

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 24th February, 2011*

+ **WP(C) 7318/2010**

UPENDRA PRAKASH BALODI Petitioner
Through: Mrs.Rekha Palli, Mrs.Punam Singh
and Mrs.Amrita Prakash, Advocates

versus
UOI & ORS. Respondents
Through: Mr.Ravinder Agarwal, CGSC with
Mr.Nitish Gupta, Advocate for UOI
& SSB.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SURESH KAIT

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

PRADEEP NANDRAJOG, J.(Oral)

1. Petitioner prays that the adverse remarks in the ACR for the year 2007-08 be quashed.
2. The adverse remarks are as under:-
“I do not agree. His performance on operational front was not up to mark. Regarding his unwillingness to

proceed to Chhatisgarh for anti-Naxal duty, I cannot offer any comment as the same does not relate to the period under review.”

3. The aforesaid was conveyed to the petitioner under memorandum dated 23.11.2008 with an opportunity to file a response thereto.

4. It is apparent that there is a problem with what is being treated as an adverse remark. Learned counsel for the parties concedes that the only part which has to be treated as adverse, is the remark: *“His performance on operational front was not up to mark.”* The reason being that the sentence next: *“Regarding his unwillingness to proceed to Chhatisgarh for anti-Naxalite duty, I cannot offer any comments as the same does not relate to the period under review”* are a disclaimer and hence not adverse.

5. What has happened was that posted as the Commandant of the 28th Bn. SSB, the battalion was deputed for duties at Araria and so was the petitioner required to be stationed at Araria. It is in the State of Bihar. It is at the Indo-Nepal Border.

6. The Director General SSB, to our mind, did a most unprofessional thing. He directed that in addition to commanding the 28th Bn. at Araria the petitioner should take over the additional charge of the SSB Bn. posted at Gwaldham in Chhattisgarh. It be noted that the distance between Gwaldham and Araria is over 1200 km.

7. When informed that in addition to his duties as Commandant of the 28th Bn. the petitioner should also take

charge of the SSB Bn. at Gwaldham, on 14.3.2008, the petitioner sent a representation to the Director General SSB informing him that it would be impossible for him to command 2 battalions stationed far apart.

8. The Deputy Inspector General SSB under whom Araria fell, while forwarding the representation of the petitioner on 17.3.2008 also concurred with what was stated by the petitioner. In para 3 of his letter dated 17.3.2008, while forwarding the representation of the petitioner, the Deputy Inspector General SSB wrote:-

“Holding the dual charge of 28 Bn. as well as 40th Bn. which are deployed at considerable distance, will be practically impossible for the officer to manage both the Bns. will be deployed in active role.”

(Note: Since we have verbatim reproduced para 3 of the letter dated 17.3.2008 the errors of syntax remain.)

9. We would have expected the Director General SSB to have acted with reason. He did not do so. What did he do? Memorandum dated 30.4.2008, listing the same to be ‘Secret’, was issued under the signatures of Deputy Inspector General (Personnel) from the headquarters of SSB to the officer who had to initiate the recording of the ACR of the petitioner. The memorandum reads as under:-

“Shri Upendra Kumar Balodi, Commandant 28th Bn. Araria, Barauni under Frontier Hqrs. Patna was ordered vide FHQ’s Fax Msg.No.9/2/2008/SSB/Pers-I-929 dated 07.03.2008 to take over additional charge of 40th Bn. earmarked for deployment for I.S. duties in Chhattisgarh with the approval of DG, SSB. In response, Shri U.P.Balodi, Commandant, 28th Bn.

submitted his representation dated 08.03.2008 requesting therein for exemption from taking over of additional charge of 40th Bn. which was not acceded to vide FHQ's Fax Msg.No.1054-55 dated 14.03.2008 in view of exigency of services. Shri U.P.Balodi, Commandant, 28th Bn. Araria submitted another representation dated 14.03.2008 requesting his non-deployment to Chhatisgarh with permission to appear before the DG, SSB in case his request for exemption from Chhatisgarh duties is not considered.

2. Accordingly, he appeared before DG, SSB on 24.03.2008 and expressed his inability to proceed for I.S. duties at Chhatisgarh on personal grounds etc. The DG, SSB has desired that such an unwilling officer should not be sent on such a sensitive assignment. An entry to this effect be recorded in his ACR for the year 2007-2008.

3. This issues with the approval of DG, SSB."

10. Suffice would it be to state that the Director General SSB could not have directed any subordinate officer to make any adverse entry in the ACR of the petitioner. At best, the Director General SSB could have brought the issue to the notice of the Initiating Officer. We note that the Director General SSB is the Accepting Authority pertaining to the ACRs of the petitioner. He could have waited his turn to record any adverse entry in the ACR, if he thought one was warranted, when the ACR proforma reached him.

11. It is apparent that out of a feeling of being hurt on his command not being obeyed, the Director General SSB directed an adverse comment to be recorded in the ACR of the petitioner that the petitioner was an unwilling officer not worthy of being sent on sensitive assignments.

12. Little did the Director General SSB realized that the Commandant of a Unit leads his men and posted either at the border or in Naxalite infested areas, who knows when would an ambush takes place or a situation of emergency requiring the Commandant to be at the spot may arise and thus it would be most irrational, if we may be excused to use the hard expression, direct a Commandant to lead two duty battalions and that too, the battalions being separated by a distance of over 1200 km.

13. To commit an error is not to be in the wrong. But to perpetuate an error is to commit a wrong. It is writ large that the Director General SSB is in the wrong and his act of vengeance has resulted in the adverse remark being recorded and for which we find there is just no material.

14. In spite of the direction of the Director General SSB, which we note is an unlawful command, we compliment the Initiating Officer i.e. the DIG SSB of the range concerned who recorded his frank opinion that the petitioner was an extremely hardworking and courageous officer with leadership qualities. He did not pen any adverse remark in the ACR of the petitioner. He graded the petitioner 'Very Good'.

15. Unfortunately, the Inspector General, who was the Reviewing Officer i.e. respondent No.3, seems to be a man who is not made of steel. He buckled under the pressure of the Director General and not only awarded the grading 'Good' to the petitioner but also entered the afore-noted adverse remarks. Needless to state, the Director General

SSB recorded concurrence.

16. Now, the adverse remarks, which learned counsel for the parties concede, are that petitioner's performance on operational front was not up to the mark. The rest what has been conveyed as the stated adverse remark is a disclaimer by the Reviewing Officer and thus we deal with the remarks "*His performance on operational front was not up to mark*" being the subject matter of the debate.

17. It is settled law that entries in the ACRs and in particular the adverse remarks are the subjective satisfaction of the concerned officer recording the ACR and/or the adverse remark, but that does not mean that the subjective satisfaction can be whimsical. Objective facts have to be disclosed and once so disclosed, it would then be a matter of the subjective satisfaction and this would be in the domain of the officer concerned and hence immune from judicial intervention. But where no objective fact on which the subjective satisfaction is reached is shown to the Court, judicial intervention would require the Court to direct corrective action to be taken.

18. We have repeatedly asked learned counsel for the respondents as to what are the facts on which the Reviewing Officer has formed the opinion that petitioner's performance on the operational front was not up to the mark. The learned counsel has given no satisfactory explanation and short of conceding, could render no factual basis for so recording, except that the petitioner made a representation to the Director General SSB of not being

directed to take over the additional charge as Commandant of the 40th Bn. stationed at Gwaldham for the obvious reason the battalion of which the petitioner was the Commandant i.e. the 20th Bn. was stationed at Araria. It was at the Indo-Nepal border and the location of the battalion at Gwaldham was 1200 km away and the Director General SSB directing as per memorandum, contents noted in para 9 above. It is apparent that the adverse remark is a result of extraneous pressure. It is without any basis. Petitioner making a representation not to be given additional charge of the 40th Bn. at Gwaldham cannot be treated as a reflection of petitioner's performance on the operational front being not up to the mark. There is no material whatsoever, at least none was shown to us that at Araria, at the operational front, petitioner's performance was not up to the mark.

19. Accordingly, we dispose of the writ petition quashing the adverse remark recorded in the ACR of the petitioner for the year 2007-2008 and direct that the same be expunged.

20. We note that there is an apparent contradiction in the downgrading of petitioner's performance, recommended as 'Very Good' by the Initiating Officer to 'Good' by the Reviewing Officer, but since in the writ petition no challenge has been made thereto, we need not take the matter any further. The probable reason for the petitioner not to be bothered is that he would still make the benchmark for promotion even if the downgraded ACR of his performance being 'Good' would remain.

21. Petition stands disposed of issuing the direction in para 19 above.

22. Costs in favour of the petitioner and against the respondents in sum of ₹5,500/-.

**(PRADEEP NANDRAJOG)
JUDGE**

**(SURESH KAIT)
JUDGE**

**FEBRUARY 24, 2011
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