

IN THE HIGH COURT OF DELHI AT NEW DELHI

**CM Nos.19721/2011 & 4974/2012 in
+ W.P.(C) 8727/2011**

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Date of decision: 29th August, 2012

SURENDER SINGH Petitioner
Through : Ms. Esha Mazumdar, Adv.

versus

UOI AND ORS Respondents
Through : Mr. Sanjiv Kumar Saxena and
Mr. Mukesh Kumar Tiwari,
Adv. for Mr. Ruchir Mishra,
Adv.

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL
HON'BLE MR. JUSTICE J.R. MIDHA

JUDGMENT (ORAL)

1. The petitioner before us assails the order dated 6th August, 2011 passed by the respondents informing him that he has not been promoted to the post of Head Constable with the Indo Tibetan Border Police (ITBP) denying him promotion to the post of Head Constable. The undisputed facts giving rise to the present petition are noticed hereafter.

2. The petitioner had joined the ITBP as Constable/GD on 11th March, 1993. Between 1993 to 2011, the petitioner was posted at various places in the country. The writ petition claims that in 2011, by an order passed on 25th July, 2011, the petitioner was promoted to the post of Head Constable but was

not given charge in this promoted post. He was orally informed that his promotion has not been given effect to because of adverse entry in his annual confidential report for the year 2007. The petitioner's representation made on 27th July, 2011 to the effect that he has never been communicated any adverse remark in the ACR of 2007 and that his promotion ought to be given effect to met with no success. Instead, the respondents issued a letter dated 6th August, 2011 reiterating their above stand that the petitioner was not allowed to take charge to his promoted post because of the adverse grading in the ACR for the year 2007. The petitioner served a legal notice on 18th August, 2011 in view of the above to the respondents to give effect to their order of promotion which was still denied to him by the reply dated 3rd October, 2011. The respondents also placed reliance on Rule 7(7) of the Swamy's Compilation on Confidential Reports of Central Government Employees therein.

3. Aggrieved by the above, the present writ petition has been filed by the writ petitioner primarily relying on the judicial pronouncements of the Supreme Court of India to the effect that adverse entries in the ACRs are required to be served upon the person concerned. The writ petitioner also challenges the respondent's reliance on the aforementioned Rule 7(7) of the

Swamy's Compilation on Confidential Reports of Central Government Employees contending that the same is just a compilation of principles which are not statutory rules and cannot overwrite the law laid down by the Supreme Court of India. In the counter affidavit, the respondents have reiterated the above position and have further taken a plea that the pronouncement of the Supreme Court of India relied upon by the petitioner reported at **(2008) 2 SCC (L&S) 771** titled **Dev Dutt v. Union of India & Others** was rendered on 12th May, 2008 and therefore, would not govern the instant case which is concerned with the ACR for the year 2007.

4. We have heard learned counsel for the parties and given a considered thought to the matter. So far as the legal position is concerned, the same is no longer res-integra and has been settled by the pronouncement of the apex court in **Dev Dutt v. Union of India** (Supra). Several pronouncements prior thereto laying down the applicable principles have been referred to in **Dev Dutt v. Union of India** (Supra). We find that the court placed reliance on the pronouncement reported at **AIR 1988 SC 2060** titled **Vijay Kumar v. State of Maharashtra & Others** wherein it was held that an uncommunicated adverse report should not form the foundation to deny the benefits to a government servant when similar

benefits are extended to his juniors.

5. The reference has also been made to the pronouncement reported at **1999 (1) SCC 529** titled **State of Gujarat and Another v. Suryakant Chunilal Shah** wherein it was held as follows:-

“Purpose of adverse entries is primarily to forewarn the Govt. servant to mend his ways and to improve his performance. That is why, it is required to communicate the adverse entries so that the Govt. servant, to whom the adverse entry is given, may have either opportunity to explain his conduct so as to show that the adverse entry was wholly uncalled for, or to silently brood over the matter and on being convinced that his previous conduct justified such an entry, to improve his performance.”

6. In **Dev Dutt v. Union of India** (Supra), the petitioner had been awarded a ‘good’ entry in his ACR for the year 1993-94 for which reason he was not considered for promotion to the post of Superintending Engineer, the benchmark be a ‘very good’ report. The respondents had contended that a ‘good’ ACR was not an adverse report and therefore, did not require to be communicated. In this background, the court had held that *“non-communication of entries in the Annual Confidential Report of a public servant, whether he is civil, judicial, police or any other service (other than the military), certainly has civil consequences before it may affect his chances for promotion or get other benefits (as already discussed above). Hence such*

non-communication would be arbitrary, and as such violative of Article 14 of the Constitution”.

7. In the case before us, we are concerned with the Constable with the ITBP which is a para military organization and the principles laid down by the court in the forgoing judgments and the authoritative pronouncement in **Dev Dutt v. Union of India** (Supra) have to guide adjudication. The same bind the respondents who have failed to communicate the adverse entry in the 2007 ACR to the petitioner which has formed the basis for denial of the posting to him in the rank of a Head Constable, even though he had been actually found fit for promotion and the respondents had even actually issued a order of promotion.

8. So far as the respondent's reliance on Rule 7(7) of the Swamy's Compilation on Confidential Reports of Central Government Employees is concerned, we find that similar reliance was placed on an office memorandum by the respondents before the Supreme Court of India in **Dev Dutt v. Union of India** (Supra). In this case, the court had held that no rule or government instruction can violate Article 14 or any other provision of the Constitution. In this regard the observations of the Supreme Court of India in para 12 of the pronouncement in **Dev Dutt v. Union of India** (Supra) may

be usefully adverted to and read as follows:-

“12. Learned Counsel for the respondent submitted that under the Office Memorandum 21011/4/87 [Estt.'A'] issued by the Ministry of Personnel/Public Grievance and Pensions dated 10/11.09.1987, only an adverse entry is to be communicated to the concerned employee. It is well settled that no rule or government instruction can violate Article 14 or any other provision of the Constitution, as the Constitution is the highest law of the land. ***The aforesaid Office Memorandum, if it is interpreted to mean that only adverse entries are to be communicated to the concerned employee and not other entries, would in our opinion become arbitrary and hence illegal being violative of Article 14. All similar Rules/Government Orders/Office Memoranda, in respect of all services under the State, whether civil, judicial, police, or other service (except the military), will hence also be illegal and are therefore liable to be ignored.***”

Thus, Rule 7(7), even if considered binding, if restricting communication of ACRs to only adverse entries would be illegal as it violates Article 14 of the Constitution. The same cannot control or guide the actions of the respondents.

9. In this background, having regard to the aforenoticed well settled principles of law, we direct as follows:-

- (i) The order dated 6th August, 2011 passed by the respondents against the petitioner is hereby set aside and quashed.
- (ii) The respondents are directed to communicate the adverse entries in the ACR for the year 2007 to the petitioner

within a period of six weeks from today.

(iii) On receipt of the said communication, it shall be open to the petitioner to make representation, if any, against the entry within a period of two months thereafter which shall be decided by the respondents within a further period of two months.

(iv) In case, the respondents take a view in favour of the petitioner, the petitioner having already been found fit for promotion and having actually promoted by the order dated 25th July, 2011, the promotion shall be given effect to with arrears of pay and all other consequential benefits.

(v) The petitioner shall be entitled to cost of the present petition which are quantified at Rs.15,000/-. The cost shall be paid within a period of two months from today.

GITA MITTAL, J

J.R. MIDHA, J

AUGUST 29, 2012

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