

IN THE HIGH COURT OF MANIPUR

AT IMPHAL

WP(C) No. 115 of 2021

Shri Satyendra Prasad Singh, aged about 57 years, S/o (Late) Ganga Prasad Singh, a permanent resident of Khoksa Buzurg, P.O. Khosa Buzurg, P.S. Desari, Vaishali District, Bihar, Pin-844504 presently posting at 29 Assam Rifles, L Khunou, Manipur, Pin-932029, C/o 99 APO.

..... Petitioner/s

- Versus -

1. The Union of India through the Secretary, Ministry of Home Affairs, Government of India, New Delhi-110001.
2. The Director General Assam Rifles, Records Branch, Shilong, Pin:793011.
3. The HQ, 21 Sector Assam Rifles, Pin-932421 C/o 99 APO.
4. The Commandant, 42, Assam Rifles, Pin-932042, C/o 99 APO.
5. The Commandant, 29 Assam Rifles, Pin-932029, C/o 99 APO.

.....Respondent/s

B E F O R E

HON'BLE MR. JUSTICE A. GUNESHWAR SHARMA

For the petitioner	::	Mrs. Momota Devi Oinam, Advocate & Mrs. Runashree Saikia, Advocate
For the respondents	::	Mrs. S. Samarjeet, Sr. PCCG
Date of Hearing	::	29.02.2024
Date of Judgment and Order	::	22.04.2024

JUDGEMENT & ORDER (CAV)

[1] Heard Mrs. Momota Devi Oinam, learned counsel for the petitioner and Mr. S. Samarjeet, learned Sr. PCCG for the respondents.

[2] The present writ petition has been filed challenging the decisions contained in the letters dated 01.07.2019 and 25.09.2019 issued by the Directorate General Assam Rifles, Records Branch, Shillong with a prayer for quashing/setting aside the reviewed ACR of the petitioner for the year 2016-17 and for giving promotion to the rank of Sub/Clerk.

[3] The petitioner was initially appointed as Riflemen (General Duty) on 31.12.1985 and re-mustered as Lance Naik/Writer (now Warrant Officer) on 01.10.1986 and subsequently promoted to Naib Subedar/Clerk on 01.01.2007 and posted at 29 Assam Rifles since June, 2018 and presently attached at L Khunou, Noney District, Manipur since August, 2020 till date. As the petitioner has completed 13 (thirteen) years in the grade of Naib Sub (Clek), he is eligible for promotion to the higher rank of Sub(Clk).

[4] The DPC was held in the year 2019 for promotion to the rank of Sub (Clk), the petitioner, who is at Sl. No. 44 of the Seniority list of Naib Subedar Clerk published on 19.01.2018 by the Directorate General Assam Rifles (Record Branch), Shillong, was superseded by one of his juniors namely Md. Yasin, who is at Sl. No. 45, vide promotion order dated 26.02.2019.

[5] Being aggrieved, the petitioner submitted a representation dated 27.04.2019 to the Directorate General Assam Rifles (Grievance Cell/Record Branch), Shillong for considering for promotion to the rank of Sub (Clk) and also submitted another representation dated 27.07.2019 to the Directorate General Assam Rifles (Grievance Cell/Record Branch), Shillong to consider him in the merit of the case.

[6] The present writ petition has been filed amongst the following grounds:

- (i) The actions of the respondents are illegal, arbitrary, discriminatory and unconstitutional.
- (ii) The weak rating of ACR for the year, 2016-2017 had not been communicated to the petitioner and as such, non-communication of the ACR criteria of the petitioner is against the Record Office Instruction (in short ROI) bearing No. 4/97 contained in para Nos. 32 and 40.
- (iii) The respondents have failed to follow the instruction at para No. 1 which is contained in the letter dated 06.06.2002 and vide letter dated 29.05.2019, promoting the petitioner to the rank of Sub (Clerk) was not recommended by the DPC held in the year 2019 due to lacking of ACR for the year 2016-17 and as per the instruction contained at Para No. 1 (b) and (c) of the letter dated 06.06.2002, before endorsing Weak Point or Adverse Remarks at ACR, a periodical warnings/performance counselling should be administered to the ratee (the present petitioner).
- (iv) vide letter dated 16.05.2017, the DGAR, Shillong circulated the instruction for review of ACRs for the year, 2016 wherein it is stated that Grading the incumbent below "Very Good" in the ACR will be considered as "Adverse Report" and if the ACR is not reviewed and graded below "Very Good" the same should be justified in detail in the pen picture and should be marked with red ink on top of the first page of CR as "Reviewed". But in case of the petitioner, it was not done by the concerned authority and as such, it was illegal, arbitrary and discriminatory.

- (v) As per the ACR criteria for promotion from Naib/Sub (Clerk) to the rank of Subedar (Clerk), as per the instruction contained in the letter dated 29.12.2016, the petitioner is entitled for promotion to Sub (Clerk).

[7] In the counter affidavit of the respondents, it is stated that the petitioner came up for promotion from Naib Subedar (Clerk) to Subedar (Clerk) as per his seniority in the year 2019 and he was screened by the Departmental Promotion Committee (DPC) 2019 along with his batch mates. The DPC was centrally held at Directorate General Assam Rifles, Shillong in the month of January 2019. The DPC 2019 found the petitioner at serial No.23 ineligible for promotion due to lacking in Annual Confidential Report (ACR) criteria, as he was graded 'High Average' with 05 points in the ACR for the year 2016-17. It is further stated that to be eligible for promotion, the petitioner should have been graded at least 'Above Average' with 07 points in that ACR. Accordingly, the petitioner was superseded for promotion by his junior Naib Subedar (Clerk) Md. Yashin. As per relevant rule, for promotion from Naib Subedar to Subedar, a person should have 3 'Above Average', ie, 07 points (Very Good) and 2 not below 'High Average', ie, 05 points (Good) in the last 5 ACRs. The policy of enhancement of bench mark for grant of promotion and Modified Assured Career Progression Scheme benefits as per 7th Central Pay Commission from 'Good' to 'Very Good' was also adopted in Assam Rifles. The ACR gradings of the petitioner taken into account by DPC 2019 for the last five years, ie, 2013-2014 to 2017-2018 are given below:

Sl No	Year	Points	Grading	Recommended	Remarks
1	2013-14	7	Above Average	Recommended	Eligible for promotion
2	2014-15	7	Above Average	Recommended	Eligible for promotion
3	2015-16	7	Above Average	Recommended	Eligible for promotion

4	2016-17	5	High Average	Recommended	Lacking for promotion
5	2017-18	7	Above Average	Recommended	Eligible for promotion

[8] It is stated that in the Bench Mark for Performance Appraisal for Promotion dated 29.12.2016 issued by DGAR, Shillong for the DPC 2019 for promotion from 'Nb Sub to Sub', 3 ACRs (ie, 2016 to 2018) should not be below 'Very Good' (Above Average- 7 points) and remaining 2 ACRs should not be below 'Good' (High Average- 5 points). Since the petitioner was lacking in ACR for the year 2016-2017, he was not found eligible and hence not recommended for promotion and in his place his junior was recommended and promoted. It is further clarified that since the ACR for the year 2016-17 was not an adverse report, communicating the grading to the petitioner was done away.

[9] In the rejoinder affidavit, the petitioner states that as per counter affidavit of the respondents, the ACR for the year 2016-17 graded as 'High Average' was not an adverse report, but no reason has been provided for not promoting the petitioner. It is pointed out that 'not adverse report' and 'ineligible for promotion' are contradictory and the uncommunicated adverse/negative report cannot be used to deny promotion to the petitioner.

[10] Mrs. O. Momota, learned counsel for the petitioner submits that as per reply dated 25.09.2019 issued by Records Branch, DGAR, Shillong, 'High Average' grading is 'not an adverse' and hence not communicated to the petitioner. On the other hand, in another communication dated 01.07.2019 issued by Records Branch, it is mentioned that the petitioner did not meet the enhanced bench mark for promotion and hence was not considered for promotion. Learned counsel has pointed out that the ACR for year 2016-17 of 'High Average 5 points' of the petition was considered below bench mark earmarked by DPC for the year 2019 and the same is to be treated as an 'adverse entry'. It is submitted that such adverse grading ought to be informed to the petitioner. Mrs. O. Momota draws the attention of this Court to the important fact that for the last five ACRs, the petitioner was graded 4 times as 'Above Average- 7 points' and 1 time as 'High Average- 5 points' and as such

he had more than the minimum bench mark of 3 'Above Average- 7 points' grading and he ought to be recommended for promotion. It is submitted that no cogent reason is given for not promoting the petitioner who has obtained grading more than the minimum bench mark.

[11] Mrs. O. Momota, learned counsel for the petitioner relies on the following decisions with regard to mandatory intimation of adverse report and uncommunicated adverse report cannot be a basis for denying benefit: entry in ACR

(a) **Dev Dutt v. Union of India: (2008) 8 SCC 725 @ Para 9,10,17&18** to the effect that nomenclature is not relevant and it is the effect of the entry which determines whether it is adverse or not. It was also held that an adverse entry in ACR must be communicated, otherwise it will be in violation of the principle of fairness which is the soul of natural justice.

(b) **Vijay Kumar v. State of Maharashtra: 1988 (Supp) SCC 674 @ Para 3** holding that 'It is the settled principle that an uncommunicated adverse report should not form the foundation to deny benefits to a government servant when similar benefits are extended to his junior'.

(c) **UP Jal Nigam V. Prabhat Chandra Jain: (1996) 2 SCC 363 @ Para 2,3** where it has been held that reason for downgrading should be recorded and informed to the employee.

(d) **State of Gujarat v. Suryakant Chunilal Shah: (1999) 1 SCC 529 @ Para 25** which held that the purpose of adverse entry is primarily to forewarn the government servant to mend his ways and to improve his performance and such entry is required to be communicated.

(e) In the case of **Rajib Kumar Sarkar v. Union of India: WP(C) No. 145 of 2016 order dated 24.04.2019**, Meghalaya High Court set aside the denial of promotion on the basis enhanced bench mark when the petitioners grading during the relevant time the ACR grading was not adverse and within benchmark.

(f) In the case of **Dev Datta Sharma v. Union of India: WP(C) No. 447 of 2019 order dated 07.10.2023**, High Court of Manipur set aside

denial of promotion on the basis of uncommunicated adverse report and directed for giving promotion with respect to Assam Rifles.

[12] Relying on the above referred case laws, Mrs. O. Momota, learned counsel for the petitioner submits that the impugned orders be set aside, as the denial of promotion to the petitioner was on the basis of uncommunicated adverse entry in ACR and prays for giving a direction to the respondents to grant promotion to the petitioner with consequential reliefs from the date on which his junior was promoted. During the course of hearing, it has been informed that the petitioner was subsequently promoted to Nb Sub (Clk) vide order dated 20.01.2023 and his junior Md. Yasin was also further promoted to the post of Sub Maj (Clk). It is further pointed out that the petitioner retired from service in the month of January 2024 on attaining the age of superannuation. It is prayed that the petitioner be given subsequent promotion to the post of Sub Maj (Clk) as granted to his junior with all consequential relief.

[13] Mr. S. Samarjeet, learned Sr.PCCG for the respondents has submitted that as per the bench mark for DPC 2019, the petitioner should have grading of 3 'Above Average' for the years 2016 to 2018 and 2 'High Average' for the remaining years. But the petitioner has only 'High Average' for the year 2016 in terms of enhanced bench mark as per 7th CPC and he was not rightly considered for promotion and his junior was considered and promoted to Nb Sub. It is also pointed out that the petitioner has not challenged the instruction dated 29.12.2016 issued by DGAR, Shillong prescribing the bench mark for promotion and has not impleaded Md. Yasin who had superseded him and hence writ petition is not maintainable. Reliance is placed on the decision reported as **AIR 1977 SC 1701** holding that writ petition is bad for nonjoinder of necessary party. On merit, it is pointed out that in the case reported as **AIR 2008 SC 2513 @ para 40 & 41**, Hon'ble Supreme Court held that communication of adverse report in ACR will not be applicable to military. It is prayed that the writ petition be dismissed.

[14] Mrs. O. Momota, learned counsel for the petitioner has clarified that the petitioner is not challenging the promotion of his junior, but he only claims parity with him and as such he was not impleaded as a party. It is further

pointed out that the conditions of service of Assam Rifles is not governed by Army Act and hence the decision in **AIR 2008 SC 2513** will not be applicable in the facts of the present case and as such adverse entry in ACR must be communicated, otherwise the same cannot be used to deny promotion to the petitioner.

[15] This Court has perused the materials on record and considered the submissions made at bar and relevant law in this regard. In the present case, the petitioner was graded as 4 'Above Average 7 pts' and 1 'High Average 5 pts' during the last five years, while the rules required only 3 'Above Average 7 pts' and 2 'High Average 5 pts' during the last 5 years. But, for the DPC 2019, the bench mark for promotion from 'Nb Sub to Sub' was laid down as 3 'Above Average 7 pts' for the year 2016-18 and 2 'High Average 5 pts' for other years. The DPC 2019 did not consider the petitioner as eligible, as he got only 'High Average' during the year 2016-17 instead of 'Above Average' as prescribed by DPC 2019. In other words, the rating of the petitioner for the year 2016-17 was treated as below bench mark fixed by relevant rule and hence it is deemed to be an adverse entry. It is also a fact that this entry was not communicated to the petitioner as admitted by the respondents on the plea of the same 'not adverse entry', but the same was considered below bench mark by the respondents to deny promotion to the petitioner.

[16] This Court is of the considered view that the stand of the respondents is not consistent and as opposed to relevant rules. On one hand, it is stated that the grading of 'High Average' for the year 2016-17 was not 'adverse entry', but the petitioner was denied promotion on the ground of below bench mark grading. As held in the case of **Vijay Kumar** (supra), uncommunicated adverse entry in ACR cannot be a ground to deny promotion to the petitioner. Another fallacy in the stand of the respondents is that the rule requires only 3 'Above Average' during the last five years and 2 'High Average' and the petitioner was graded 4 'Above Average' during the last five years and well above the minimum bench mark. Denial of the promotion to the petitioner on the basis of instruction dated 29.12.2016 is arbitrary, irrational and without any basis. This Court is of firmed opinion that executive instructions cannot

override the statutory requirements and the plea of the respondents that the petitioner did not challenge the instructions dated 29.12.2016 for DPC 2019 is without any substance and hence rejected.

[17] In the circumstances, the writ petition is allowed with the following directions:

- (a) Letters dated 01.07.2019 and dated 25.09.2019 issued by Directorate General Assam Rifles, Shillong are set aside;
- (b) Uncommunicated entry of 'High Average' in the ACR for the year 2016-17 cannot be used to deny promotion to the petitioner as per the instructions dated 29.12.2016, when the petitioners had 4 'Above Average- 7 points' as per rules;
- (c) The petitioner be promoted to the post of Sub (Clk) wef 26.02.2019, the date from which his junior was promoted with all consequential benefits; and
- (d) The petitioner also be considered for promotion to the post of Sub Maj (Clk) wef 16.01.2023, the date from which his junior was promoted with all consequential benefits, if found eligible as per rules, within a period of 3 months from the date of receipt of a copy of this order.

[18] With the above directions and observations, the writ petition is allowed. No cost.

[19] Registry is directed to send a copy of this order to Director General of Assam Rifles, Shillong for information and necessary compliance.

JUDGE

FR/NFR

joshua

**KH.
JOSHUA
MARING**

Digitally signed by
KH. JOSHUA
MARING
Date: 2024.04.22
13:10:03 +05'30'