

(2018) 03 KL CK 0056

In the High Court Of Kerala

Case No : Writ Petition (Civil) No. 15213 Of 2012

Santhi G.Jaidev @APPELLANT@Hash Union Of India And Ors

Date of Decision : 01-03-2018

Acts Referred:

Central Civil Services (Classification, Control & Appeal) Rules, 1965 — Rule 14

Citation : (2018) 03 KL CK 0056

Hon'ble Judges : P.V. Asha, J

Bench : Single Bench

Advocate : N.Sukumaran, S.Shyam, N.K.Karnis, Bobbymathew Koothattukulam, Kuruvilla John, N.Nagaresh, T.Sanjay

Final Decision : Disposed Off

Judgement

1. The petitioner, who is working as Group Commandant in Central Industrial Security Force (in short 'CISF'), has filed this writ petition, aggrieved by the denial of promotion to the post of Deputy Inspector General which was due to her in 2011- 2012.

2. The petitioner commenced her service as an Assistant Commandant on 20.08.1990. She got promotions as Deputy Commandant and thereafter as Commandant in the year 1999 and 2004 respectively. She was promoted as Senior Commandant in November, 2007. The next promotion is to the category of Deputy Inspector General (DIG). She completed 20 years of service on 20.08.2010 and became eligible for promotion as DIG. On 15.11.2010 a show cause notice was issued to her raising allegations against her based on certain anonymous complaints, relating to the period when she worked in Jawaharlal Nehru Port Trust, Bombay. After she submitted her reply, a memo of charge was issued and dissatisfied with the explanation to it, a domestic enquiry was ordered. Petitioner challenged the memo of charges and proceedings to conduct domestic enquiry by filing W.P.(C) No.3031 of 2012. By Ext.P1 judgment dated 02.04.2012, this Court found that the report on preliminary enquiry based on which proceedings were initiated to conduct domestic enquiry, was vitiated for being violative of the provisions in Chapter III of the Vigilance Manual and orders

issued by Government from time to time. This Court found that the enquiry was conducted on the basis of anonymous complaints, at a crucial point of time when she was due for consideration for promotion. Seeing that there was gross violation of mandatory procedures stipulated in Chapter III of the Vigilance Manual, issued by the Central Vigilance Commission, this Court quashed the memo of charge as well as the enquiry report. However, it was made clear that the authorities would be free to initiate fresh action in accordance with law, if warranted.

3. By the time, the judgment was rendered, the Departmental Promotion Committee (DPC for short) for promotion to the post of DIG had already met on 23.12.2011 and on 13.03.2012. The juniors of petitioner were considered by that DPC. In the case of petitioner sealed cover procedure was adopted. In the seniority list of Senior Commandant as on 31.12.2010, which is produced as Ext.P2, petitioner was ranked at Serial No.18. As per Ext.P3 order dated 12.01.2012, promotions were granted to Serial No.10 to 20 on the basis of the selection made by the DPC which was held on 23.12.2011. Petitioner submitted that another DPC was convened on 13.03.2012 and serial no.21 to 28 were promoted on 02.04.2012 and as per Ext.P4 order dated 31.05.2012, Serial No.29 in Ext.P2 seniority list was promoted. Aggrieved by this, petitioner submitted Ext.P5 representation before the Director General, pointing out the judgment Ext.P1 and requesting to take steps to review the sealed cover adopted in her case in the DPC convened in December 2011 and March 2012 and to promote her in preference to her juniors. She submitted Ext.P6 reminder thereafter pointing out the vacancies arising on account of retirement on 30.06.2012. By Ext.P7 order, the petitioner was informed that on the basis of Ext.P1 judgment, the sealed cover proceedings in respect of the petitioner was opened, on getting permission from the Ministry and in the light of the instructions contained in DOP&T OM dated 14.09.1992, when it was found that she was found 'unfit' by the DPC for promotion for the rank of Deputy Inspector General.

4. In the meanwhile petitioner had submitted application under the Right to Information Act, seeking for the details regarding the findings of the DPC which was convened in 2011-12. In Ext.P8 letter dated 21.03.2012 in answer to her application, she was informed that the Annual Confidential Reports (ACR) for the period from 2005-2006 to 2009-2010 were considered by the DPC held on 23.12.2011. But the grading given in the ACR was not furnished to her, saying that the proceedings of DPC in her case have been kept in sealed cover in terms of DOP&T OM and dated 14.09.1992. It was also informed that the net vacancies to be filled up for the year 2010-11 and 2011-12 were 10 (8+2). From the documents furnished to her it was seen that she was sl.no.15 among the 17 officers considered for 10 vacancies for 2011-12. But the remarks against the name of petitioner was "as in sealed cover". Out of the 17 officers, 8 were found fit for promotion by the DPC. From Ext.P9 reply it was seen that petitioner was considered against the 14 vacancies of DIG for the year 2012-13 and she was sl.no.6 among the 20 officers in the eligibility list. In this list also the remarks

against her name was "as in sealed cover".

5. Petitioner points out that as per Ext.P10 letter dated 29.02.2008 the Director General of CISF had awarded her a commendation certificate in recognition of her outstanding work of commendable nature in the career. Petitioner was No.2 among the 43 officers who were given such certificate from 29.02.2008 to 03.03.2008. Petitioner points out that a copy of the Annual Confidential Report (ACR) for the period from 10.06.2008 to 31.03.2009 and NICs from 01.04.2008 to 11.05.2008 and from 12.05.2008 to 09.06.2008 in her case, received from the Head Quarters were forwarded to her as per Ext.P11 letter dated 26.02.2010 affording her an opportunity to submit representation, if any, within 15 days, against the specific factual observations in the report leading to assessment in terms of attributes, work output etc.

6. In the ACR for the period from 10.06.2008 to 31.03.2009, the remarks of the Reporting Authority below the entry as 'to quality of output' was "quality of performance of the officer is very good." Below the entry 'knowledge of sphere of work' the remark was "The Officer has adequate knowledge of functions, rules and their application." Against the entry 'attitude to work' the remarks was "A sincere and dedicated officer who is always willing to take initiative and systematise her work". Under the entry 'initiative' the remarks were "a resourceful officer who is capable of handling unforeseen situation on her own and always willing to take additional responsibility." With similar remarks on her capability, the overall assessment was "a sincere hard working and very disciplined officer.". The grading was "very good". The Reviewing Officer, though agreed that the reporting authority had made the remarks with due care and attention after taking into account all relevant materials, in his remarks as against the entries "Do you agree with the assessment of the officer given by the Reporting Authority? (in case of disagreement) please specify the reasons. Is there any thing you wish to modify or add?" answered "Yes, but the officer has been over assessed by the Reporting Officer. The officer is a good officer." As against the entries, "General remarks with specific comments about the general remarks given by the Reporting Authority and remarks about the meritorious work of the officer including grading", it was written "I agree to the extent that the officer's grading is over assessed. The officer can be graded as a good officer." The grading given by the reviewing authority was "Good". Accepting Authority, the Director General of CISF remarked "agree with Reviewing Officer accepted as Good."

7. Petitioner submitted Ext.P12 representation dated 08.03.2010. She pointed out that the Reporting Officer's appraisal in various spheres/aspects of the performance was the 31 entries given in the report and the Reviewing Authority agreed that the reporting authority had made his remarks with due care and attention and after taking into account all relevant materials. Despite this, the Reviewing Authority stated that petitioner was over assessed, in the absence of any material. She pointed out that 'very good' is the benchmark for the career

progression and anything less than that would seriously affect her promotional prospects. She pointed out that she was not issued any warning or memo or admonition or advisory by the reviewing authority during the period of reporting, by which she was liable to be downgraded as good and therefore the reviewing authority was whimsical and biased. Pointing out the timely completion of her work and the initiatives she had taken, she requested to upgrade her grading as "very good". As per Ext.P13 letter dated 08.02.2011, the Assistant Inspector General informed the petitioner that her representation addressed to the Director Inspector General was considered by the competent authority with regard to the reference to the relevant documents and comments furnished by the concerned authorities and found that there was credible material on record to deduce that the grading endorsed in her ACR (APAR) is based on objective assessment made by her senior officers on her performance and therefore representation was rejected.

8. From Ext.P13 it is seen that the competent authority who considered the representation of the petitioner was the Director General himself who had accepted remarks of the Reviewing authority. Even though petitioner requested for the copies of the materials based on which her representation was rejected, her representation for the same was rejected as per Ext.P14 letter dated 15.09.2011.

9. Immediately thereafter she received the copy of her Annual Performance Appraisal Report (APAR)- Ext.P15 for the period from 27.06.2009 to 31.03.2010, along with Ext.P15(b) letter dated 22.09.2011. In this report grading was on a score of 1-10; the score above 8 is outstanding; above 6 and below 8 is very good. While reporting Officer had given 7.4 marks, the marks given by reviewing authority was 7.6. But the accepting authority rejected both those and awarded only 5 degrading her from very good to good. It was remarked that "a balanced and proactive lady officer who herself dedicated in protecting the PSUs placed under Group Hqrs., in the light alarming security scenario with her close supervision and innovative methods. Apart from achieving the set targets, she liaised with various managements and expedited the pre-induction formalities for induction of CISF at MRPL Mangalore and BPCL Cochin." The Reviewing Authority remarked that he was satisfied with the Reporting Officer that the Reporting Officer had made the report with due care and attention and taking into account all the relevant materials. He also agreed with the assessment given by the Reporting Officer except the score and modified the score to 7.6. He agreed by the pen picture given by the Reporting Officer by modifying an overall grade (on a score of 1-10) to 7.6. The accepting authority remarked and stated as follows:

"The officer supervised the functioning of a few Units i.e. only four. There was no report of any innovative methods adopted by the officer in the inspection remarks or any recommendation or appreciation of the good work by the officer by her superior authorities. There was some mishandling of induction of Mangalore Refinery as proper care was not taken reg. accommodation. I do not

agree with RO & Rev. Auth."

10. On receipt of the copy of APAR, petitioner submitted Ext.P16 representation addressed to the Secretary to Government of India, Ministry of Home Affairs pointing out her grievances against the down gradation in 2009-10 by the Director General, the Accepting Authority. The petitioner pointed out that observation made by the Accepting Officer was baseless as it was the responsibility of the concerned Public Sector Undertaking to complete the pre-induction formalities for induction of CISF whereas the MRPL management could not get a proper accommodation and the only two accommodations which were identified were seen by higher authorities also; referring to the letters of the DIG dated 21.1.2010 and 7.7.2010 regarding accommodation. She pointed out that second accommodation was rejected by the accepting authority himself despite the fact that it was accepted by the DIG(SZ) and there was no mishandling of induction of Mangalore Refinery on her part. It was inability of the PSU to provide suitable accommodation in keeping with norms in time and that cannot be attributed to her. She also pointed out that she has made timely recommendation for the accommodation of first phase induction and thus her suggestions were forwarded along with photographs by mail. However representation forwarded as per Ext.P16 letter dated 29.10.2011 was rejected as per Ext.P17 letter dated 7.12.2011. It was stated that the competent authority has carefully considered her representation and the relevant documents and found that there is credible material on their part to conclude that the grading endorsed in her APAR is based on objective assessment made on her performance and hence her representation dated 29.10.2011 has been rejected by the competent authority. The petitioner points out that the representation submitted by her against APARs were rejected by the very same officer who furnished the marks in the APAR as accepting authority.

11. Subsequent to Ext.P1 judgment petitioner submitted Ext.P28 representation before the 2nd respondent requesting to convene a review DPC, in the light of OM dated 13.04.1998 and 10.04.1989 of Do PT, pointing out that the down gradation in the ACR of 2008-09 by the reviewing and accepting authority without recording any reason and the reduction of score in APAR of 2009-10 by the accepting authority and denial of consideration of her representation by the competent authority requires to be expunged. As per Ext.P30 order dated 26.09.2012 she was informed that her request for review of ACR/APAR was referred to Ministry of Home Affairs and the decision would be communicated to her on hearing from MHA.

12. Petitioner points out that her grading is very good from 2010-11 onwards. She is denied promotion on the basis of her grading in the ACR/APAR for 2008-09 and 2009-10 and those are not drawn in accordance with the instructions in Exts.19, P20 and P21. Petitioner submits that the rejection of appeal submitted by the petitioner against both the APAR for 2008-09 and 2009-10, by the accepting authority is illegal and the appeal should have been

forwarded to an authority higher than the accepting authority, where as both the appeals were rejected by the very same authority, the Director General.

13. Whiles the petitioner received another memo of charge as against these proceedings when the Director General had rejected the representations. Petitioner filed this writ petition in the year 2012 itself. During the pendency of the writ petition a memo of charge Ext.P31 was issued which is produced along with IA No.11306 of 2014, proposing to take action against the petitioner under Rule 14 of the CCS(CC&A) Rules, 1965 on the allegations (1) petitioner maintained close proximity with constable K.V.V.Rao and extended him preferential treatment and (2) that she carried out financial transaction amounting to Rs.2,41,500/- through the account of her PA SI/Steno Devaraj Singh. The petitioner submitted her reply Ext.P33 and thereafter it was followed by representations Exts.P34 and P36. It is stated that enquiry was conducted thereafter. In Ext.P37 letter it was stated that the enquiry report was submitted on 20.4.2015. The petitioner submits that so far final orders are not issued and the petitioner is not considered for promotion on the basis of the proceedings which were initiated against her in 2012 though it was quashed by this Court in Ext.P1 judgment.

14. The petitioner has prayed for a direction to the respondents to promote her as DIG while challenging Exts.P13 and P17 as well as Exts.P11 and P15 to the extent she was downgraded and the remarks from very good to good and reduce the marks from 7.6 to 6 and also for a direction to convene a review DPC to correct the irregularities in Exts.P8 and P9 proceedings and for a direction to promote her as DIG with retrospective effect from 12.01.2012.

15. Respondents have filed counter affidavit before the amendment of the writ petition as well as after the amendment. In the counter affidavit filed by the respondents it is admitted that the Director General himself rejected the appeals against the grading of petitioner in her APAR. It is pointed out that in a similar case of one Sri.Ipil Horo, who was downgraded in his ACR by Director General, CISF, it was forwarded to Ministry of Home Affairs as per Ext.R1(a) U.O. Note dated 28.09.2010, but it was returned as per Ext.R1(c) UO Note dated 13.10.2010, directing the 2nd respondent to dispose of the same, as done as per Ext.R1(b) U.O Note dated 6.8.2010. Therefore the appeals submitted by the petitioner against Exts.P13 and P17 were considered by the Director General himself and was rejected as per Ext.R1(d) order dated 27.11.2012 and it was communicated to the petitioner. The Ministry of Home Affairs in Ext.R1(b) stated as follows:

"The matter has been examined. Directions in this case are to DG, CISF. The issue relates to writing/review of CR of dc in CISF. In the normal channel of Reporting/Reviewing Officers, in this case, DG, CISF is the final authority. Hence, the case may be decided/final order passed by the DG, CISF".

16. Ext.R1(d) was issued thereafter in tune with the aforesaid order rejecting her

case. Ext.R1(d) refers to several representations of petitioner submitted in 2012 requesting review of the downgrading for the years 2008-09 and 2009-10. However petitioner submits that she has not received any such communication. At any rate the action of Government in refusing to consider the representations against ACR/APAR has caused prejudice to the petitioner.

17. Regarding fresh disciplinary action initiated against the petitioner as per Ext.P31 memo of charges it is stated that subsequent to the judgment of this Court, matter was referred to the Ministry of Home Affairs. Thereafter the Central Vigilance Commission gave concurrence to proceed against the petitioner on 3.1.2013. After 23.5.2014 CVC advised to initiate proceedings for imposing major penalty against the petitioner. Accordingly memo of charge issued to the petitioner on 23.6.2014 alleging that petitioner maintained close proximity with constable K.V.V.Rao and extended him preferential treatment and that she carried out financial transaction amounting to Rs.2,41,500/- through the account of her PA SI/Steno Devaraj Singh. Enquiry was conducted and report was submitted finding her not guilty of the first charge and finding charge no.2 as partly proved. The inquiry report was forwarded to the Ministry of Home Affairs. It was sent to the Central Vigilance Commission and thereafter to the Department of Personnel and Training for concurrence on 07.12.2016. The learned ASGI submits that presently it is pending before the UPSC for its advice.

18. I heard Sri. N.Sukumaran, learned Senior Counsel appearing for the petitioner and the learned ASGI for the respondents. From the pleadings it is clear that petitioner was proceeded against at the time when she was due for promotion immediately after she completed 10 years at the time when the DPC was to meet. However when the charge memo as well as proceeding to conduct enquiry was set aside petitioner's case for promotion was reopened. But it was found that she was found unfit by the DPC.

19. It is seen that in Ext.P11 ACR for the year 2008-09 petitioner was graded as very good by the reporting authority. But the Reviewing Officer, though agreed that the reporting authority had made the remarks with due care and attention after taking into account all relevant materials, disagreed with the assessment made by the Reporting Authority saying that petitioner was over assessed by the Reporting Officer and petitioner can only be a good officer. On the remarks on the meritorious work of petitioner including grading, also it was stated that he agreed to the extent that the officer's grading is over assessed and she can be graded as a good officer. No reason is stated for such a down grading. The accepting authority also agreed to that without stating any reason. As per Ext.P21, MHA UO Note CR. dated 16.11.2005 assessment by the reviewing/accepting authority shall be impartial and objective and in the event of down gradation sufficient reasoning should be given or recorded. Ext.P11 does not contain any reasoning. Ext.P13 order rejecting her representation also does not furnish any reasoning apart from stating that the superior officers have graded her after objective assessment. Petitioner's request for the materials relied on by

them for down gradation was also rejected. Moreover the representation is seen considered and rejected by the Director General himself who is the accepting authority who agreed with the reviewing authority. The down gradation which is made in violation of Ext.P21 UO note without giving any reason and the rejection of representation are all therefore illegal.

20. It is pertinent to note that Ext.P21 OM dated 06.01.2010 provides that DPC shall treat such down gradation without giving reason as non-est. As per the instructions in Ext.P26 and DoPT OM dated 08.09.1998 and 16.06.2000, those attaining at least 4 benchmark grading out of five ACRs should be assessed as fit for promotion.

21. In fact the 2nd respondent ought to have forwarded the representation to the Government. At any rate in the absence of any reasoning, even while rejecting her representation the down gradation of petitioner in Ext.P11 ACR is illegal and hence Ext.P11 ACR to the extent it downgraded the petitioner from very good to good is liable to be quashed.

22. Though petitioner submitted Ext.P12 representation, it was rejected simply stating that competent authority found that there is credible material on record to deduce the grading and that the grading was endorsed after objective assessment of her ACR. Representation against Ext.P11 was submitted on 8.3.2010. It was rejected as per Ext.P13 on 8.2.2011. APAR for the year 2009-10 was forwarded to her as per Ext.P15 and representation against it was rejected on 7.12.2011. From Ext.R2(d) order (which petitioner states that it is not communicated to her), it is clear that further representations/appeals submitted by the petitioner in 2012 requesting for review of the downgrading in the ACR for 2008-09 and APAR for 2009-10 were forwarded to the Ministry of Home Affairs and Ext.R2(d) was issued by the accepting authority himself rejecting her request. There is no provision for an authority who himself had made the remarks to examine the representation/appeal against the remarks and it can only be by the higher authority. Even in a case where the aggrieved officer submits representation or appeal before a subordinate authority, it is incumbent on them to forward it to the appropriate/competent authority for consideration.

23. At the time when the DPC met, the representation of the petitioner against the downgrading in Ext.P15 APAR was pending. In fact the downgrading in Ext.P15 should not have operated prejudicial to petitioner unless and until her representation was considered. At any rate finally the representation was rejected by the very same authority in violation of the principles of natural justice. Thereafter the rejection of the representations submitted by the petitioner requesting for review of the down grading for both these years, when he himself as accepting authority, agreed with the reviewing authority in the downgradation for one year and in the APAR of 2009-10 he alone in his capacity as accepting authority downgraded the petitioner, is in violation of the principles of natural justice. By such a consideration the very purpose for which the opportunity to represent is defeated. As held by the apex court in *Dev Dutt v.*

Union of India : (2008) 8 SCC 725, while directing that even the entries very good, good, average, fair, poor, etc shall be communicated to the public servants, in order to comply with the principles of natural justice, that representation should also be heard by an officer superior to the one who did the downgrading. Following observations in Dev Dutt's case (supra) are relevant :

"37. 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 authority concerned, and the authority concerned 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.

24. On a reference to three Judge Bench, the judgment in Dev Dutt's case (supra) was approved in Sukhdev Singh v. Union of India, (2013) 9 SCC 566, as follows:

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

Paragraph 37 which directs that representation has to be considered by a higher authority was also approved. Therefore the representations against the remarks made by the 2nd respondent has to be considered by 1st respondent and the refusal on the part of 1st respondent to consider the same as well as consideration by the same authority are in violation of the principles of natural justice.

25. The inordinate delay in finalising the disciplinary action of the petitioner shall not stand in the way of consideration of petitioner for the promotions.

26. As the downgrading, in Ext.P11 ACR for the year 2008-09 and the order Ext.P13 upholding it, is made contrary to Ext.P21 DoPT OM, without stating any reason, the case of the petitioner has to be considered by convening a review DPC treating the ACR Ext.P11 disregarding the downgrading.

27. Government has to re-consider Ext.P16 representations of petitioner and pass orders on the same.

In view of the above, the writ petition is disposed of as follows:

1. Ext.P11 ACR to the extent it downgraded the petitioner as 'good' is quashed;
2. The orders Exts.P13 and P17 are quashed and the first respondent is directed to consider and pass orders on Ext.P16 representation of the petitioner within a period of 2 months from the date of receipt of a copy of the judgment, after

affording her an opportunity of hearing;

3. There shall be a direction to the respondents to convene a review DPC to consider the case of the petitioner for promotion as DIG for the year 2011-12 disregarding the downgrading in Ext.P11 ACR in accordance with rules and to issue consequential orders within a period of six weeks from the date of receipt of a copy of the judgment;

4. In the event of her being found fit for promotion, she shall be given all consequential benefits on par with her juniors who were promoted in that year;

5. The disciplinary proceedings pending against the petitioner shall be finalised within a period of two months from the date of receipt of a copy of the judgment.