nigam's case (Supra) will have no application in relation to the Army personnel.

The Fundamental Right of the Army Personnel stands curtailed in terms of Article 33 of the Constitution of India but the same would be confined only to the provisions of the Army Act, 1950 and the Army Rules, 1954. Neither the provisions of the Army Act nor the Army Rules deal with the matter, which has been dealt with by the Apex Court in U.P. Jal Nigam's case (Supra) . A person's right to be considered for promotion in terms of Article 16 of the Constitution of India is a Fundamental Right. Such a right cannot be curtailed unless it is pointed out that there exists a law enacted by the Parliament of India in this behalf in terms of Article 33 of the Constitution of India.

19. We have noticed hereinbefore that the matters relating to recording of ACR(s) are governed by the provisions of the Army Orders and Instructions issued from time to time. IO and the RO, thus, were in a statutory obligation to follow the said directions and/or instructions. As indicated hereinbefore, even the Recommending Officer had reported that although the petitioner was entitled to a warning and/or counselling, the same has not been done. Had the petitioner been communicated the grant of lower grading by the I.O./R.O. for the year 1998, he could have made a statutory complaint at an appropriate time and in all probability the same could have been considered in proper perspective.

20. In Lt. Col. Krishan Chand's case (Supra) , whereupon Mr. Jain placed strong reliance, a Division Bench of this Court was dealing with a case where a writ petition was filed on speculative and subjective remarks of ACR wherein even the persons against whom a complaint had been made were not impleaded as parties. It was observed :-

"13. Considering the provisions of All India Services Act and All India Services (Confidential Rules) Rules, 1970 vis-a-vis the adverse remarks and communication thereof, the Supreme Court in State of Haryana Vs. P.C. Wadhwa, IPS, Inspector General of Police and Another, held that the whole object of making a communication of adverse remarks is to give to the officer concerned

an opportunity to improve his performance, conduct or character as the case may be. An adverse remarks should not be understood in the terms of punishments but really it should be taken as an advice to the officer concerned so that he can act in accordance with the advice and improve his service career.

14. In *U.P. Jal Nigam and others Vs. Prabhat Chandra Jain and others*, , it was held that if the graded entry is of going a step down, like falling from "very good" to "good" that may not ordinarily be an adverse entry. Since both are positive gradings. All that is required by the Authority recording confidentials in the situation is to record reasons for such down grading on the personal file of the officer concerned, and inform him of the change in the form of an advice. If the variation warranted be not permissible, the very purpose of writing annual confidential reports is frustrated."

Only as regards Special Army Order No. 3-7/89 relating to selection system or as regards communication of ACR, it was observed that no specific challenge was made having regard to the legality or validity thereof. The Court relied upon a decision of the Apex Court in *Lt. Col. K.D. Gupta v. Union of India and Ors.* AIR 1989 SC 1393, which was rendered in the fact situation obtaining therein. As therein the Court was not concerned with the case of apprehended prejudice, it did not go into the question having regard to the fact that there existed sufficient safeguards in the Army Rules. Furthermore, the ratio in a decision, as is well known, must be understood in the fact situation obtaining in the case.

21. In *Gurdial Singh Fijji Vs. State of Punjab and Others*, , it has been held:

"17. The principle is well-settled that in accordance with the rules of natural justice, an adverse report in a confidential roll cannot be acted upon to deny promotional opportunities unless it is communicated to the person concerned, so that he had an opportunity to improve his work and conduct or to explain the circumstances leading to the report. Such an opportunity is not an empty formality, its object, partially, being to enable the superior authorities to decide on a consideration of the Explanation offered by the person concerned, whether the adverse report is justified. Unfortunately, for one reason or another, not arising out of any fault on the part of the appellant, though the adverse report was communicated to him, the Government has not been able to consider his Explanation and decide whether the report was justified....."

In the said decision, it has also been held that one adverse/ lukewarm report cannot be said to have any significant bearing in the process of selection for promotion.

22. Yet recently in *Bishwanath Prasad Singh Vs. State of Bihar and Others*, , the law has been laid down in the following terms:-

"33. A number of decisions dealing with the object and purpose of writing confidential reports and care and caution to be adopted while making entries in the confidential records of Government officers have been referred to in the

cases of High Court of Judicature at Allahabad Through Registrar Vs. Sarnam Singh and Another, as also in the case of High Court of Punjab and Haryana Through R.G. Vs. Ishwar Chand Jain and Another, . We need not repeat the same. Suffice it to observe that the well-recognized and accepted practice of making annual entries in the confidential records of subordinate official by superiors has a public policy and purposive requirement. It is one of the recognized and time-tested modes of exercising administrative and disciplinary control by a superior authority over its subordinates. The very power to make such entries as have potential for shaping the future career of a subordinate officer casts an obligation on the High Courts to keep a watch and vigil over the performance of the members of subordinate judiciary. An assessment of quality and quantity of performance and progress of the judicial officers should be an ongoing process continued round the year and then to make a record in an objective manner of the impressions formulated by such assessment. An annual entry is not an instrument to be wielded like a teacher's cane or to be cracked like a whip. The High Court has to act and guide the subordinate officers like a guardian or elder in the judicial family. The entry in the confidential rolls should not be a reflection of personal whims, fancies or prejudices, likes or dislikes of a superior. The entry must reflect the result of an objective assessment coupled with an effort at guiding the judicial officers to secure an improvement in his performance where need be; to admonish him with the object of removing for future, the shortcoming found; and expressing and appreciation with an idea of toning up and maintaining the imitable qualities by affectionately patting on the back of meritorious and deserving. An entry consisting of a few words, or a sentence or two, is supposed to reflect the sum total of the impressions formulated by the inspecting Judge who had the opportunity of forming those impressions in his mind by having an opportunity of watching the judicial officer round the period under review. In the very nature of things, the process is complex and the formulation of impressions is a result of multiple factors simultaneously playing in the mind. The perceptions may differ. In the very nature of things there is a difficulty nearing an impossibility in subjecting the entries in confidential rolls to judicial review. Entries either way have serious implications on the service career. Hence the need for fairness, justness and objectivity in performing the inspections and making the entries in the confidential rolls.

23. In view of the aforementioned authoritative pronouncements, there cannot be any doubt that in terms of the said purported ACRs, the matter relating to the extension of services of the petitioner could not have been determined on the basis thereof. The respondents, Therefore, should consider the matter afresh in the light of the observations made hereinbefore and an appropriate order may be passed at an early date preferably within a period of four weeks from the date of communication of this order.

This writ petition is disposed of with the aforementioned directions. However, in the facts and circumstances of the case, there shall be no order as to costs.