

(2023) 07 DEL CK 0110

In the Delhi High Court

Case No : Civil Writ Petition No. 8135 Of 2019

Rajdeep Chowdhary

APPELLANT

Vs

Union Of India And Ors

RESPONDENT

Date of Decision : 14-07-2023

Acts Referred:

Central Civil Services (Classification, Control and Appeal) Rules, 1965 — Rule 11
Border Security Force Act, 1968 — Section 40
Narcotic Drugs and Psychotropic Substances Act, 1985 — Section 8, 21, 25, 29

Citation : (2023) 07 DEL CK 0110

Hon'ble Judges : Suresh Kumar Kait, J; Neena Bansal Krishna, J

Bench : Division Bench

Advocate : Harish Kumar Mehra, Ajay Diggual, Kamal Diggpaul, Swati Kwatra, Nitin Chaturvedi, Hemendra Singh

Final Decision : Disposed Of

Judgement

Suresh Kumar Kait, J

1. The present petition has been filed by the petitioner seeking quashing of Show Cause Notice dated 12.05.2016 and order dated 22.07.2016 issued by the respondents. In addition, a writ of mandamus directing the respondents to promote the petitioner from the post of Assistant Commandant to the post of Deputy Commandant w.e.f. 01.04.2014 with all consequential benefits, is also sought.

2. Petitioner claims to have been working as Assistant Company Commandant at 66th Battalion of BSF and was also administratively looking two other platoon posts. An FIR bearing No.306/2012, under Sections 8/221/29/25 of Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) was registered at Jaisalmer, Rajasthan on 08.08.2012 alleging that four civilians in Jaisalmer City were arrested with 8 kg heroin and Rs.4.35 lacs of Indian currency, was smuggled from Pakistan during intervening night of 04/05.08.2012.

3. A staff Court of Inquiry was ordered by Inspector General (IG) (Head Quarter), BSF, Jodhpur to investigate the circumstances in which the heroin crossed the said area. On 06.11.2012, the Presiding Officer completed the Inquiry and submitted his opinion that AOR between BP No.717/I-S to BP NO.717/2-S is the responsibility of BOP SKD Ex.66 Bn BSF from where the suspected crossing of Heroin has been reported, however no specific area has been pointed out by the apprehended persons and no khura has been detected by the BSF; the evidence available was totally circumstantial; the main accused was at large and so, there was nothing to point out negligence or laxity on the part of individuals on duty.

4. In view of the aforesaid inquiry report dated 06.11.2012, the Deputy Inspector General (DIG) SHQ, BSF recommended the IG (HQ) that investigation was complete and no one is to be blamed till the time investigation is complete or the incident is confirmed by the police. Ignoring the report dated 06.11.2012 and recommendation of the DIG (SHQ) dated 10.12.2012, the IG (HQ) on 30.05.2013 recommended action against the petitioner for failure on his part in proper domination of AOR as per BSF Act, 1968. Consequently, the Special Director General (DG) (West), BSF vide communication dated 18.06.2013 recommended that disciplinary action be taken against the petitioner and Sub Inspector Gopal Dass, who was the then senior most platoon officer.

5. Vide order dated 06.08.2013, the disciplinary action was taken and the DIG, BSF on 14.12.2013 recorded evidence against six BSF officials, including the petitioner herein. On the even date, charge-sheet was issued under Section 40 of the BSF Act alleging that the petitioner had failed to exercise proper border domination in AOR as a result whereof, crossing of 8 kg heroin and Rs.4.35 lacs of Indian Currency took place on 04/05.08.2012. The additional evidence was recorded on 19.12.2014.

6. The DIG concerned after analyzing the evidence prepared his remarks dated 09.04.2015 and observed that no evidence emerged to substantiate the charge prepared against the petitioner.

7. The grievance raised by the petitioner in the present petition is that despite the afore-noted remarks dated 09.04.2015, he was served with a Show Cause Notice dated 12.05.2016 by the DIG, whereby he conveyed DG's "displeasure" to the petitioner. Vide letter dated 18.05.2016, petitioner requested the concerned authorities to furnish him copies of Record of Evidence (ROE) and Additional Record of Evidence (ROE) along with other documents to enable him to file reply to the aforesaid show cause notice. In response thereto, the respondents had provided him copy of ROE and Additional ROE, however, copy of remarks/recommendations of senior officers were not supplied to him. Vide his reply dated 05.06.2016, petitioner conveyed the DG that despite there being no implication by him directly or indirectly, ROE was initiated against him and he was subjected to untold miseries and agonies. So, he prayed for an acquittal of the charge.

8. Petitioner vide his letter dated 24.06.2016 requested the DG (BSF) that his promotion was due on 01.04.2014 as per the recommendations of the Departmental Promotion Committee (DPC) held in November, 2013 and he is entitled to promotion. Petitioner relied upon OM dated 27.03.2015 issued by the Ministry of Home Affairs which stipulates as under:-

"(i) Displeasure is not a penalty enlisted in Rule 11 CCS (CCA) Rules 1965 and therefore, it cannot be considered for denial of promotion.."

9. The DIG vide order dated 22.07.2016, rejected the request of petitioner made vide letter dated 24.06.2016 conveying DG's "displeasure" to the petitioner.

10. During the course of hearing, learned counsel appearing on behalf of the petitioner submitted that petitioner was entitled to promotion from the post of Assistant Commandant to Deputy Commandant w.e.f. 01.04.2014, however, ignoring the OM dated 27.03.2015 issued by the Ministry of Home Affairs he has been promoted on 06.11.2016. Even petitioner's request vide letters dated 24.06.2016 and 21.11.2016 has not been acceded to by the respondents. Furthermore, vide letter dated 18.01.2018, petitioner was informed by the respondents that the disciplinary proceedings initiated against him was converted into administrative action.

11. Learned counsel for petitioner drew attention of this Court to judgment dated 16.02.2019 passed by the concerned Court at Jaisalmer to submit that the accused persons were acquitted in the FIR bearing No.306/2012, based upon which departmental action was initiated against the petitioner. Learned counsel further submitted that the petitioner is aggrieved of the arbitrary action on the part of respondents whereby he has been denied promotion from the date his batch-mates have been given promotion i.e. w.e.f. 01.04.2014.

12. To counter the claims raised by the petitioner, learned Central Government Standing Counsel (CGSC) appearing on behalf of respondents submitted that the accused persons arrested in the FIR in question, had revealed that the heroin was crossed over to India through Indo-Pak Border on the intervening night of 04/05.08.2012, which was under the responsibility of Border Out Post (BOP) SKD of Ex-66th Battalion, BSF. Upon investigation, it was found that the area was not properly dominated by the troops deployed there. There was lack of supervision on the part of BSF Commander, Coy Commander as well as Unit Commander. Hence, the DG had sought disciplinary action against the petitioner and the BOP Commander/SI Gopal Dass.

13. Petitioner was charged under Section 40 of BSF Act having failed to exercise proper border domination in AOR. The ROE and Additional ROE was held and though the charge against the petitioner could not be established, however, the IG, BSF in exercise of powers under provisions of BSF Rules 59/1/5 recommended to dispose of the case by issuance of DG's "displeasure". Accordingly, vide letter dated 22.07.2016, DG's "displeasure" was conveyed to the petitioner.

14. Learned CGSC further submitted that DPC for promotion to the rank of Deputy Commandant was held on 19.02.2014 (for the vacancy year 2014-15) and 19.02.2015 (for the vacancy year 2015-16). However, the case of petitioner was administratively disposed of by awarding DG's "displeasure" to him. His representation dated 26.06.2016 was considered and rejected by the competent authority being devoid of merit.

15. Thereafter, DPC was held on 26.09.2016 for the vacancy year 2016-17, wherein petitioner was found fit for promotion and accordingly, he was promoted to the rank of Deputy Commandant. Learned CGSC submitted that petitioner's representation dated 24.06.2016 for grant of promotion with retrospective effect i.e. 01.04.2014 was considered by the DPC and rejected vide letter dated 19.12.2017.

16. Learned CGSC further submitted that petitioner was posted as Coy Commander during the relevant period when the incident in question took place. With the arrest of four accused persons, it came to the knowledge of the respondents that the crossing of heroin could take place through the area, as it was not properly dominated by the troops deployed there. There was lack of supervision on the part of DOP Commander, Coy Commander and Unit Commander. Hence, the disciplinary action taken against the petitioner is well merited.

17. It was submitted by learned CGSC that DG's "displeasure" was conveyed to the petitioner vide order dated 22.07.2016. The representation of the petitioner dated 26.06.2016 was considered by the competent authority of the BSF as well as Ministry of Home Affairs and the same was rejected administratively by conveying DG's "displeasure".

18. Learned CGSC fairly conceded that the "displeasure" is not a penalty as per OM dated 27.03.2015 issued by the Ministry of Home Affairs, however, for the purpose of promotion, DPC is required to scrutinize overall service record of five years' ACR/APAR, before finally concluding the assessment for promotion.

19. It was further submitted that acquittal of accused in FIR No.306/2012 has no effect on the departmental proceedings against the petitioner and so, petitioner cannot absolve himself from the responsibility of not deploying appropriate troops on the fateful night of 04/05.08.2012 when the incident in question took place. It was submitted that the present petition is devoid of merit. Hence, the same deserves to be rejected.

20. In rebuttal, learned counsel for petitioner submitted that petitioner has been performing his duties efficiently and he deserves to be promoted from 01.04.2014 and the "displeasure" conveyed by the DG should have no effect on his promotion. According to petitioner, "displeasure" is not a penalty enlisted in Rule 11 of CCS (CCA) Rules, 1965. Also that in terms of OM dated 27.03.2015, petitioner cannot be denied promotion from the date it became due to him. Hence, the present petition deserves to be allowed. Reliance was placed upon

decision of this Court in O.P. Nimesh Vs. Union of India & Ors. (2018) 10 DEL CK 270 in support of petitioner's case.

21. This Court heard the rival contentions urged by both the sides at length. This Court finds that pursuant to registration of FIR No.306/2012, under Sections 8/221/29/25 NDPS Act, a staff Court of Inquiry was directed against the petitioner and other officials of the BSF and vide Opinion dated 06.11.2012 it was held that there was not any laxity or negligence on the part of individuals on duty. Consequently, the DIG vide Recommendations dated 10.12.2012 recommended as under:-

"6. I, therefore, recommend that:

a) no one is to be blamed till the time investigation is completed or confirm the incident by Police;

b) necessary instructions may be issued to border deployed units to strengthen the domination especially in that area where BFL is not exist. Moreover, special attention is also required to be paid during dawn, twilight and dark phase of Moon while dominating the AOR."

22. Being dissatisfied with the recommendations, the IG recommended action against the petitioner and ROE and Addl. ROE were recorded. In the meanwhile, DPC for the vacancy year 2014-15 was convened on 19.02.2014, wherein petitioner's case was kept pending due to pendency of ROE. Again, for the vacancy year 2015-16, the DPC convened on 19.02.2015, however, again petitioner's case was kept pending due to pendency of ROE.

23. Upon conclusion of ROE, the DIG concerned filed the following Remarks dated 09.04.2015 in the case of petitioner:-

"Ongoing through the case in its entirety and record of evidence, the statement of prosecution witnesses and concerned documents in the ROE, no evidence emerged in the ROE to substantiate the charge framed against. Shri Rajdeep Chowdhary, AC & Inspr Gopal Dass.

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After analyzing all the above facts, it is concluded that the entire case seems doubtful as there is no conclusive and circumstantial evidence regarding crossing of consignment. The case of the arrested person is still sub-judice.

Therefore, taking into consideration all aspects of the case based on the statement & documentary evidence produced in the ROE, the charge is not proved against Sh Rajdeep Chowdhary, AC 66 Bn BSF & Inspr Gopal Dass of 66 Bn BSF (now 120 Bn BSF). Hence it is recommended that the charge against the above individuals be dismissed."

24. Though vide Court of Enquiry dated 10.12 2012 as well as Recommendations dated 09.04.2015, petitioner was recommended to be discharged for the offence

in question, however, he was served with Show Cause Notice dated 12.05.2016 for tentative proposed conveyance of DG's displeasure. The petitioner filed reply dated 18.05.2016 to aforesaid Show Cause Notice dated 12.05.2016 and also made a request dated 24.06.2016 praying for grant of promotion from 01.04.2014.

However, vide order dated 22.07.2017, petitioner's reply dated 18.05.2016 to the aforesaid Show Cause Notice dated 12.05.2016, was rejected and he was conveyed DG's "Displeasure".

25. The petitioner is aggrieved that due to DG's displeasure, he has been deprived of his promotion which was due from 01.01.2014.

Petitioner has claimed that in the DPC for the vacancy year 2014-15 convened on 19.02.2014, his case was kept as pending due to pendency of ROE. Again, for the vacancy year 2015-16, the DPC convened on 19.02.2015 wherein his case was again kept pending due to pendency of ROE. The petitioner has placed reliance upon Rule 11 of CCS (CCA) Rules, 1965 to submit that "displeasure" is not a penalty and he cannot be denied promotion from the date it actually became due to him.

26. Now the question which arises for consideration before this Court is as to whether due to DG's "displeasure", the petitioner can be deprived of the promotion, especially when the charge framed against him has been recommended to be set aside. This Court has gone through the Minutes of DPC Meeting dated 19.02.2014 and 19.02.2015, wherein the reason for keeping petitioner's case pending is mentioned as "pendency of ROE" and not "displeasure".

27. The petitioner has placed reliance upon decision in O.P. Nimesh (Supra) wherein the petitioner, DIG (Medical) in BSF, had sought promotion to the rank of IG (Medical) from the date his juniors were promoted. This Court in the said case had noted two points for consideration, first the DPC had considered that in his APAR of the year 2012-13, the petitioner therein was given two below bench mark grading and second, DG's "displeasure" remark was also mentioned in detail.

28. The petitioner in O.P. Nimesh (Supra) as well as petitioner before this Court have relied upon OM dated 27.03.2015 notified by the Ministry of Home Affairs, wherein it is mentioned that "displeasure" is not a penalty enlisted in Rule 11 of the CCS (CCA) Rules, 1965. Pertinently, the aforesaid OM dated 27.03.2015 reads as under:-

"No.I.45026/01/2015-Pers.III

Government

of India Ministry

of Home Affairs

North Block, NewDelhi

Dated the 27th March, 2015

OFFICE MEMORANDUM

Subject: Instructions regarding the effect of award of DG's displeasure of officers of the Central Armed Police Forces.

The undersigned is directed to refer to this Ministry's letter No.I.45026/25/87-Pers-II dated June 1989 on the subject mentioned above and to issue the following fresh instructions in supersession of the aforesaid letter:-

- (i) Displeasure is not a penalty enlisted in Rule 11 of CCS(CCA) Rules, 1965 and therefore it cannot be considered for denial of promotion,
- (ii) If a Displeasure or warning has been given to an officer / Member of the CAPF, the Reporting / Reviewing / Accepting Authority, while writing the Annual Performance Assessment Report (APAR), should take this into consideration and decide to reflect or not to reflect the same based on the improvement or otherwise noticed in the person after receipt of the displeasure or warning.
- (iii) Once the APAR of an officer or member of the CAPF is finalized for the year or the date for finalizing such APAR is over, the displeasure or warning conveyed will become infructuous.

2. These revised instructions will take effect from the date of issue of this OM. In no case, cases settled before issue of this OM in the light of the instructions dated June 1989 in vogue till now, will be reopened."

29. This Court in O.P. Nimesh (Supra) in view of the fact that when DPC in the said case was held on 15.07.2015, the aforesaid OM dated 27.03.2015 had already been notified, held that "displeasure" was not a bar in promotion of the petitioner therein and directed the respondents therein to hold a review DPC and assess petitioner's case in accordance with rules.

30. Significantly, in the present case, the two DPCs dated 19.02.2014 and 19.02.2015, wherein the case of petitioner was kept pending for promotion, were held prior to coming into force the aforesaid OM dated 27.03.2015, Para-2 whereof clearly mentions that the cases prior to coming into force this OM, shall be considered in the light of OM instructions dated June, 1989.

31. In the present case petitioner is seeking promotion w.e.f. 01.04.2014 i.e. when his juniors were promoted vide DPC, which was convened on 19.02.2014.

32. In our considered opinion, petitioner was first given clean chit in the year 2012 itself. However, disciplinary action commenced against the petitioner on 06.08.2013 and the DIG in view of evidence led, prepared the remarks dated 09.04.2015 that no evidence emerged against the petitioner. A perusal of copies of minutes of the DPC dated 19.02.2014 as well as next DPC convened on 19.02.2015, reveal that his case has not been considered for promotion due to

remarks "Due to pending ROE". Relevantly, vide Show Cause Notice dated 12.05.2016 by the DIG, petitioner was conveyed DG's "displeasure". The petitioner, vide his reply dated 05.06.2016 to the aforesaid Show Cause Notice dated 12.05.2016, conveyed the DG that there was no direct or indirect implication against him in the FIR in question. However, vide order dated 22.07.2016, the DIG rejected petitioner's request dated 24.06.2016 conveying him DG's "displeasure".

33. Considerably, when petitioner was conveyed "displeasure" by the Show Cause Notice dated 12.05.2016 and his request dated 24.06.2016 was turned down by DIG, the OM dated 27.03.2015 had already been notified, which states that "displeasure" is not a penalty enlisted in Rule 11 of the CCS (CCA) Rules, 1965. Moreover, in the minutes of meetings held on 19.02.2014 and 19.02.2015, against the name of petitioner, "displeasure" has not been mentioned. It is also not the case of respondents that petitioner's APARs were below Bench mark in the years 2014 and 2015 which would curtail his right to promotion.

34. The Hon'ble Supreme Court as well as this Court in various decisions have noted the considerable role played by the DPC while evaluating the case of candidates for promotion. Not only the APARs for the relevant years but also the overall work, performance and diligence of a candidate has also to be borne in mind, especially in a case where a candidate is being ignored and his/her juniors are given promotion.

35. In the case in hand, petitioner was considered for promotion in the DPC held on 26.09.2016 for the vacancy year 2016-17 and was promoted on 06.11.2016. In our considered opinion, petitioner's case stood deferred for promotion in the years 2014 and 2015 due to pendency of ROE and having been given clean chit, he deserves to get promotion from the date it actually became due to him.

36. In view of above-said, the present petition is allowed. In the light of OM dated 27.03.2015, the Show Cause Notice dated 12.05.2016 and order dated 22.07.2016 conveying "displeasure" by the respondents, are set aside. This Court is informed that petitioner has already been promoted to the post of Deputy Commandant on 06.11.2016. Consequently, a direction is issued to the respondents to convene a review DPC within four weeks to consider the case of petitioner subject to fulfilment of other eligibility criteria prevalent in the year 2014. Needless to say, if petitioner fulfils the criteria, he shall be promoted from the post of Assistant Commandant to the post of Deputy Commandant w.e.f. 01.04.2014 i.e. the date his juniors have been promoted, with all consequential benefits.

37. With directions, as aforesaid, the present petition is accordingly disposed of.