

IN THE HIGH COURT OF TRIPURA
A G A R T A L A

W.P.(C) NO.247 OF 2012

Dr. Pramod Kumar,
son of Late Neel Kanth,
serving as Chief Medical Officer(SG),
24th Bn. Now 110 Bn. BSF,
Panisagar, P.O. & P.S. Panisagar,
District : North Tripura

..... Petitioner

- Vs -

1.The Union of India,
represented by the Secretary,
Ministry of Home Affairs,
North Block, Rastrapati Bhawan
New Delhi- 110001

2. The Director General,
Border Security Force,
Block No.10, CGO Complex,
Lodhi Road, New Delhi-110003

3. The Special Director General (West)
Border Security Force, BSF Campus,
Lakahnaur, P.O. Sohana,
District : Mohali Chandigarh(Punjab)

4. The Inspector General,
Border Security Force,
Frontier Head Quarters, BSF Rajasthan
Jodhpur, 342026

5. Deputy Inspector General (ADM),HQ, SPL DG,
(West), BSF Campus, Lakahnaur, P.O. Sohana,
District : Mohali(Chandigarh)

6. Deputy Inspector General,(Confid Section),
Pers Directorate, BSF,
Block No.10,5th Floor, CGO Complex, Lodhi Road
New Delhi- 110003

7. Mr. S.N. Jain,IPS
Formerly Inspector General, BSF,
Frontier HQ BSF, Jodhpur, Rajasthan,
At present Addl. Director General,
State Crime Record Beuro(SCRB), Jaipur,
Rajasthan, P.O. Jaipur

.....Respondents

B E F O R E

THE HON'BLE MR. JUSTICE S. TALAPATRA

For the petitioner : Mr. A.K. Bhowmik,
Sr. Advocate
Mr. R. Datta, Advocate

For the respondents : Mr. A.Lodh, Advocate

Date of hearing : 19.11.2015

Date of judgment & order : 08.12.2015

Whether fit for reporting :

Yes	No
√	

JUDGMENT & ORDER

By means of this writ petition the petitioner has challenged the grading awarded to the petitioner for the year 2003-04 which was made known to the petitioner after about 8 years by the communication dated 09.07.2011. The grading which was awarded to the petitioner is 'Good' but such grading is below the bench mark for promotion to the next grade.

2. The petitioner was initially appointed as the Medical Officer in the Border Security Force, (in short 'BSF') on 09.05.1988. In the course of time, the petitioner was promoted to the post of Senior Medical Officer on 10.10.1992 in the rank of the Deputy Commandant in the BSF. Thereafter, he was again promoted to the post of the Chief Medical Officer with effect from 09.05.1999. The petitioner has asserted that both the Initiating Officer and the Reviewing Officer have awarded him 79 marks out of 100 for the said year. Accordingly, the petitioner was awarded **"Very Good"** in Part (VIII) in the Annual

Confidential Reports. The following observation has been recorded by the Senior Technical Officer :

“He is a sincere, dedicated, hardworking CMO who possesses very good professional knowledge. He is having very good clinical judgment and good art of patient’s care. He maintained unit hospital very nicely and took very keen interest in patient’s health care. Grade- “Very Good”.

3. Thereafter, the IG/Director (Med) HQ DG BSF MHA made the following remark “Professionally Very Good, CMO” the Reviewing Officer (DIG) also made the remark in respect of the petitioner as **“Very Good Doctor”**.

4. The respondent No.7, at the relevant point of time, was holding the post of Inspector General, BSF, as the Accepting Authority differed with the remarks made by the Initiating Officer/Reporting Officer as well as by the Reviewing Officer under whom petitioner had served directly. The Accepting Authority entered the following remark in the ACR of the said assessment year (2003-04)

“I do not agree with the above. Seen his work closely during visits and other interactions, noted “Good”.”

5. Having received the said communication dated 19.07.2011 Annexure 1 to the writ petition, on 08.08.2011, the petitioner submitted a representation for upgrading from ‘Good’ to ‘Very Good’ for the period 01.04.2003 to 31.03.2004 on the basis of the remarks given by the Reporting, Reviewing, Technical and Senior Technical Officers. The said representation

dated 08.08.2011, Annexure 2 to the writ petition was not acceded to and the grading as awarded was maintained by the order dated 09.11.2011, Annexure 4 to the writ petition.

6. According to the petitioner, the said order dated 09.11.2011 is entirely a non-speaking order without any substance or reason. The petitioner made a representation to the respondent No.2, the Director General BSF on 02.02.2012, Annexure 5 to the writ petition. The respondent No.2 informed the petitioner that a further representation could not be entertained, by the communication dated 20.03.2012, Annexure/6 to the writ petition. The petitioner was entitled to be considered for promotion to Senior Administrative Grade(SAG) on completion of 20 years of service of regular service in the BSF.

7. From 09.05.2008 to the time of filing of the writ petition, the petitioner has completed 24 years of service in the BSF. The petitioner has apprehended that for the said grading, he would be prejudicially affected and deprived of the promotional benefit. It has been further asserted that the Reporting Officer and the Reviewing Officer made their comment in due time in the year 2004 whereas the respondent No.7 had written his impugned remark thereafter, but when the same was written is not available in the report. The petitioner has categorically stated in the Para-12 of the writ petition as under:

“The Respondent No.7 in his capacity as Inspector General of BSF Battalion once in two years and to

make one casual visit each year and as such there was no occasion to see the work of the petitioner closely or to have other interactions with the petitioner as noted in the impugned confidential report and in fact the Respondent No.7 had no occasion to see the work of the petitioner closely better than Initiating & Reviewing Authorities or to have other interactions with the petitioner and as such the adverse remarks made by the Respondent No.7 is not based on fact & written with malice & malafide intention. Thus the adverse remarks made by the Respondent No.7 in the impugned ACR are baseless and is liable to be quashed."

8. It is not disputed that under the present system of writing of the confidential reports, there are only two levels for writing reports, namely the Reporting officer and the Reviewing officer and there is no provision for any other authority for writing his remarks/comments about the work & conduct of an officer in his confidential reports. The Department of personnel has advised that since there are only two levels for writing the confidential reports, i.e. reporting and reviewing authority, the remarks by an officer other than the reporting & reviewing officer in the confidential reports are not in order. In spite of the aforesaid provision precluding the Respondent No.7 from making his impugned adverse remarks, the respondent No.7 made the impugned adverse remarks with alleged malafide intention. Thus, the petitioner has prayed for expunging of the remark by the respondent No.7 upholding the remarks of the Reporting and the Reviewing officer for the year 2003-04, communicated by the letter dated 19.07.2011.

9. The facts are mostly admitted.

Mr. A.K. Bhowmik, learned Senior Counsel appearing for the petitioner has submitted that even though the remark as awarded by the accepting authority, the respondent No.7 is not adverse in nature but since the bench mark for promotion to the superior post as "Very Good" the said remark becomes adverse. In support of his contention he has relied on some reports namely **Dev Dutt versus Union of India**, reported in **(2008) 8 SCC 725**, **Abhijit Ghosh Dastidar versus Union of India** reported in **(2009) 16 SCC 146**, **Sukhdev Singh versus Union of India and Others**, reported in **(2013) 9 SCC 56**, to placate the ratio that the entry 'Good' if falls below the bench mark would be adverse and non-communication of that remark or grading would be of serious consequence inasmuch as it may affect the chance of promotion or getting other benefits. Non-communication therefore would be arbitrary. In the event of non-communication the said entry should not be used for consideration for promotion to the higher grade.

10. By the D.G.P & T Letter No. 27-2/83-Vig.II, dated 21.01.1983, the Government of India's guidelines precluding from making entries have been communicated. The said communication provides as under :

"Under the present scheme of writing of confidential reports, there are only two levels for writing reports, namely, the Reporting Officer and the Reviewing Officer. There is no provision for any other authority for writing his remarks/comments about the work and conduct of an officer in his confidential reports. The Department of Personnel have advised that since there are only two levels for writing the confidential reports, i.e. reporting and reviewing authority, the

remarks by an officer other than the reporting and reviewing authority, the remarks by an officer other than the reporting and reviewing officers in the confidential report are not in order”.

11. The said provision has been quoted by the petitioner in his representation dated 08.08.2011, Annexure- 2 to the writ petition along with the copy of the relevant page of Swami's compilation of Establishment and Administration. Without making reference to the said aspect of the matter, the order dated 09.11.2011, Annexure 4 was passed by maintaining the grading as 'Good' in the ACR of 2003-04, for the period from 01.04.2003 to 31.03.2004 in respect of the petitioner.

12. As already stated, a further representation by the petitioner made to the Director General, BSF dated 02.08.2012 Annexure 5 to the writ petition was simply discarded as such representation was considered to be not maintainable as there is no provision for making further representation, by the order dated 20.03.2012, Annexure-6 to the writ petition.

13. Mr. Bhowmik, learned Senior Counsel has submitted that while disposing the representation of the petitioner the competent authority has failed to take due care of the policy which is comparatively progressive in nature. As such, the said decision on the representation is liable to be interfered with.

14. For the respondent, Mr. A. Lodh, learned Senior Panel Counsel has submitted that the earlier office memorandum containing the guidelines for writing the ACRs has been by

implication superseded by the office memorandum dated 30.01.1978. The said memorandum dated 31.01.1978, Annexure R-7 to the counter affidavit filed by the respondents, provides as under :

“If the Reviewing Authority or the Accepting Authority as the case may be has over-ruled the Reporting Officer or the Reviewing Authority as the case may be, the remarks of the latter authority should be taken as the final remarks for the purposes of relevant entries that the higher authority has come to a different assessment consciously after due application of mind. If the remarks of the Reporting Officer, Reviewing authority and Accepting Authority are complementary to each other and one does not have the effect of over-ruling the other, then the remarks should be read together and the final assessment made by the DPC.”

15. Based on the said rule Mr. Lodh, learned senior panel counsel has emphatically submitted that the superior authority's remark shall be maintained in the ACRs. As such, the remarks made by the respondent No.7 while he was holding the position of the Inspector General, BSF should be maintained and accordingly, the same has been maintained while disposing the representation. The objection as raised by the petitioner does not have any substance at all. Mr. Lodh, learned senior panel counsel has further submitted that irrespective of his grading as 'Good', the petitioner has been allowed to move to the next higher scale under the DSCP scheme and as such for such remark he has also not been prejudicially affected. On query from the court, however Mr. Lodh could not make any reply whether that indicates that any adverse effect of the said

remark has been erased or that remarks/ grading would not affect his prospect of promotion. In support of his contention, Mr. Lodh, learned senior panel counsel appearing for the respondents has referred to a decision in **Union of India and Others versus S.P. Nayyar**, reported in **2015 (3) SLR 1 (S.C.)**. In the said decision, the Supreme Court has held as under:

“It was submitted that the ACRs of 1994-95 and 1995-96, respondent was graded ‘Very Good’ by the Initiating Officer(IO) Reviewing Officer(RO) as well as Accepting Authority(AO). For the ACR of 1996-97 the respondent was graded ‘Very Good’ by the Initiating Officer as well as Reviewing Officer, but the appellant No.3-E.N. Ram Mohan who was the Accepting Officer, down-graded the ACR as ‘Good’ without recording any reason. However, the Director-General, BSF, undoing the damage, graded the respondent as ‘Very Good’. It is further contended that the record produced before the High Court also revealed that appellant No.3 -E.N. Ram Mohan who took over as Director-General, BSF, down-graded ACRs of the respondent for the years 1997-98 and 1998-99 to ‘Good’ contrary to the grading given by Initiating Officer and Reviewing Officer that too without assigning any reason there for, contrary to the instructions dated 3rd December,1991. The down-graded ACRs of the respondent for the years 1997-98 and 1998-99 were never communicated to him”.

16. By placing reliance on the said decision of **Union of India and Others versus S.P. Nayyar**, Mr. Lodh, learned senior panel counsel has submitted that making remarks by the Accepting Officer is not entirely prohibited. However, the Accepting Officer must give reasons. In the case in hand, the Accepting Officer has given some reasons for such remark. Mr. Lodh, learned senior panel counsel has further submitted that in the ACRs, there is a column for the Accepting Officer and as such

it is absurd to suggest that the Accepting Officer cannot make his remarks. Mr. Lodh, learned senior panel counsel has finally submitted that by the office memorandum dated 30.01.1978, what has been provided is that the Accepting Authority's remark should be final. Hence, he has urged that the writ petition be dismissed being bereft of substance.

17. While appreciating the submission made by the learned counsel for the parties as well as the records produced with the writ petition and the counter affidavit, the question that falls for consideration is that when the Reporting Officer /Initiating Officer and the Reviewing Officer returned concurrent remark whether within the present frame work of writing ACR the Accepting Officer can give the contrary remark, which is adverse in nature.

18. It cannot be denied that in the modified ACR forms there is a column for the Accepting Officer but the question is when there is concurrent remarks by the Reporting/Initiating Officer and the Reviewing Officer whether the Accepting Officer can give contrary view in the present framework of writing ACRs. The office memorandum as quoted in Swamy's Compilation of Establishment and Administration provides the guidelines by stipulating that there are only two levels in the writing of ACRs i.e. the Reporting and Reviewing Authority. The remarks by an officer other than the Reporting and the Reviewing Authority of the Confidential Report are not in order. The said order dated

21.01.1983 is required to be read with the office memorandum dated 10.04.1989 which has provided that the Reviewing Authority or the Accepting Authority, as the case may be, has overruled the Reporting Officer or Reviewing Authority as the case may be, the remarks of the superior authority should be taken as the final for the purpose of relevant entries in the premises that the higher authority has come to a different assessment consciously on due application of mind. This part of the stipulation made in paragraph 6.2.1(7) of the office memorandum dated 11.04.1989 deals with the conflicting remarks of the Reporting Officer and the Reviewing Officer.

19. It has unambiguously been provided that in the event of conflicting remarks, the remarks returned by the superior authority should be the final remark. It has also provided that if the remarks of the Reporting Officer and the Reviewing Authority and the Accepting Authority are complementary to each other and one does not have the effect of overruling the other, then the remark should be read together while making the final assessment by the DPC.

20. What Mr. Lodh, learned senior panel counsel appearing for the respondents, has submitted that the earlier decision of the Government of India as reflected in the order dated 21.01.1983 and quoted by the petitioner in his representation, has been superseded by the provisions in paragraph 6.2.1(f) of the office memorandum dated 10.04.1989,

and it cannot have any impact. Nowhere the subsequent memorandum dated 08.04.1989 has stated to supersede the procedure of writing the ACRs. When there is no conflict between the Reporting Officer and the Reviewing Officer it is only natural that the Accepting Officer should accept the remark that has been returned by the Reporting Officer and the Reviewing Officer. Only in the event of conflicting remarks or assessments between the Reporting Officer/Initiating Officer and the Reviewing Officer, the Accepting Authority may after applying the mind in the perspective may record his remark. In that event, the remark of the Accepting Authority would be final. Other interpretations would make the system opaque and disorderly.

21. The decision as relied by Mr. Lodh in **Union of India and Others versus S.P. Nayyar** has been returned in a different fact situation. However, a close reading would show that the Accepting Authority gave the different remark from the Reporting /Initiating Authority and the Reviewing Authority without any cogent reason.

22. The apex court has interfered with the decision of the Accepting Authority . The word 'reason' appeared in **Union of India VS S.P. Nayyar** has a close relation with the fact situation. No reason as highly subjective as in this case would be sustainable to reverse or modify concurrent remarks entered by the Reporting/Initiating Authority and the Reviewing Authority. In

this case what has happened is that on the basis of purported reason of “occasional visit” the remarks returned by the Reporting/Initiating Authority and the Reviewing Authority has been modified. The reason as provided is no reason as there is no conflict in the remarks returned by the Reporting/Initial/ and the Reviewing Authority.

23. For purpose of transparent and objective dispensation, the primacy must be given to the Reporting/Initiating/ and the Reviewing Authority. Unless, there is any conflict in their remarks, the Accepting Authority would not substitute their remarks by his own remarks. Any deviation therefrom cannot be accepted in the present framework of writing ACR. Hence, this court is persuaded to interfere with the remark made by the Accepting Authority in the ACR of the petitioner for the year 2003-04 covering the period from 01.04.2003 to 31.03.2004 and hence, the remark ‘Good’ as awarded by the Accepting Authority is hereby set aside. The remark given by the Reporting/Initiating Authority and the Reviewing Authority as “Very Good” shall be restored in the ACR of the petitioner for the year 2003-04 for the period from 01.04.2003 to 31.03.2004.

24. As consequence thereof the order dated 09.11.2011 Annexure 4 to the writ petition is set aside. If the petitioner has been deprived of any benefit for the impugned remark, all such benefit shall be restored within a period of 3 months from today.

25. In the result, the writ petition stands allowed to the extent as indicated above.

There shall be no order as to costs.

JUDGE

Sabyasachi B.