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

% **Date of Decision : 19.02.2019**

+ **W.P.(C) 10816/2016 & CM APPL. 11300/2018**

UNION OF INDIA AND ORS Petitioners
Through: Mr. R.V. Singha, Mr.A.S. Singha and
Mr. Amit Sinha, Advs.
versus

TUSHAR RANJAN MOHANTY Respondent
Through: Respondent in person.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE A. K. CHAWLA

VIPIN SANGHI, J (ORAL)

1. The Union of India has filed this writ petition alongwith three other petitioners, namely, Prof. TCA Anant (Petitioner No.2), Mr. Swapan Kumar Das (Petitioner No.3) and Mr. A.K. Bhatia (Petitioner No.4) to assail the order dated 27.11.2015 passed by the Central Industrial Tribunal, Principal Bench, New Delhi ("Tribunal") in OA No. 1973/2014.

2. Vide the impugned order, the Tribunal allowed the said Original Application preferred by the respondent-applicant, and held that the Annual Performance Assessment Report (APAR) of the respondent was vitiated, on

account of lacunae set out in the body of the impugned order. The Tribunal set aside the adverse APAR of the respondent as recorded by the Accepting Authority. Petitioner No.2 herein acted as the Accepting Authority. The Tribunal directed that the remarks recorded by the Reporting and the Reviewing Authority shall continue to stand.

3. At the outset, we may observe that Mr. Sinha, learned counsel for the petitioners, has filed this petition with Memo of Appearance on behalf of Union of India. There is no *Vakalatnama* filed on behalf of the petitioner Nos. 2 to 4. The said petitioners were impleaded as party respondents in their personal capacity in the OA preferred by the respondent, since he made allegations of personal *malafides* against the said officers in relation to the matter of recording of his APAR. Even before the Tribunal, petitioner Nos. 2 to 4 herein, did not appear to defend themselves and did not file any response. On our query, Mr. Sinha submits that since the petitioner Nos. 2 to 4 were the officers serving at the relevant point of time, Union of India is entitled to defend their actions.

4. We are afraid that when a party/respondent is impleaded on the ground of personal *malafides*, and they are impleaded in their personal capacity, it is for them to personally defend the allegations made against them, and the Union of India cannot defend the allegations of personal *malafides*, since the Union of India would have no knowledge of such allegations of personal *malafides*, and would not be in a position to meet to same. The Union of India would be justified in defending their conduct as legal within the framework of the rules and prescribed procedure but, whether or not, the said conduct is laced with *malafides*, is an aspect which

the officers concerned must defend on their own.

5. The respondent preferred the OA to seek quashing and setting aside of adverse comments and below benchmark grading in the APAR for the year 2011-12. He also sought direction that the petitioner Ministry i.e. Ministry of Statistical and Programme Implementation, should upgrade his APAR for the year 2011-12, and to grant 10 marks out of 10 to him. He also sought suitable stricture against respondent Nos. 2 to 4 in the OA i.e. petitioner Nos. 2 to 4 in the present petition.

6. The Tribunal while allowing the said OA has, in depth, examined the position with regard to the preparation/recording/completion of APAR as per the instructions of the DoP&T. The Tribunal framed the following issues for its determination :

“1. What is scope and purpose of writing APARs?

2. Whether the remarks recorded by the respondents are hit by time-line prescribed by DOP&T instructions?

3. Whether the remarks recorded in the APAR of the applicant get vitiated by providing blank form of APAR belatedly to the applicant?

4. Whether non-delivery of caution to the applicant to maintain his conduct vitiates the proceedings altogether?

5. Whether the remarks recorded in the APAR of the applicant are hit by mala fide?

6. What relief, if any, could be granted to the applicant?”

7. The findings returned by the Tribunal in the impugned order in relation to issue Nos. 2 to 4 are, as follows :

*“12. Insofar as second and third of the issues are concerned, it is true that as per DOP&T OM on the subject, the blank APAR Form should have been provided to the applicant by 31st March, 2012, if not earlier. However, we also take into account the argument of the learned counsel for the respondents that the form had been placed at the website of the department for the purpose, and, therefore, if for any reason the form could not be received, the applicant was duty bound to submit his self-appraisal in time after downloading the blank APAR form from the departmental website. In any case, it appears that the format has been signed on 11.04.2012. The applicant has admittedly submitted his self-appraisal on 15.05.2012, which is late by one month. However, as it appears from the Chart, the recording of remarks by reporting, review officers had been done within time. **Now the question arises is as to what prejudice has been caused to the applicant when both the reporting and reviewing officers had given 7 and 7.8 to him.** Moreover, we take into account that even if the blank APR Form had not been received by the applicant, since it was available on website, it could have been downloaded and submitted by him within the prescribed time limit. Had he done so, the ball would have rested in respondents’ court. However, if the version of the applicant were to be accepted, even then he could have submitted the form within time.*

13. Having submitted the self-appraisal late, the applicant cannot now turn around to say that the entire exercise has been vitiated by providing the form late to him. As per the remarks of the accepting authority having received almost one year late, we note that there is no date given below the remarks of the accepting authority. It appears from para 3 of the counter affidavit that the APAR was disclosed to the applicant vide OM dated 16.12.2013. For the sake of greater clarity, we reproduce the relevant portion of the same, which reads as under:-

“3. The applicant has made representation on 24.1.2014 (copy enclosed at pages 263-523 of the

OA), whereas the APAR was disclosed to him vide OM dated 16.12.2013 i.e., much after time line of 15 days of the permissible time limit. The applicant, who has all along in his representation, has made out a case of the remarks of Reporting and Accepting Authority being vitiated one on account of the same being made contrary to the time line as per the DOPT's instructions, has himself submitted the representation after the time limit."

14. From the above, it can be deduced that the accepting authority had recorded his remarks sometimes between 29.11.2012 and 16.12.2013. We also take note of the argument of the learned counsel for the respondents that the applicant had himself submitted his appeal on 24.01.2014. We further find that there is a representation dated 15.09.2014 on record at page 586 of the paper book. On the other hand, this OA has been filed on 28.05.2014.

15. **On the basis of above, we note that the applicant has been vigilant in exercise of his rights and, therefore, the balance of convenience must weigh in his favour. In absence of any other proof on record, we accept that the accepting authority had recorded his remarks after the statutory period of one month. At the same time, we also take into account that the remedies available to the applicant have all been exhausted by him and, hence, what prejudice may have been caused to the applicant at this stage is indeterminate. Moreover, this Tribunal, not being the appellate authority for the remarks, cannot go into the merits of the remarks but it is only concerned with as to whether the procedures have been followed correctly and whether any prejudice has been caused to the applicant on that account.**

16. **In respect of issue no.4, we take note of the fact that nowhere does the counter affidavit or the learned counsel for the respondents specify that when the performance of the applicant was found wanting, a caution was delivered to him or he was advised to improve upon his conduct. Therefore, we take it as an admitted fact that no warning of any kind had ever**

been delivered to the applicant prior to downgrading his APAR particularly by the accepting authority. This, to our mind, appears to be clearly contrary to the principles of writing APARs and commenting upon the performance of the employee concerned. The Hon'ble Supreme Court in Dev Dutt versus Union of India [2008 (8) SCC 725] has observed as under:-

"8. Learned counsel for the respondent relied on a decision of this Court in Vijay Kumar vs. State of Maharashtra & Ors., 1988 (Supp) SCC 674, in which it was held that an un-communicated adverse report should not form the foundation to deny the benefits to a Government servant when similar benefits are extended to his juniors. He also relied upon a decision of this Court in State of Gujarat & Anr. vs. Suryakant Chunilal Shah, 1999 (1) SCC 529, in which it was held:

"Purpose of adverse entries is primarily to forewarn the Government servant to mend his ways and to improve his performance. That is why, it is required to communicate the adverse entries so that the Government servant to whom the adverse entry is given, may have either opportunity to explain his conduct so as to show that the adverse entry was wholly uncalled for, or to silently brood over the matter and on being convinced that his previous conduct justified such an entry, to improve his performance".

On the strength of the above decisions learned counsel for the respondent submitted that only an adverse entry needs to be communicated to an employee. We do not agree. In our opinion every entry must be communicated to the employee concerned, so that he may have an opportunity of making a representation against it if he is aggrieved."

17. It flows from extension of the principles of natural justice that before an adverse APAR is recorded, the concerned employee is required to be called and cautioned since the very purpose of writing APAR is to bring about improvement in the performance of the officer reported upon. This, as we have already noted, is not found to have taken place in respect of the applicant. The question may now arise as to whether the word 'caution' is confined only to the reporting authority or it shall apply equally to the reviewing and accepting authorities as well. To our mind, since both the reviewing and accepting authorities are recording APAR of the officer reported upon and the APAR having civil consequences for such officer, they are in a position to observe the performance of the officer. Therefore, it was all the more necessary to deliver caution to the applicant to improve upon his conduct in whatever manner he may deem fit. Of course, it goes without saying that this need not be a recordable warning since it would amount to punishment for which different procedures are to be followed. In the instant case, as we have stated earlier, this has not happened. We, therefore, let this issue rest at this point.

(emphasis supplied)

8. On the aspect of *malafides*, the Tribunal draws a comparison between the remarks and grading assigned to the respondent by the Reporting Officer; the Reviewing Authority and the Accepting Authority. The tabulation set out in the impugned order in this regard, reads as follows :

<i>Remarks of reporting officer with grading</i>	<i>Remarks of reviewing authority with grading</i>	<i>Remarks of accepting authority with grading</i>
<i>Sh. Mohanty is extremely dynamic and knowledgeable. However, he is temperamental and</i>	<i>I agree with some remarks given by the Reporting Officer in the Pen Picture but not with some</i>	<i>In the period under report Shri T.R. Mohanty DDG was on compulsory wait from 1.4.2011 till</i>

works according to his own style which is little inconvenient at times. He needs to take more interest and initiative in his work especially as he is quite intelligent and has a potential to contribute more. He is also expected to develop a greater spirit rather than following coercive techniques to extract their cooperation. It will help in optimizing overall output. Grading: 7.0 – Very Good.	remarks given by the Reporting Officer. The officer is very intelligent and quite meticulous in his work. The quality of output of his work is very good. He was to maintain a strict discipline in his Division. He is very sympathetic towards backward section of the society and deals with them with care and affection. Grading : 7.8.  सत्यमेव जयते	04.11.2011, he worked as DDG in RPU for little less than 5 months in the year. The reporting officer has termed Shri Mohanty's claim of exceptional contribution as exaggerated. He states that his contribution to SYB 2011, SYB 2012 and the BRICS publication as insignificant. He states that Mr. Mohanty is temperamental and works according to his own style which is a little inconvenient at times. He also would like him to develop greater learning spirit. I agree with his observations. Shri Mohanty though intelligent and quite knowledgeable he needs to be systematic in his work and develop the quality of an effective leader. Overall, I would rate his work and
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		competency as ‘Good’ Grading: 5.
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The Tribunal also tabulates the time line in which the procedures for recording of the APAR in question were followed, or not followed. This tabulation reads as follows:

<i>Sl.No.</i>	<i>Nature of Action</i>	<i>Date by which to be completed</i>	<i>Actual date on which completed.</i>
1	<i>Distribution of blank CR to the concerned employee for self-appraisal.</i>	<i>31st March, 2012 (this may be completed even a week earlier)</i>	<i>Not provided.</i>
2	<i>Submission of self-appraisal to Reporting Officer to be reported upon</i>	<i>15th April, 2012</i>	<i>Submitted on 15.05.2012.</i>
3	<i>Submission of report by reporting officer to Review officer</i>	<i>30th June, 2012.</i>	<i>30th August, 2012</i>
4	<i>Report to be completed by Reviewing Officer.</i>	<i>31st July, 2012</i>	<i>29th November, 2012</i>
5	<i>Appraisal by accepting authority, wherever provided.</i>	<i>31st August, 2012</i>	<i>No date mentioned</i>

9. The Tribunal also takes note of the earlier order passed by it in OA No.52/2018 decided on 25.08.2015, wherein similar allegations of *malafides* had been made by the respondent against the very same Officers. In that decision, the allegations of *malafides* were held to be not substantiated. The Tribunal then goes on to observe that in the facts of the present case, there

are two other factors which lead to an inference of *malafides*. These factors are – the departure in showing the APAR to the respondent as per the prescribed procedure, and no recordable warning was delivered to him. The Tribunal goes on to observe that ‘*Whenever something is done out of course and sufficient explanation is not forthcoming, it is an indication of malafides. Therefore, in the instant case also, we find the malafides inferred from the unbroken chain of incidents*’.

10. The Tribunal observed that the signatures of the respondent are missing below the remarks of the Accepting Authority, which shows that either the procedure prescribed has not been complied with, or, that the remarks were not accepted by the Accepting Authority within the stipulated period of one month. The Tribunal also observed that it was only on 16.12.2013, that the remarks were formally communicated to the respondent i.e. well beyond the period of one month. The conclusion drawn by the Tribunal in the impugned order reads as follows :

“24. In conclusion, we hold that the purpose of recording APAR is reformative one to bring about improvement in future conduct of the employee concerned, but the allegation of mala fide is not found to be substantiated against the respondent no.2. However, we have found that the remarks were not recorded by the accepting authority within a period of one month and the requirement of APAR in the form of a Certificate by the officer reported upon has also not been complied with. Further, we do not find anywhere nor has it been asserted by the respondents that the applicant had been advised to improve upon his future conduct. Therefore, we have no option except to hold that the requirement of APAR as laid down in law has not been complied with. We have already referred to the decision of the Hon’ble

Supreme Court in Dev Dutt Versus Union of India (supra) which makes recording of APAR subject to rules of principles of natural justice and its reformative purpose.”

11. The first submission of Mr. Sinha is that the respondent had preferred his statutory remedy of an appeal against the recording of the APAR on 24.01.2014. Without waiting for a decision on the said appeal, he preferred the OA on 28.05.2014 i.e. within a period of four months. He submits that during pendency of the Original Application it was informed to the respondent that the Minister-in-charge had disposed of his appeal on 14.10.2014. He submits that the APAR of the respondent, as recorded, merged in the Appellate order, and the Appellate's order was not challenged before the Tribunal. He submits that the filing of the Original Application itself was pre-mature, and the Tribunal ought not to have entertained the same.

12. On the other hand, Mr. Mohanty points out that the schedule prescribed in the APAR form shows that the appeal/representation against the recording of the APAR has to be disposed of by the Competent Authority within one month from the date of the receipt of representation. Thus, on the expiry of one month of making of the said representation/appeal on 24.01.2014, the cause of action arose in favour of the respondent and the respondent was justified in approaching the Tribunal without any delay.

13. We find that the Tribunal has negated this argument of the petitioner-Union of India by placing reliance on Section 20 of the Administrative Tribunal Act, 1985, which provides that the period of six months provided

under Section 20(2)(b) is not mandatory in all cases, and power is vested in the Tribunal to take up an OA even earlier, since the word used in the said Section is “Ordinarily”. It is clear that the representation/ appeal was required to be disposed of within a period of one month of the same being made, and since more than four months had elapsed from the time when the respondent made representation on 24.01.2014, in our view, the approach of the respondent to the Tribunal on 28.05.2014 cannot be labeled as premature.

14. Other aspect that may be noticed, and is relevant for this purpose, is that the allegations of the applicant were those of *malafides* against the private respondents. That being the position, the Appellate Authority may have had limited role in the matter. As a matter of fact, the Appellate Authority rejected the representation/appeal by observing that since he was not the incumbent Minister at the relevant point of time, he cannot take a view in the matter. This submission of Mr. Sinha is therefore, rejected.

15. Mr. Sinha has argued that the allegations of *malafides* against petitioner nos. 2 to 4 were sketchy, and the Tribunal was not justified in inferring *malafides* against them while passing the impugned order.

16. We called upon the respondent to draw our attention to the averments made in the OA alleging personal *malafides* against petitioner nos. 2 to 4 herein. We find that there are no specific averments of personal *malafides* made against petitioner nos. 2 to 4, and no incident has been pointed which could have triggered the souring of the relationship between the respondent and the said officers, which could lead to their acting with a bias, or

malafide, against the respondent. Thus, we agree with the submission of Mr.Sinha that the inference of personal *malafides* drawn against petitioner nos. 2 to 4 may not be justified, merely because their conduct in the matter of recording APAR of the respondent was found to be irregular. To that extent, we set aside the findings of the Tribunal.

17. The Tribunal, as noticed above, has in depth gone into the procedure prescribed, and the procedure adopted in the case of the respondent in recording his APAR and found that there has been serious breach of the same by the Accepting Authority. Mr. Sinha has not been able to attack the findings of the Tribunal on these aspects, which are a matter of record. That being the position, the relief granted by the Tribunal to the respondent, in our view, is completely justified and cannot be questioned. Accordingly, while upholding relief granted to the respondent, we set aside the findings of personal *malafides* returned by the Tribunal against petitioner no.2 Prof. T.C.A. Anant.

18. Petition stands disposed of in the above terms.

VIPIN SANGHI, J

A. K. CHAWLA, J

FEBRUARY 19, 2019

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