

HIGH COURT OF MEGHALAYA
AT SHILLONG

WA No.35/2022 with
MC (WA) No.17/2022

Date of order: 01.03.2023

Mohamed Affan Farooqui Vs. Union of India & ors

Coram:

Hon'ble Mr. Justice Sanjib Banerjee, Chief Justice
Hon'ble Mr. Justice H. S. Thangkhiew, Judge

Appearance:

For the Appellant : Mr. M.R.D. Singh, Adv with
Mr. M.L. Nongpiur, Adv

For the Respondents : Mr. R. Debnath, CGC

i) Whether approved for reporting in Law journals etc.: Yes/No

ii) Whether approved for publication in press: Yes/No

JUDGMENT: (per the Hon'ble, the Chief Justice) (Oral)

At first blush, particularly on the basis of the papers relied upon by the Assam Rifles, it would appear that the writ petitioner-appellant approached this Court with an utterly false case. Indeed, the present appeal was itself being dismissed, before it was pointed out on behalf of the appellant that the papers relied upon by Assam Rifles do not match up and it is apparent that such papers may have been doctored or presented to the prejudice of the appellant.

2. The appellant complains that a departmental promotion committee meeting held on October 14, 2019 unfairly found the appellant

to be unfit to be promoted. The reason given by the DPC was that in one of the annual confidential reports relevant for consideration – that for the year 2015-16 – the appellant herein was rated as average. The DPC was of the opinion that in terms of the prevailing rules, when an officer had been graded average during any one of the relevant years for which the ACRs had to be considered, such officer would not be entitled to promotion.

3. The case that the appellant as the writ petitioner brought to this Court was that prior to January 13, 2020 he had no inkling of any adverse remark that had been attributed to him in any of his relevant ACRs. There is also an undisputed document revealing that by a written communication of November 29, 2019, the appellant was forwarded copies of several of his ACRs and that he received the same on January 13, 2020.

4. Based on the accepted principle that an adverse remark made in the ACR of an employee had to be brought to the notice of the concerned employee for him to make a representation against the same within reasonable time and the fact that there was no adverse remark in his ACR that the appellant had been informed of, the appellant questioned the propriety of the decision not to promote him from second-in-command as revealed by the DPC minutes of October 14, 2019.

5. In course of the proceedings before the Court of the first instance and even in this appeal, Assam Rifles relied on a document that apparently reveals that the grading of average had been completed in respect of the year 2015-16 by April 1, 2016 and that the appellant herein was shown the same ACR whereupon he appended his signature thereto on April 1, 2016. Ordinarily, it would not occur to a court of law that a disciplined police force as the Assam Rifles would attempt to play fast and loose with it and gave a false impression with an attempt to deceive the Court. But that is exactly how the Assam Rifles has conducted itself in the present proceedings.

6. The relevant rules of the organisation, which are not in dispute, require that ACRs be made available to the concerned personnel contemporaneously. This follows repeated judgments of constitutional courts in this country requiring adverse reports to be brought to the knowledge of the concerned personnel so that they may have a chance to represent thereagainst. Oftentimes, the career of a brilliant or a good officer may be ruined because of the adverse remark of a superior who may have a personal grudge against the officer and which adverse remark may be reviewed and corrected by superior peers upon receipt of a representation in such regard.

7. The writ court found that since the appellant herein had acknowledged having seen the ACR by signing on the first page thereof and appending the date of April 1, 2016, it did not lie in the appellant's mouth to suggest that he was not contemporaneously aware of the average rating in his ACR for 2015-16 and his consequential ineligibility to be considered for promotion at the DPC of 2019.

8. Despite the appellant being afforded a chance to use a rejoinder and to specifically deal with the allegations in the affidavit filed by Assam Rifles in the appeal, the appellant's rejoinder is replete with lectures on legal theories, reports of case laws and divers other irrelevant material, including may be the weather at the South Pole; but not the essential facts required in an affidavit. It has become a fashion of the mediocre these days to hold forth on legal issues, principles and precedents without referring to the basic facts in dispute in an affidavit. It must be remembered that pleadings filed before Court are primarily to enlighten the Court on the factual position and, the effect of the facts based on the law may be indicated in short.

9. In the present case, the entire ACR of the appellant for the year 2015-16 was disclosed in the affidavit filed by Assam Rifles and, on the first page, the appellant's signature appeared clearly. It was thus incumbent on the appellant to indicate why the facts were such that the

appellant's signature on the first page of the ACR should not be accepted as conclusive evidence of the appellant having been given the complete ACR or shown the same contemporaneously.

10. Thankfully, paragraph 15 of the writ petition contains the primary attack and, what ought to have been indicated in greater detail in the rejoinder in the appeal, finds mention in such paragraph 15 of the writ petition:

“15. That the petitioner states that in the ACR for the year 2015-16 dated 01.04.2016, there is a column (b) where the Initiating Officer (Commandant) has to give details as to whether the ratee been given verbal or written guidance for improvement during the reporting period and in the aforesaid column the Initiating Officer (Commandant) has himself noted Nil for verbal and Nil for written. However, surprisingly in the same ACR dated 01.04.2016, the DIGAR (Reviewing Officer) has recorded that *“Farooqui as 2IC of 35 AR performed ‘average’. He was counselled by me in April 2015 and by the Comdt 35 AR on 08 Apr 15 to improve his inter personal conduct with officers and JCOs/OR. Being a present LMC, his contribution to CT ops was ltd. Copy of warning letter issued by Commandant 35 AR to the officer vide 36 AR Letter No.59503/RSD/Pers/2015/141 dt 08 Apr 15 is enclosed.”* As such, the stand taken by the Initiating Officer (Commandant) and the Reviewing Officer (DIGAR) are in itself contradictory as the Initiating Officer (Commandant) has recorded Nil for verbal as well as written. Further, with regard to the warning letter dated 08.04.2015, it is the case of the petitioner that the petitioner never received the aforesaid letter from the Commandant 36 Assam Rifles as claimed by the DIGAR. Further, it is pertinent to mention herein that the purported warning letter was issued by the Commandant 36 Assam Rifles on 08.04.2015 prior to the ACR dated 10.06.2015. However, there was no mention of the warning letter by the Commandant 36 Assam Rifles in the ACR dated 10.06.2015 and further the Commandant 36 Assam Rifles has graded the petitioner 8 points with the remark that *“2IC M.A. Farooqui is an extremely sincere,*

hard working and dedicated officer. He is systematic and methodical in his approach and assertive in his task. He displays honesty and propriety in use of service position and resources. He has efficiently completed the task allotted to him. He at times has single handedly fulfilled the responsibility of Adjt, OM and 2IC of the Battalion. Courteous, polite but firm in dealing. He is an asset to the organization.”

11. In the set of documents pertaining to the ACR of the appellant for the year 2015-16, the first page carries the signature of both the initiating officer and of the appellant herein with the same date of April 1, 2016. Apart from the initiating officer's comments which are indicated at paragraph 16 of the ACR, there are other parts to the ACR including paragraph 18. Paragraph 18 is chosen out for special mention since such paragraph is damning to the appellant herein and if the contents thereof are true and the appellant was aware of the same contemporaneously, the appellant would have no case at all.

12. Paragraph 18 of the relevant ACR contains the comments of the Deputy Inspector-General of Assam Rifles. These comments have been made on April 24, 2016. The DIGAR remarks as follows:

“Farooqui as 2IC of 36 AR performed “average”. He was verbally counselled by me in Apr 15 to improve his inter personal conduct with offrs and JCOs/OR. Being a pernt LMC, his contribution to CT Ops was ltd.

Copy of warning letter issued by Comdt 36 AR to the offr vide 36 AR letter No.59503/RSD/Pers/2015/143 dated 08 Apr 15 is encl.”

13. It may be necessary to look at the applicable rules at this stage. As per an office memorandum issued by the Department of Personnel and Training of the Union dated May 14, 2009, the full annual performance appraisal report (otherwise known as annual confidential report or ACR) including the overall grade and assessment of integrity “shall be communicated to the concerned officer after the Report is complete with the remarks of the Reviewing Officer and the Accepting Authority ...” The same memorandum also mandates that the concerned officer “shall be given the opportunity to make any representation against the entries and the final grading given in the Report within a period of fifteen days from the date of receipt of the entries in the APAR.”

14. It cannot be missed that as late as in the year 2017, the Ministry of Home Affairs noticed that the transparency as required to be maintained in respect of APARs may not have been followed by the several departments or organisations under such Ministry. In a memorandum of October 16, 2017, the Ministry advised all Central Armed Police Forces to “ensure that the APARs of the officers/officials are communicated to them” with appropriate acknowledgement in such regard.

15. The two aspects that need to be highlighted in the present case are that the office memorandum issued by the DoPT in the year 2009 required

the completed APAR or ACR to be communicated to the relevant employee and that such employee had to be afforded a chance to make a representation against any adverse remark that may be contained therein.

16. Against such backdrop, it is the appellant's ACR of 2015-16 that has been relied upon by Assam Rifles that needs to be seen in greater detail. It is true that the appellant had signed the first page of the ACR bearing the date April 1, 2016, but it is apparent on a reading of the entirety of the ACR that as on April 1, 2016, the ACR had not been completed. In fact, though the initiating officer's comments appear to have been made on April 1, 2016, the reviewing officer's comments appear to have been made on April 9, 2016, the DIG's comments on April 24, 2016 and the Inspector-General's comments on May 13, 2016.

17. Though the appellant seeks to indicate the internal inconsistencies in the comments of the four superior personnel and also seeks to rely on the commendations heaped on the appellant and his exemplary performance noticed in the other ACRs, there is no need to go down such path once it is apparent that the subsequent superior officers, despite their comment apparently to the contrary, expressly found the initiating officer's comment to be justified.

18. What is undeniable is that there is nothing on record to demonstrate that the appellant was forwarded a copy of his ACR for the

year 2015-16 upon the completion thereof. Merely because the appellant signed the first page of the document on April 1, 2016 by which time the initiating officer may have already indicated his comments, would count for nothing since the initiating officer's comments were subject to review, modification or correction by the superior officials. No attempt has been made by Assam Rifles to show that subsequent of the completion of the appellant's ACR for 2015-16 and prior to the DPC meeting of October 14, 2019, the appellant herein was made aware of his complete ACR for the relevant year. Indeed, the only other relevant document that is on record demonstrates that a bunch of ACRs, including for the year 2015-16, was made over to the appellant only on January 13, 2020, though the covering letter in such regard was dated November 29, 2019.

19. It is elementary that when rules are in place, matters which are governed by the rules have to be dealt with in accordance therewith. The appellant herein was seriously prejudiced in the appellant not being provided the full complement of his ACR for the year 2015-16 and the adverse rating therein for him to make a representation against the same. Since it is evident from the documents produced that the appellant did not have his completed ACR for the relevant year prior to the DPC meeting of October 14, 2019, the DPC could not have taken the adverse rating of the appellant in the year 2015-16 into account.

20. There is a further feature of the matter that cannot be missed. According to DIG's comments at paragraph 18 of the ACR, a warning letter was issued by the commandant of the relevant regiment to the appellant on April 8, 2015. Remarkably, neither the initiating officer nor the reviewing officer referred to any written or verbal guidance having been issued to the appellant during the period covered by the report.

21. Indeed, information regarding any verbal or written guidance for improvement is sought only from the initiating officer and the reviewing officer as such officials would be in a much better position to be aware of the same than the superior officials. It is somewhat surprising that despite the initiating officer and the reviewing officer not referring to any verbal or written guidance for improvement having been issued to the appellant herein during the period covered by the report, a particular written communication in such regard is referred to by the DIG.

22. Further, as is evident from paragraph 15 of the writ petition, it was categorically asserted by the appellant herein that "with regard to the warning letter dated 08.04.2015, it is the case of the petitioner that the petitioner never received the aforesaid letter from the Commandant 36 Assam Rifles as claimed by the DIGAR."

23. To boot, the appellant has appropriately emphasised in paragraph 15 of the writ petition that is highly unlikely that the appellant's conduct

would warrant a written guidance for improvement and yet the same commandant who is said to have issued the written guidance would be so gushing in his praise for the appellant as is evident from the commandant's grading of the appellant at eight points and his appreciation of the appellant's performance as quoted at the end of paragraph 15 of the writ petition.

24. At any rate, upon the appellant herein making a positive assertion that he had not been served any written guidance of April 8, 2015, it was incumbent on Assam Rifles to positively establish that such letter had been delivered to the appellant. There is abject failure on the part of Assam Rifles and the respondents in such regard.

25. As a consequence, the appellant would be entitled to promotion at the DPC of October 14, 2019 since the purported adverse remark against the appellant in the appellant's ACR of 2015-16 would have to be disregarded upon the employer's failure to afford the appellant a chance to represent against the same.

26. It is submitted on behalf of the appellant that with effect from February 1, 2023, the appellant has been promoted as a Commandant. Thus, the relief that the appellant will now be entitled to is that the appellant would be deemed to have been promoted to the relevant promotional post as the appellant's peers at the DPC held on October 14,

2019 and the appellant's consequential seniority and pecuniary benefits will be counted accordingly. The additional pecuniary benefits that the appellant is now found to be entitled to, should be made over to the appellant within three months from date.

27. The judgment and order impugned dated August 2, 2022 is set aside inasmuch as it fails to appreciate that in terms of the relevant rules as indicated in the office memorandum of the DoPT of the year 2009, all employees were entitled to be made aware of their completed ACRs contemporaneously and, in particular, if there was any adverse report against an employee, such employee had to be afforded a chance to represent against the same within 15 days of the completion of the report. Clearly, Assam Rifles acted in breach of the obligation that it owed to the appellant and in acting as aforesaid, affected the appellant's right to be considered for promotion.

28. Apart from the fact that the appellant was harshly dealt with by a disciplined police force, it is evident that the Assam Rifles tried to hoodwink this Court into believing that the appellant had due notice and knowledge of his ACR of 2015-16 long prior to the DPC finding the appellant unfit for promotion. The Director-General of Assam Rifles would do well to advise his officers that they should be extremely careful

in presenting their side of the case or in preparing affidavits before a court of law.

29. In addition to the benefits that the appellant will be entitled to receive, the appellant will be paid costs assessed at Rs.1 lakh for the trouble that the appellant has had to go through to vindicate his right. Such payment will also be made within three months from date.

30. WA No.35 of 2022 succeeds as above and WP (C) No.266 of 2020 is allowed to the extent indicated.

31. MC (WA) No.17 of 2022 is disposed of.

(H. S. Thangkhiew)
Judge

(Sanjib Banerjee)
Chief Justice

Meghalaya
01.03.2023
"*Lam* DR-PS"

