

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

Judgment Reserved on September 19, 2013

Judgment Delivered on October 23, 2013

+ W.P.(C) 5913/2011

RAJEEV BHATNAGAR Petitioner
Represented by: Mr.Sachin Sharma, Adv.

versus

UNION OF INDIA & ORS. Respondents
Represented by: Dr.Ashwani Bhardwaj, Adv.

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

1. The present writ petition has been filed by the petitioner seeking the following reliefs:-

“(a) Issue appropriate writ, order or direction to the respondents quashing the adverse ACR for the period 1/1/2006 to 3/11/2006 and for the period 1.1.2007 to 31.12.2007 and direct the respondent consider the petitioners case for promotion to higher grade/rank retrospectively since his junior was promoted the petitioner to the rank of Asst. Commandant, (Exe.).

(b) Quash and set aside the order of rejection of representation dated 20/08/2010 and 22.10.2010 in appeal dated 23.06.2010.

(c) Pass Order directing the Respondents to

consider the case of the Applicant for promotion on the basis of self-assessment and on the basis of earlier ACRs excluding the ACRs of 2006 and 2007.

(d) Granting the cost of the petition.”

2. The relevant facts are that the petitioner was appointed in Central Industrial Security Force (CISF) as Sub-Inspector on June 30, 1987. He was subsequently promoted to the post of Inspector in November 1996. The petitioner was posted at Indian Oil Corporation Plant at Panipat vide order dated May 21, 2005. On September 15, 2006 he was transferred to DHEP Dulhasti, J&K before the usual term of three years in Panipat expired.

3. On February 01, 2007 the petitioner was informed that he was transferred to DHEP Dulhasti on the basis of an adverse annual confidential report for the period January 01, 2006 to November 03, 2006.

4. The petitioner represented to the Inspector General against the adverse remarks for the aforesaid period which was the basis for his transfer. He had sought for cancellation of his transfer order. The same was rejected. The final rejection letter with regard to his representation was dated October 24, 2007.

5. The petitioner filed a writ petition being WP(C) No.928/2008 before this Court wherein he had claimed the following reliefs:-

“(a) Issue appropriate writ, order or direction to the respondents quashing the adverse ACR for the period 1/1/2006 to 3/11/2006.

(b) Quash and set aside the order of rejection of

appeal dated 24/10/2007.

(c) Quash and set aside the order of transfer dated 15/9/2006 and the order of rejection dated 23/4/2007, as it is malafide, arbitrary, biased and punitive in nature.”

6. The grounds of challenge in the said writ petition were that; no show cause notice was ever issued stating any shortcomings in so far as his working is concerned, nor any communication was made of the adverse remark to the petitioner, which were only conveyed after his transfer to Dulhasti.

7. During the pendency of the said writ petition the petitioner confined his relief to quashing of adverse ACRs for the period January 01, 2006 to November 03, 2006 and the subsequent order rejecting the representation on October 24, 2007.

8. This Court had called for the records and after perusing the same was of the view the remarks of the Senior Reviewing Officer who had rated him “below average” for the reason, that he was transferred out on adverse ground, was directed to be struck off from the ACR of the petitioner. This Court consequently quashed the order dated October 24, 2007 without effecting the transfer of the petitioner to Dulhasti. The operative para of the order of this Court dated November 26, 2008 in WP(C) No.928/2008 is reproduced as under:-

“It is, thus, our considered view that the ACR in question does not have any adverse remark and it cannot be said that the SRO can without giving any reasons opine that the transfer order itself should be treated as an adverse remark. This is apart from the fact that at no stage was any notice

issued to the petitioner other than when the petitioner made a representation.

A writ or mandamus is issued quashing the remarks of the SRO that the transfer order itself should be treated as an adverse remark and the same be accordingly struck off from the ACR of the petitioner. The consequence of the same is that the order in appeal dated 24.10.2007 is also quashed without effecting the transfer.”

9. We may only point out here that the respondents vide order dated June 26, 2009 have expunged the adverse remark of “below average” recorded in the ACR for the period January 2006 to November, 2006 of the Senior Reviewing Officer.

10. Pursuant to the judgment of the Supreme Court in the case reported as 2008 (8) SCC 725 Dev Dutt v. Union of India, the Government of India issued instructions on April 13, 2010 whereby it was decided, even below benchmark grading in the ACRs prior to the period 2008-2009 be communicated to the concerned employee so as to enable him to make representation within 15 days of such communication.

11. The respondents issued letter dated June 08, 2010 communicating to the petitioner the ACR gradings for the period January 01, 2006 to November 03, 2006 (2006) and January 01, 2007 to December 31, 2007 (2007) as being below benchmark. The petitioner made a representation against the ACRs of 2006 to the DIG (North Zone) vide letter June 23, 2010. The primary grounds taken by the petitioner in the representation against the ACR gradings are as following:-

“(i) A bare perusal of the ACR for the year 2006 would reveal that the remarks of the Reviewing Officer itself speak the state of mind when he first accepted the remarks of the Reporting Officer by writing the word ‘yes’ but later on edited with the word ‘no’ but he was failed to state the reason in the para-3 of the part (IV).

(ii) The assessment of the performance of the Applicant as an average by Reviewing Officer without any sufficient ground conspicuously speaks the odious work of the officer as he was supervising the unit at the distance of 300 kms. So the reporting officer was the best judge on ground.

3) Without prejudice to the aforesaid contentions, I beg to submit this representation on the following facts for your kind considerations:-

(i) The self appraisal seated by the Applicant was totally ignored in which he highlighted his tremendous efforts in controlling the various types of crimes.

(ii) During the period under review Applicant was cash rewarded for the best governance vide letter no.F-20014/CISF/SOC/3DA/07/613B dated 3/04/07 for the incident taken place on dated 08/07/06 which was highlighted by the Applicant in the self-appraisal.

(iii) Commandant DHEP Dulhasti vide letter no.E-34012/CISF/DHEP/ADM-1’ REWARD /07/1740 dated 9/05/07 commended the good work of the undersigned during the visit of Honorable ADG/CISF on dated 29/11/06.

(iv) None of the any supervisory officer of the Sector, Zone, Group HQ’s or Unit had ever passed any adverse remarks verbally or in writing

against the applicant during the period under question.

(v) In the past I had tried my best to impress the authority about my competency and hardwork at all level but could not get justice. Later on moved to Hon'ble High Court of Delhi for justice where Hon'ble High Court of Delhi acquitted the Applicant from the adverse remark through the judgment and the same was communicated by the IG/NS through letter no.V-14013/04/2008/NS/LEGAL-3864 dated 26/06/09 about the expunge of adverse remark recorded in the ACR of the undersigned but it seems through your above letter that still justice is awaited."

12. In so far as his representation dated June 23, 2010 against the ACR gradings of the year 2007 is concerned, the petitioner has stated as under:-

"Shri Ovinder Kumar, AC on fresh appointment in the year 2007 joined CISF Unit DHEP Dulhasti and was directed by the Commandant Shri B M Tandi to supervise Charlie company which was far away about 40 kms from the Dulhasti. He remained there completely during the tenure of 2007. The rest of the companies were being looked after by the Dy. Comndt Shri N K Sharma. Therefore writing the ACR for the entire year of 2007 by an officer under whom I did not work is against the instruction on the subject of initiation of ACR of the GOI and therefore, it s crystal clear that the provisions of the instructions of GOI have been clearly violated.

3) Without prejudice to the aforesaid contentions, I beg to submit this representation on the following facts for your kind consideration:-

(i) The Reporting officer had clearly stated in almost all the columns that I possess everything required for an Inspector and in such a situation grading me as an Average Inspector in column no.23 is unjustifiable, illegal, improper, and irregular and is against the weight of evidence and probabilities of the case. The rest adverse comment evidently speaks contention of the Reporting officer. The Reviewing Officer also without going through all these facts had simply accepted the remarks of the Reporting officer which is incorrect in the eyes of law.

(ii) The Reporting officer had graded my performance in almost all the columns as Adequate, meaning of which is above Average/Satisfactory and certainly can not be average. This simple fact the Reporting officer had failed to see and Reviewing officer also without going through all these facts had simply accepted the remarks of the Reporting officer, which is bad in the eyes of law.

(iii) None of the any supervisory officer of Sector, Zone or the unit under the period of review had ever passed any adverse remarks verbally or in writing against me.

(iv) part (HI) and (IV) of the Reporting as well as Reviewing officers may kindly be perused in which both of them failed to state the reason of their assessment. Thus, this conspicuously speaks the malafide intention of both the officers who were definite enough anyhow to spoil the career of the undersigned by ignoring the self-appraisal of the Inspector.

(v) The remarks of the Reviewing officer in para-6 of part (IV) itself revealed that officer without understanding the contents was under the pressure to spoil the career of the undersigned.”

13. These representations of the petitioner were rejected vide letters dated October 24, 2010 and August 20, 2010 respectively.

14. The respondents vide order August 28, 2010 excluded the name of the petitioner for promotion. Being aggrieved thereby the petitioner made a representation to the IG, CISF dated September 17, 2010 through the Dy. Commandant, CISF which representation was returned back to the petitioner with the observation the petitioner's representation was already disposed of vide letter dated October 20, 2010. Suffice would it be to state that the petitioner submitted a memorial to the IG CISF in terms of his letter dated January 18, 2011 which according to the petitioner has not been replied till date.

15. Aggrieved by the ACR gradings which are below the benchmark and his non-promotion the petitioner has filed the present writ petition.

16. Mr.Sachin Sharma, Advocate appearing for the petitioner would submit that the ACR gradings for the year 2006 and 2007 are because of mala fide and bias of the respondents who have been made party in person i.e. respondent Nos.5 and 6 respectively. He contends that the ACR gradings for the year 2006 and 2007 are liable to be set aside as they have been communicated belatedly only in the year 2010. Mr.Sharma states that there was no notice, warning ever given to him in the year 2006 and 2007 and as such the ACR gradings could not have been "Average". Further stress is laid on the fact that this Court in WP(C) No.928/2007 having quashed the remarks of the Senior Reviewing Officer, the grading

given by the officers below gets merged with the remark of the SRO and as such the same should be treated as “good” instead of average. The submission is that the rejection of the representation is totally perverse and the authorities have not taken into consideration the relevant instructions of the Govt. of India. Mr.Sharma would further canvass strenuously that in so far as the ACR of 2007 is concerned the same was written by an officer who had only supervised his work for 14 days. In terms of the instructions of the Govt. of India minimum three months supervision is necessary to enable an officer to write an ACR. He specifically names one Mr.Ovinder Kumar, respondent No.5 who was Asstt. Commandant, while that petitioner was posted at Dulhasti, who acted as the reporting officer.

17. Mr.Sachin Sharma would rely upon the following judgments in support of his contentions (2008) 8 SCC 725 *Dev Dutt v. Union of India & Ors.*; (2009) 16 SCC 146 *Abhijit Ghosh Dastidar v Union of India & Ors.*; *Sukhdev Singh v. Union of India & Ors. Civil Appeal No.5892/2006 decided on April 23, 2013*; (2009) 17 SCC 770 *Pawan M.Chandra v. Rajasthan High Court & Anr., Union of India & Anr. v. V.K.Vashisht WP(C)5036/2012 decided on December 19, 2012.*

18. On the other hand Dr.Ashwani Bhardwaj, learned counsel appearing for the respondents would submit that the allegations of mala fides and bias are not sustainable on facts and in law inasmuch as the petitioner in his representation had never alleged bias or mala fide against any of the officer. According to him after the judgment of the Supreme Court in *Dev Dutt's case (supra)* the Govt. of India

issued instructions on April 13, 2010 whereby it was decided that any ACR grading below the benchmark necessarily to be communicated.

19. It is only after the said instructions were issued by the Govt.of India, the respondents herein communicated to the petitioner the below benchmark in his ACR in the month of June, 2010. He further pleads that there is no delay in communicating the below bench mark gradings to the petitioner. According to him before 2010 only adverse remarks were to be communicated. Since the remarks as communicated to the petitioner were not adverse in nature the same were not communicated to the petitioner. In any case by communicating the below benchmark gradings in ACR, the respondents have implemented the law laid down by the Supreme Court in Dev Dutt's case (supra) and the instructions issued by Govt.of India on April 13, 2010.

20. So far as the issue of the ACRs for the year 2006 is concerned, Dr.Bhardwaj would further submit that the same stands determined by this Court in WP(C) No.928/2008. The challenge in this writ petition to the ACRs of 2006 would be barred by the principles of res judicata. He also places reliance on the last paragraph of the order of this Court dated November 26, 2008 to submit that this Court had only quashed the remarks of the Senior Reviewing Officer wherein it had observed that the transfer order itself should be treated as an adverse remark. In view of the said finding, this Court would not go into the aspect of the gradings of the year 2006.

21. Dr.Ashwani Bhardwaj has also taken us through the various

advisory memos issued to the petitioner from time to time. According to him the memos were issued on April 03, 2006; August 05, 2006 and July 20, 2006 (page 277-278) to submit that the activities/performance of the petitioner were/was not upto the mark. Therefore Dr.Bhardwaj would justify the ACR gradings of “average” given to him for the year 2006 and 2007, which have been questioned in the writ petition.

22. We have seen the representations made by the petitioner against the ACR gradings for the year 2006 and 2007. There are no allegations of bias and mala fide against any of the officer. The only allegation against an officer, even if made, is against Mr.Ovinder Kumar, Asstt. Commandant, that too only to the extent that he was posted far away about at 40 kms from Dulhasti and he had not supervised his work. To allege mala fides is one thing, but to say that he was posted 40 kms. away is another thing. The same would not signify mala fides or bias.

23. On the aspect of delay in communicating the ACR gradings for the year 2006-2007 is concerned, we agree with the submission of Dr.Ashwani Bhardwaj that after the judgment of the Supreme Court in Dev Dutt's case (supra) the Govt. Of India had issued instructions on April 13, 2010 to ensure ACR gradings, if below benchmark, are communicated to an employee. We note that immediately thereafter the ACR gradings for the year 2006 and 2007 were communicated to the petitioner. Before Dev Dutt's case (supra) instructions dated April 13, 2010, only adverse ACRs were to be communicated to the employee concerned. We therefore find that there is no delay after the instructions dated April 13, 2010

were issued.

24. Even if it could be held that there is delay, the same had been properly explained. Rather, by communicating the ACR gradings of below benchmark, the respondents have implemented the judgment of the Supreme Court in Dev Dutt's case (supra). In this regard para 44 of Dev Dutt's case (supra) is relevant on this particular aspect which reads as under:

“We, therefore, direct that the “good” entry be communicated to the appellant within a period of two months from the date of receipt of the copy of this judgment. On being communicated, the appellant may make the representation, if he so chooses, against the said entry within two months thereafter and the said representation will be decided within two months thereafter. If his entry is upgraded the appellant shall be considered for promotion retrospectively by the Departmental Promotion Committee (DPC) within three months thereafter and if the appellant gets selected for promotion retrospectively, he should be given higher pension with arrears of pay and interest @ 8% per annum till the date of payment.”

25. In so far as the contention of Mr.Sachin Sharma, learned counsel for the petitioner that no notice or warning was given to him before the particular gradings were recorded in the ACR is concerned, the same is not correct as it is seen that from time to time the respondents had communicated to the petitioner about his working. In fact, we note that the communication dated July 20, 2006 is a communication by Group Commandant with the Dy.Inspector General who had inquired with regard to certain malpractices of the personnel at main gate of IOC, Panipat. In the

said communication, it was mentioned by the Group Commandant that the activities/performance of the petitioner was not upto the mark for controlling crime and lack of administration.

26. The contention of Mr.Sachin Sharma that this Court while adjudicating upon WP(C) No.928/2007 had quashed the average grading given to the petitioner; that thereupon the grading of the officers below gets merged with the remark of the Senior Reviewing Officer and that the grading should be treated as “good”, is concerned the same has no force. We have seen the order passed by this Court in the aforesaid writ petition. This Court had only quashed the “below average” grading given on the basis of the remarks made by the Senior Reviewing Officer that the transfer itself should be treated as adverse remark. This remark having been quashed, the adverse grading given was rightly expunged by the respondents pursuant thereto. However, the grading of “Average” of the year 2006 stands.

27. We are also unable to agree with Mr.Sachin Sharma that Mr. Mr.Ovinder Kumar, the reporting officer had only supervised the work of the petitioner for 14 days. Mr.Ashwani Bhardwaj, learned counsel for the respondents has drawn our attention to para 12 of the counter affidavit wherein the respondents have taken a specific plea that Mr.Ovinder Kumar was given the charge of Charlie Company till his relieving from the unit. During this tenure he was given the charge of GO I/C of other companies and was assigned duties of AC, Admn. and DDO. He was the only officer present in the unit except the Commandant who was in position to initiate the ACR of unit sub-officers including the petitioner. As such the ACRs were

initiated by Mr.Ovinder Kumar. We have seen, the rejoinder, the petitioner has not denied these averments made in the counter affidavit.

28. That apart, we have seen the representation made by the petitioner against ACR gradings specially the one dated June 23, 2010 wherein the petitioner admit the fact that Mr.Ovinder Kumar remained at Dulhasti completely during the tenure of 2007 which means Mr.Ovinder Kumar was posted during the entire period of 2007 in Dulhasti. We also find that there is no averment in the representations stating that Mr.Ovinder Kumar has supervised the petitioner's work only for 14 days. We have no hesitation to conclude Mr.Ovinder Kumar was given the charge of the company wherein the petitioner was posted and he had rightly initiated for the ACRS for the year 2007.

29. The reliance placed by Mr.Sachin Sharma, Advocate on various judgments is also misconceived. These judgments would in fact support the case of the respondents. Except Pawan M.Chandra's case (supra) all other cases cited by the petitioner had only decided that the below bench mark gradings have to be communicated. This position of law is well settled and cannot be disputed. In the present case, in conformity, the respondents have communicated the ACR gradings which are admittedly below the "benchmark" for promotion.

30. In so far as the judgment of Pawan M.Chandra's case (supra) is concerned we find that on facts the same can be differentiated inasmuch as in the said case the Supreme Court was concerned with the adverse remarks of very sweeping in nature had been made

against a judicial officer. These include comments on his integrity, which were made on the basis of the two complaints made by the two accused whose bail application etc. stood rejected by the judicial officer. The judicial officer made representation against the remarks duly supported by evidence.

31. In the present case the respondents have put on record the advisory memos issued to the petitioner in the year 2006. Surely the work and conduct of the petitioner is reflected by those advisory memos. Moreover there is no comment on the integrity of the petitioner.

32. In view of the above discussion, we do not find any merit in the writ petition. The same is accordingly dismissed. There is no order as to costs.

(V.KAMESWAR RAO)
JUDGE

(GITA MITTAL)
JUDGE

OCTOBER 23, 2013
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