

GAHC010119532022



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/4418/2022

HARI RAM
S/O. SRI RATTAN CHAND, SERVING AS A HAVILDAR/GD (GENERAL DUTY)
AT THE ASSAM RIFLES C/O. 99 APO, PIN-932042.

VERSUS

THE UNION OF INDIA AND 3 ORS
REP. BY THE SECRETARY THE GOVT. OF INDIA, MINISTRY OF HOME
AFFAIRS, NEW DELHI-110001.

2:THE DIRECTOR GENERAL

ASSAM RIFLES
HEAD QUARTER DIRECTORATE GENERAL
ASSAM RIFLES SHILLONG-11.

3:THE COMMANDANT 42ND ASSAM RIFLES

C/O. 99 APO
PIN-932042.

4:G/2901470 WARRANT OFFIER/GENERAL DUTY RAM KUMAR

C/O. THE COMMANDANT 42ND ASSAM RIFLES
C/O. 99 APO
PIN-932042

Advocate for the Petitioner : MS. S BORA

Advocate for the Respondent : ASSTT.S.G.I.

**BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA**

ORDER

Date : 02-08-2023

Heard Mr. S. Bora, learned counsel for the petitioner as well as Mr. A.K. Dutta, learned CGC appearing for all the respondents.

2. Aggrieved by non-consideration of the candidature of the petitioner for promotion to the post of Warrant Officer/General Duty, the present writ petition has been filed under Article 226 of the Constitution of India.

3. In brief, the case of the petitioner is that he was initially enrolled in the Assam Rifles as Rifleman/General Duty on 29.05.1994. On 01.01.2008, the petitioner was promoted to the rank of Havildar/(GD) General Duty. On 26.04.2019, three persons holding the rank of Havildar/(GD) General Duty, were promoted to the rank of Nb Sub (GD). The petitioner claims that as per the seniority position, the petitioner also should have been considered for promotion. Accordingly, the petitioner had submitted a representation dated 16.12.2019 to the Commandant, 42nd Assam Rifles with the prayer to consider that he had fulfilled all the criteria for promotion and to grant promotion to him to the rank of Warrant Officer/General Duty as per the seniority. The respondent authorities vide reply letter dated 29.02.2020, informed the petitioner that due to the lack of Annual Confidential Report (ACR) criteria, he could not be promoted to the rank of Warrant Officer/General Duty.

4. It is projected that the said letter dated 29.02.2020 was received by his Company office on 06.03.2020. At that time, he was on leave and therefore, the said letter was communicated to the petitioner on 14.03.2022. It is projected

that the petitioner is medically in SHAPE-I from the date of his enrolment and the specific stand has been taken in the writ petition that any remark contained in the ACR which was adverse to his interest was never communicated to him.

5. Per contra, the learned CGC has relied on the affidavit-in-opposition filed by the respondent nos. 1 to 4 and it is submitted that the benchmark in force for grant of promotion and 'Modified Assured Career Progression Scheme' benefits has been enhanced from 'Good' to 'Very Good' on implementation of the 7th Central Pay Commission Recommendations, which was done w.e.f. 01.01.2016 vide O.M. dated 27/28th September, 2016 issued by the Department of Personnel and Training, Ministry of Personnel, Public Grievances and Pensions, Government of India. It is submitted that the said ACR criteria from 'Good' to 'Very Good' has been implemented in Assam Rifles vide Directorate General, Assam Rifles letter dated 23.11.2016 and 29.12.2016 which are annexed to the affidavit-in-opposition. It is submitted that as per the letter dated 23.11.2016 by the Directorate General, Assam Rifles, on securing 1 point in the ACR, the grading will be 'Below Average', equivalent to 'Zero', on securing 2 points in the ACR, the grading would be 'Average', equivalent to 'Good', on securing 3 points in the ACR, the grading would be 'High Average', equivalent to 'Very Good' and on securing 4 points, the grading would be 'Above Average', equivalent to 'Very Good'.

6. It is projected that as per the grading criteria, the person who is to be considered for promotion should not have more than 3 red ink entries in his entire service, including not more than one red ink entry during last five years and that he would not be entitled to promotion within one year of last red ink entry and the candidate should be in SHAPE-I medical category. In so far as

educational qualification is concerned, one should have Army Certificate of Education-II or Matric pass and that the length of service should have been 5 years' service as Havildar (General Duty). It is projected that as per the ACR criteria, three (3) out of last five (5) reports i.e. ACR for the year 2015-2016, 2016-2017 and 2017-2018 should not be below 'Above Average/High Average' i.e. 4/3 points (Very Good reports) and the remaining two (2) ACR for the year 2013-2014 and 2014-2015 should not be below 'Average' i.e. 2 points (Good reports). It is also projected that out of the last five (5) reports, three reports must be from Battalion/Assam Rifles Training Centre and School/National Security Guard (not applicable to General Duty personnel forming part of any Assam Rifles team of any discipline attached to Assam Rifles/Army Formation) (Applicable to GD persons only) and the person should be recommended for promotion in all last five (5) reports.

7. It is submitted that the petitioner was graded 'Average (02 points)' by his Initiating Officer and Reviewing Officer in the ACR for the year 2016-2017 which was below the prescribed benchmark of 'Above Average (04 points)' or 'High Average (03 points)' i.e. 'Very Good'. Accordingly, the petitioner became disentitled for consideration of promotion.

8. The learned CGC has also submitted that as the petitioner was graded 'Average (02 points)' in the ACR for the year 2016-2017 and was recommended for promotion, the said entry in the ACR cannot be considered to be an adverse report and was required to be communicated to him. Accordingly, it is submitted that the supersession of the petitioner for promotion to the rank of Warrant Officer was in accordance with the Government policy.

9. The learned CGC has also submitted that after the petitioner has

submitted his representation dated 16.12.2019, the same was duly considered and rejected and therefore, there cannot be a fresh review of the candidature of the petitioner for promotion.

10. In this regard, the learned counsel for the petitioner has submitted that the grading of 'Average (02 points)' had resulted in denial of promotion to the petitioner which cannot be said to be not an adverse remark against the petitioner.

11. By referring to the case of *Dev Dutta vs. Union of India and others*, (2008) 8 SCC 725, the Supreme Court of India had given a verdict to the effect that every entry, not merely a poor or adverse entry, relating to an employee under the State or an instrumentality of the State, whether in civil, judicial, police or other service (except the military) must be communicated to him within a reasonable period of time. Paragraph 13, 15, 17 and 18 of the said judgment is extracted below :-

13. In our opinion, every entry (and not merely a poor or adverse entry) relating to an employee under the State or an instrumentality of the State, whether in civil, judicial, police or other service (except the military) must be communicated to him, within a reasonable period, and it makes no difference whether there is a benchmark or not. Even if there is no benchmark, non-communication of an entry may adversely affect the employee's chances of promotion (or getting some other benefit), because when comparative merit is being considered for promotion (or some other benefit) a person having a 'good' or 'average' or 'fair' entry certainly has less chances of being selected than a person having a 'very good' or 'outstanding' entry.

15. If we hold that only 'poor' entry is to be communicated, the consequences may be that persons getting 'fair', 'average', 'good' or 'very good' entries will not be able to represent for its upgradation, and this may subsequently adversely affect their chances of promotion (or get some other benefit).

17. In our opinion, every entry in the ACR of a public servant must be communicated to him within a reasonable period, whether it is a poor, fair, average, good or very good entry. This is because non-communication of such an entry may adversely affect the employee in two ways :

(1) Had the entry been communicated to him he would know about the assessment of his work and conduct by his superiors, which would enable him to improve his work in future; (2) he would have an opportunity of making a representation against the entry if he feels it is unjustified, and pray for its upgradation. Hence, non-communication of an entry is arbitrary, and it has been held by the Constitution Bench decision of this Court in Maneka Gandhi vs. Union of India that arbitrariness violates Article 14 of the Constitution.

18. Thus, it is not only when there is a benchmark but in all cases that an entry (whether it is poor, fair, average, good or very good) must be communicated to a public servant, otherwise there is violation of the principle of fairness, which is the soul of natural justice. Even an outstanding entry should be communicated since that would boost the morale of the employee and make him work harder.

12. In the considered opinion of the Court, although the petitioner was provided with 'Average (02 points)' in the ACR for the year 2016-2017, but such an entry had resulted in denial of promotion to the petitioner. Therefore, the Court is inclined to hold that the said entry of 'Average (02 points)' in the ACR for the year 2016-2017 was an adverse entry so far as the petitioner is concerned and the non-communication of the said remark to the petitioner has resulted in losing an opportunity by the petitioner to make a representation against such adverse remark. Accordingly, the Court is further inclined to hold that the non-consideration of the petitioner for promotion for the adverse remark appearing in the ACR for the year 2016-2017 was without granting an opportunity to the petitioner to submit his representation. This Court is also inclined to hold that the non-communication of the said entry was unfair on the part of the respondents and is in violation of the rights of the petitioner to natural justice.

13. The Supreme Court of India in paragraph 36 in the case of *Dev Dutta (supra)* had made it clear that all entries, whether poor, fair, average, good or very good must be communicated to the concerned employee. Therefore, in terms of the directions contained in the case of *Dev Dutta (supra)*, the Court is

inclined to direct the respondent authorities to communicate the entries of 'Average (02 points)' in the ACR for the year 2016-2017 to the petitioner. On communication of such entry to the petitioner, the petitioner would be allowed to make a representation against such entry before the concerned competent authority. The concerned competent authority is directed to decide the representation of the petitioner in a fair manner, preferably within a period of 1 (one) month. In order to assure fairness to the petitioner, this Court is inclined to direct the respondent authorities that the representation of the petitioner against the said entry in the ACR for the year 2016-2017 should be considered by an authority whose rank is higher than the one who made the earlier entry, which would be conducive to fairness and transparency in public administration and would also ensure fairness to the petitioner. In terms of the order passed by the Court in the case of *Dev Dutta (supra)*, this Court is inclined to clarify that the observations made in this order would not apply to the military officers.

14. It is provided that if the entry of the petitioner is upgraded, the petitioner shall be considered for promotion retrospectively from the date when his juniors were given the benefit of promotion i.e. by giving regard to the seniority of the petitioner as existed prior to promotional order no. A-121/2019 dated 26.04.2019. While considering the representation, the authority shall ignore the letter no. A/191/2020/3443 dated 29.02.2020 issued by the Major/Adjt on behalf of the Officiating Commandant, 42 Assam Rifles. In other words, it is provided that the letter dated 29.02.2020 shall not be considered with by the authorities when the representation of the petitioner is considered on merit.

15. This writ petition stands allowed to the extent as indicated above,

leaving the parties to bear their own cost.

JUDGE

Comparing Assistant