
(2007) 08 GAU CK 0008
In the Gauhati High Court
Case No : W.A. No. 1 (SH) of 2006

Prakash Pandey

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 09-08-2007

Acts Referred:

Citation : (2008) GLT 226 Supp

Hon'ble Judges : T. Vaiphel, J;A.P. Subba, J

Bench : Division Bench

Advocate : B. Bhattacharjee and S. Chankija, for the Appellant; S.C. Shyam, for the Respondent

Final Decision : Dismissed

Judgement

A.P. Subba, J.—This writ appeal is directed against the common judgment and order dated. 31.10.2005, passed by the learned single Judge in WP (C) No. 38(SH)2002 and WP (C) No. 120(SH)2003 dismissing both the writ petitions.

2. The relevant facts of the case, briefly stated, are that the present writ Appellant joined Border Security Force (BSF) as Assistant Commandant on 2.1.1995. On completion of his initial training he was posted at 37 Bn BSF Srinagar (Nishat Bagh). When the unit was shifted to Shillong in August, 1997, the Appellant was deployed at BOP Lyngkhat, Dawki, in the East Khasi Hills District, Meghalaya, where he was made Company Commander on 19.1.98. On the next day of his being made Company Commander i.e. on 20.1.1998, one H. Baite a constable, No. 9009853 joined his Unit/Company on transfer from 55 Bn. BSF. The said constable was detailed for Sentry duty to keep watch on the Cipher Box and the Treasury Chest in the intervening night of 2nd and 3rd June 1998. However, the said constable instead of guarding Cipher Box and the Treasury chest made off with cash money amounting to Rs. 4,89,053/- (Rupees Four Lakhs Eighty Nine Thousand Fifty Three) only, one 9mm pistol along with 95 rounds of ammunition kept in a coy Kote by tempering the latch and bolt of the door. A Court of Inquiry instituted in connection with the said incident indicated

the Appellant on two counts namely that the Appellant had failed to detail double sentry at night and that he had failed to chain the Treasury Chest. The Court of Inquiry accordingly, recommended communication of displeasure of the appropriate authority and recovery of 5% of the total loss to the Government i.e. Rs. 4,89,053/- from his salary.

3. Pursuant to the Court of Inquiry Report a Record of Evidence (ROE) was ordered vide order dated Nil March 1999 and on completion of the same a show cause notice dated 21.8.2000 was issued calling upon the Appellant to show cause as to why DCs Displeasure should not be conveyed to him. The show cause by the Appellant in reply was turned down as being unsatisfactory and vide letter dated 26.01.2001, DG's Displeasure was communicated to him. An appeal preferred by the Appellant before the Home Secretary Government of India through proper channel also met with the same fate as the same was rejected as being devoid of merit. In the meantime before the DG's displeasure was conveyed a Departmental Promotion Committee (DPC) sat on 16.2.2001 to consider and recommend the case of promotion of eligible Assistant Commandants to the post of Deputy Commandants. However, the name of the Appellant did not find place in the list of recommendees as there was adverse remark in his ACR for the year 1997-98 and he was superseded by 38 officers junior to him. Similarly the next DPC which sat on 23.4.2002 also did not recommend the name of the Appellant as there was adverse remark in his ACR for the year 2001 -02 and as a result he was superseded by another batch of 75 members of officers junior to him. A representation addressed to DG BSF thereafter seeking justice failed to evoke any response. Two writ petitions - one challenging the penalty imposed on him namely, recovery of Rs. 24,792 from his salary and communication of DG's Displeasure and the other for quashing the adverse remarks in his ACR for the years 1996-97 and 2001-02 and DPC recommendation dated 16.2.2001, were both dismissed by common judgment and order dated 30.10.2005 passed by the learned single Judge in (1) WP (C) 120 (SH) 2003. It is against this order that the present writ appeal has been filed by the Appellant.

4. The contentions of the present Appellant before the learned single Judge, in short, was that he was not responsible for the unfortunate incident which occurred solely on account of the failure of the concerned authorities to warn him of the dubious nature and character of the constable H, Baite when he was posted to his Coy. According to the Appellant he would never have detailed the said constable on Sentry duty if he had any prior information of his antecedents. It was thus his contention that it was wrong on the part of COE to recommend recovery of the 5% of the total loss and communication of displeasure in so far as the same came in the way of promotional prospects of the Appellant. It was further contended that according to the standard laid down a Coy of the BSF should have a total strength of 137 personal but at the relevant time he had only 46 combatants with the responsibilities of 3 BOP's and as such he was left only with 5 personal for sentry duty to the Kote after allotting duties to all the

combatants and as such he had no way out. It was thus contended that his supersession by the batch of officers all junior to him on account of adverse entries made in his ACR's was not appropriate and according to law.

5. The contention of the respondent department before the learned single Judge, on the other hand, was that as per standing orders of the BSF at least two sentries were required to be detailed to guard the Kote where huge amount were kept at night. The Appellant who was at the relevant time a Commandant neither took care to brief the sentries regarding changing over of sentries nor did he adopt any system for checking of sentries either by patrolling or SOS by himself. Over and above, the Treasury Chest was also not chained. The Appellant neither detailed two sentries nor chained the Treasury Chest nor took care to see that the pistol was kept in the pistol box as per standing instructions and as such failed to ensure safety of the place. It was therefore contended that the Appellant was guilty of gross negligence and dereliction of duty resulting in huge loss to the Government. The Court of Inquiry (COI) instituted to look into the matter was therefore in accordance with the provisions under the BSF Rules. The penalty of recovery and communication of DG's Displeasure was imposed after giving due opportunity to the Appellant. The Appellant availed of full opportunity given to him to defend himself during the ROE proceedings. Since a prima facie case was found to have been made out on completion of the ROE a trial of the Appellant before the General Security Force Court was recommended against him. This recommendation was however reviewed by IG BSF, Shillong, taking into account the totality of the facts and circumstances of the case, age and service of the Petitioner and taking a lenient view DG's Displeasure was issued after giving him opportunity to show cause.

6. The contention of the respondents with regard to the supersession of the Appellant was that the Appellant was duly considered for promotion to the rank of Deputy Commandant by the DPC held on 16.2.2001 and on the basis of the confidential records of service of the Appellant the Appellant was found unfit resulting in non-recommendation of his name for promotion. Similarly, the case of the Appellant was duly considered again by the DPC held on 23.4.2002 but unfortunately this subsequent DPC also found the Appellant unfit due to adverse entry in his ACR for the year 2001-02. Hence, the Appellant was assessed as unfit by both the DPC's and accordingly officers both junior and senior to him were promoted on the basis of recommendation of the DPC's.

7. On perusal of the record and upon hearing the parties the learned single Judge was of the view that so far as the communication of DG's Displeasure is concerned, the respondent had duly followed the procedure giving full opportunity to the Appellant and as such no interference of the Court was called for in exercise of the power of judicial review of the action complained of. With regard to the adverse entry in the ACR for the year 1996-97 and 2001-02, the learned single Judge, on consideration of the materials on record, came to the conclusion that the adverse remarks pertaining to the year 1996-97 was

converted into advisory entry after giving due opportunity to the Appellant. Similarly, the adverse remarks in the ACR pertaining to the year 2001-02 were duly communicated to the Appellant and the representation submitted by the Appellant in this regard was rejected after consideration. However, specific note was taken of the fact that in spite of the adverse entry in the ACR of 1996-97 and ACR of 2001-02 the case of the Petitioner was duly considered by the DPC held on 16.2.2001 and 23.4.2002 but on consideration of the materials placed before the DPC both the DPCs found the Appellant unfit for being recommended for promotion to the post of Deputy Commandant. Hence the learned single Judge came to the conclusion that both the DPCs had duly considered the case of the Petitioner as per the well established procedure and no malafide/arbitrariness or perversity could be attributed to the DPCs proceedings. Hence, relying on the ratio laid down by the Apex Court in *Badrinath Vs. Government of Tamil Nadu and Others*, the learned single Judge dismissed the two writ petitions in the manner as already indicated above.

8. We have heard Mr. B. Bhattacharjee, the counsel for the Appellant and Mr. S.C. Shyam, the learned CGC on behalf of the respondents.

The specific point canvassed before us by Mr. B. Bhattacharjee, learned Counsel for the Appellant is that the entry of Displeasure in the ACR pertaining to the year 1996-97 not being adverse, the case of the Appellant for promotion ought not to have been rejected in the manner as was done in the present case. In support of this contention, the learned Counsel relied on a single line observation of the Apex Court occurring in paragraph 19 of the judgment rendered in *Union of India (UOI) and Another Vs. Major Bahadur Singh*, which is as follows:

The word "advisory" is not necessarily adverse.

9. There is no doubt that the above observation read in isolation leads one to believe that an "advisory" entry in the ACRs cannot be treated as adverse. However, the learned Counsel seems to have missed out the real import of the word expounded by the Hon"ble Apex Court in the observation occurring in the same paragraph as follows:

...A reading of the instructions clearly indicates that there are different stages: first is the counseling, second is the guidance and third is the consequences of the officer failing to show the desired improvement. Only when an officer fails to show the desired improvement the adverse/advisory remarks are included in his confidential report so that cognizance is taken of his weakness while planning his future placements....

(emphasis supplied)

10. The above observation makes it more than clear that the entry "advisory" cannot be considered in isolation and it must be viewed in the light of attending circumstances so as to appreciate its full implication. Thus construed, it cannot be said that the entry "advisory" counts for nothing. The following clarification

given by Ministry of Home Affairs, Government of India, in reply to the letter written by the BSF Headquarter, Shillong, vide letter dated 29th June 2007 brought to our notice by the learned CGC makes the point clear:

b) Whether adverse remark converted into advisory eventually can disqualify an officer for recommendation by the DPC for promotion.

Adverse remarks if converted to advisory will be studied by the DPC keeping in view the circumstances and lapses under which remarks were endorsed in ACR. DPC is not guided by anyone and having full discretion to devise their own method and procedure for objective assessment of the suitability of candidates.

A perusal of the above clarification makes it clear that the DPC is obliged to consider entry of advisory duly taking note of the circumstances under which such remark came to be entered in the ACR. Thus, as held by the learned single Judge no fault can be found with the approach adopted by the DPC held on 16.2.2000 while making the objective assessment of the suitability of the Appellant.

11. As regard the significance of the communication of Displeasure, the clarification given in the same letter is to the following effect:

a) Contemplated DG's displeasure can be a ground to grade a candidate to be unfit. Contemplated DG's displeasure cannot be only ground to grade a candidate to be Unfit. The DPC examine the charges of omission and commission based on findings of Court of enquiry, Show Cause Notice and reply, if any, alongwith gradings of ACR to make their own assessment.

12. In addition to the above, it is also advantageous to reproduce the instructions issued by the Ministry of Home Affairs, New Delhi, vide Circular dated Nil June 1989:

i) Displeasure of the DG should be awarded after obtaining the explanation of the officer, through a formal order. The order should be conveyed to the officer.

ii) The confidential report of the officer for the period during which the displeasure has been awarded should have a record of the fact of award of such displeasure has been recorded in the CR for prior in the normal period on of CR's by the DPC. It should be.

iii) If the displeasure falls within the period of consideration of CR's by the DPC, the facts and circumstances of the case leading in the award of displeasure should be placed before the DPC. The DPC should apply its mind to these facts and circumstance and take a view whether there has been any element of dishonesty. Pecuniary gain abuse of power or authority or moral turpitude if any of these demand is present, then, taking a serious view of the matter, the DPC should not consider the officer for promotion for a period of one or two years from the date of award of the displeasure, as if may consider appropriate. In case the displeasure has been awarded for routine or trivial infraction of the rules

and instructions, the DPC may take a more lenient view and include the officer in the panel of promotion.

iv) In a case where an officer who has been awarded displeasure during the period of consideration of CRs is either included in, or excluded from, the panel for promotion, the DPC must record a brief note as to why he has been so included/excluded.

The letter vide which the above instructions, were circulated clearly stipulated that "these displeasures may be strictly adhered to when cases of promotion of officers are considered by the DPC in future."

13. A plain reading of the above instructions make it clear that the Advisory and Displeasure notes communicated and entered in the ACR by following the appropriate procedure cannot be easily brushed aside while considering the eligibility of the members of the Force as being of no consequence. It is hardly necessary to observe that such entries must be considered in the light of the attending circumstances so as to arrive at a correct conclusion regarding overall suitability of the members of the Force who has been awarded such remarks. It is a well settled position in law that no one can claim promotion as a matter of right. The only right an employee can claim as per the law laid down by the Apex Court in *Sant Ram Sharma Vs. State of Rajasthan and Another*, is to be considered for promotion. It is also settled law that interference of the Court is called for only when the process of assessment is vitiated on the ground of bias, malafides or arbitrariness. Thus the court will not interfere where the DPC has proceeded in a fair, impartial and reasonable manner, by applying the same yardstick and norms to all candidates and there is no arbitrariness in the process of assessment. The Apex Court relying on its previous decisions rendered in (i) *State Bank of India and others Vs. Mohd. Mynuddin*, , (ii) *Union Public Service Commission v. Hiranyalal Dev* (1988) 2 SCC 242 and (iii) *Badrinath Vs. Government of Tamil Nadu and Others*, has laid down in the recent case of *Union of India v. A.K. Nanda, Asstt. Commdt, CRPF* decided on 18.5.2007 that the guidelines relating to DPC "give a certain amount of play in the joints to the DPC by providing that it need not be guided by the overall grading recorded in the confidential reports but may make its own assessment on the basis of entries in the CRs".

14. In the present case, the DG's displeasure was entered in the ACR of the relevant year after giving due opportunity to the Appellant. This goes to show that the respondents have duly adhered to the procedure established by law. As already observed above, the DPC need not confine itself to over all grading recorded in the confidential reports and can make its own assessment on the basis of the entries made in the CRs. It is pertinent to bear in mind that the case of the Appellant was duly considered by both the DPCs inspite of the adverse entries and the advisory in the ACRs. The proceedings of the DPC which was called for was placed before us for our perusal. On perusal of the same we were satisfied that the case of the Petitioner was duly considered along with all the

eligible candidates and it was on such an overall assessment of the materials place before them that the two DPCs had come to the conclusion that the Appellant was unfit for promotion and accordingly his name was not included in the list of the recommendees.

15. In view of the foregoing, we find ourselves in agreement with the conclusion of the learned single Judge that arbitrariness, malafide or perversity cannot be attributed to the DPC proceedings in the present case. It thus follows that the contention raised by the learned Counsel for the Appellant is devoid of merit and no case is made out for interference of this Court in the matter.

16. In the result, the impugned judgment and order of the single Judge is hereby confirmed and the writ appeal is dismissed.

17. In the circumstances of the case there shall be no order as to costs.