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

+ **W.P.(C) 7179/2017**

AMIT NEHRA

..... Petitioner

Through: Mr. Viraj R. Datar, Advocate

versus

UNION OF INDIA AND ORS

..... Respondents

Through: Mr. Dev P.Bhardwaj, CGSC with
Mr.Jatin Teotia, Advocates for
Respondent No.1

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE I.S.MEHTA

ORDER
12.03.2019

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Dr. S. Muralidhar, J.:

1. The Petitioner who joined the Border Security Force (BSF) as Assistant Commandant (AC) in October, 2011 has filed this petition for quashing his Annual Performance Appraisal Report (APAR) for the year 2015-16 as being malafide and contrary to the applicable rules. He seeks a direction to the Respondents i.e. the Director General of Police (DGP), BSF (Respondent No.2) to read the adverse remark 'good' as 'very good' in the said APAR.

2. The background facts are that after the Petitioner joined the BSF as AC, he was posted to 142nd Battalion in the M & C Frontier in November, 2012.

In September, 2014 he was transferred to the 144th Battalion Kalyani, South Bengal Frontier, BSF where he remained till 17th June, 2016. Thereafter he was transferred to the 93rd Battalion in Nagaland. Between 4th February, 2017 and 3rd August, 2017 he was on Army attachment with 42, Rashtriya Rifles at Phulwama in Kashmir in Counter Insurgency Operations.

3. While the Petitioner was posted at the 144th Battalion, Kalyani, South Bengal Frontier, Respondent No.3 was his Commanding Officer. While he was posted there in October/November 2015 the Petitioner noticed illegal smuggling activities taking place in the Indo Bangladesh Border. According to the Petitioner despite bringing this to the knowledge of Respondent No.3, the latter did not take interest in curbing the smuggling activity and instead removed the Petitioner from the Border posting. According to the Petitioner, he was virtually sitting in the Battalion Headquarters without any charge and his company was being led by an officer of Inspector and Sub-Inspector rank.

4. The Petitioner made four complaints against Respondent No.3 on 22nd March, 2016 the details of which have been set out in para 5 of the petition. On the basis of the above complaints, a Staff Court of Inquiry (SCOI) was ordered on 30th March, 2016 against Respondent No.3 R.K. Kanojia (AC) by the IG South Bengal Frontier. By another signal of the same date, the IG directed that the Petitioner should not be kept at the Battalion Headquarters but should be sent immediately to the Border for Commanding a coy. However, according to the Petitioner this order was not followed by Respondent No.3 and the Petitioner was retained at the Battalion

Headquarters.

5. On the other hand, Respondent No.3 initiated two Court of Inquiries (COIs) against the Petitioner. One of the COIs was ordered against him alleging that he had gone from the Battalion Headquarters to the Border to play Holi with the Jawans without permission/intimation. This COI fell through when in cross-examination, the then Adjutant of the 144th Battalion admitted that the Petitioner had informed him about his intending to play Holi with the Border Jawans.

6. The second COI was that the Petitioner had not proceeded for Government duty pursuant to an order issued to him on 22nd March, 2016. He had been asked to proceed in the general compartment of a local train. He had sent a training clerk to get his reservation done through the Dak Runner but in the evening was told that the reservation could not be done.

7. The Petitioner states that although SCOI had been ordered against him, Respondent No.3 continued as Commanding Officer (CO) of the 144th Battalion. Therefore all the witnesses who had appeared in the SCOI were under his control.

8. On 4th and 5th April, 2016 in the SCOI, the Petitioner handed over documents to substantiate his contention that smuggling was taking place in the Indo Bangladesh Border.

9. In the meanwhile, the Petitioner on 14th March, 2016 had applied for

leave for his marriage which was to take place on 17th April, 2016. On 7th April, 2016 he again moved an application to the IG requesting him to intervene and grant the Petitioner leave. On 13th April, 2016 the Petitioner was granted six days leave for his marriage and that too on undertaking that he would report after the expiry of leave for finalising of the SCOI.

10. According to the Petitioner, the only punishment given to Respondent No.3 on the conclusion of the SCOI was that he was posted outside the 144th Battalion and transferred to the 50th Battalion, which was on the move to the Station Headquarters Rajouri in Jammu. On 8th July, 2016 this was cancelled and Respondent No.3 was posted to the Frontier Headquarters South Bengal as Commandant (Ops).

11. The Petitioner had requested for cancelling of his posting to the 93rd Battalion during the pendency of the disciplinary proceedings against him. However by a Signal dated 28th September, 2016 this request was rejected. By a letter dated 5th September, 2016 the Petitioner was informed that he had been found blameworthy in the two COIs and in both COIs the 144th Battalion had processed the case for issuance of warning to the Petitioner. However, in one of the COIs the DIG Kolkata recommended issuance of 'DG's displeasure' to the Petitioner. According to the Petitioner till date he had not been provided with copies of the two COIs in which he had been found blameworthy. On account of the pendency of the above disciplinary proceedings, the Petitioner's name was not considered for deputation to the National Security Guard (NSG).

12. Turning to the APAR for the period from 1st April, 2015 to 31st March, 2016, the Petitioner states that it was the Respondent No.3's decision to give him below benchmark 'good' (i.e. below 'very good' grading) with a view to deny him the promotion. The said APAR had been written by Respondent No.3. In terms of the APAR, Procedure and Instructions-2012 (chapter –III Section 3.4) the Petitioner submitted self appraisal report on 31st March, 2016. In terms of (Section 3.5 Sr.No.1) the Assessing Officer (AO) was required to indicate his agreement or disagreement to the self appraisal. In the self appraisal report of the Petitioner, Respondent No.3 gave the remarks "I agree". However, in the pen picture of the Petitioner, the Respondent No.3 recorded as follows:

"A medium built young officer join BSF in 2011. He works with preconceived ideas and does not take advises of his seniors in right spirit for betterment of the force. He generally doesn't obey the instruction/orders of seniors & keep his personal interest before discipline. He justify his act illogically."

13. The Petitioner submits that the above remarks go to show the malafide intentions of Respondent No.3 and the remarks are also contrary to Section 3.5, Sr.No.1 of the BSF, APAR, Procedure and Instructions, 2012 which reads as under:

"3.5 Part-III Assessment of Work Output/Personnel Attributes/ Functional Competency.

It is necessary to be absolutely factual in this part of the Report as this relates to the performance of an officer during the period under report:

Srl. No. 1: IO should endorse his agreement or disagreement with Self Appraisal. Due care be taken to be factual while endorsing the remarks as further assessment has to be in

consonance."

14. The further contention of the Petitioner is that in terms of Section 2.41 of the above instructions, any officer facing a General Security Force Court ('GSFC') and similar contingencies could not have written/ reviewed the APAR's of his subordinates during the pendency of such proceedings. Section 2.41 reads as under:

"2.41 Officer facing GSFC and similar contingencies, cannot write/ review the APARs of his subordinates during the pendency of such cases, the next higher authority may initiate the APAR".

15. The Petitioner points out the APAR of the Petitioner for 2015-16 was written by Respondent No.3 on 21st June, 2016 whereas the SCOI against Respondent No.3 concluded on 24th June, 2016 when as a punishment he was posted out of the 144th Battalion.

16. By a letter dated 23rd September, 2016 the down grading of the Petitioner's grading from very good to good was communicated to him and a copy of the APAR for the said period on 1st April, 2015 to 31st March, 2016 was also provided to him.

17. The Petitioner made a representation against the adverse remarks on 15th October, 2016. This was rejected by the BSF's letter dated 2nd March, 2017. The Petitioner made another representation dated 11th April, 2017 to Respondent No.2. This too was rejected by a letter dated 1st June, 2017 on the ground that a second appeal/further representation was not provided.

18. It is in those circumstances that the present petition was filed. Pursuant to the notice issued in the present petition on 21st August, 2017 a common counter affidavit has been filed on behalf of all the Respondents on 11th January, 2018. It is stated that the two SCOI held against Respondent concluded that most of the allegations levelled by the Petitioner were baseless. The SCOI finalised the final remarks of the IG on 23rd May, 2016.

19. As far as the two SCOIs ordered against the Petitioner were concerned, he was found blameworthy in both of them as per the remarks of the Unit Commandant. The DG's displeasure was communicated to the Petitioner for neglecting to obey the general order given by the Commandant to attend the Sand Model Exercise on 23rd March, 2016 at the 24th Battalion, BSF. Both COIs were returned for rectification of certain observations. Finally on 10th January, 2017 the Station Headquarters intimated that both COIs ordered by the 144th Battalion "had no relevance and hence no further action was required of both COIs." Accordingly, both the COIs were closed. As per the final remarks of the IG, the DGs displeasure was issued to Shri R.K. Kanojia for lack of supervision in his company area of responsibility.

20. Six officers including Respondent No.3 as well as the present Petitioner were posted out of 144th Battalion "on administrative grounds on Delhi Administration." Specific to the recording of the Petitioner's APARs, it is contended that its marking was done "as per performance of the Government servant and various aspects of its discipline and command" and that "desirable marking in the APAR cannot be claimed as a matter of right." The Petitioner's contentions regarding the remarks of Respondent No.3 in

the pen picture are not accepted and it is contended that

“Petitioner has misconceived from the first few words used by the reporting officer that reporting officer is in agreement with the Petitioner’s self-appraisal. It is quite evident from the perusal of complete pen picture that reporting officer is in disagreement with the petitioner's self-appraisal.”

21. It is stated that since the Respondent No.3 was not facing any GSFC nor was any disciplinary action pending against him at the time of initiation of APAR, the Petitioner’s contentions were ‘baseless’.

22. The Court finds that reply of the Respondents to the central issue about Respondent No.3 having been vindictive in downgrading the Petitioner has not been satisfactorily answered. In particular, the Petitioner’s contention relating to Section 2.41 has not been satisfactorily replied. The expression “similar contingency” used in Section 2.41 would certainly cover the SCOI which was pending against Respondent No.3 at the relevant time. The Respondents therefore have no answer to the Petitioner’s contention that when the SCOI concluded against Respondent No.3 on 24th June, 2016, he could not have entered any remarks in the Petitioner’s APAR on 21st June, 2016.

23. Another significant aspect is that the two COIs initiated by Respondent No.3 against the Petitioner were ultimately closed. This demonstrated the malafide nature of the action of Respondent No.3 in subjecting the Petitioner to the two COIs in retaliation to the Petitioner subjecting Respondent No.3 to the SCOIs pursuant to his own complaints. Clearly, therefore, the

recording of the above remarks in the Petitioner's APAR could not be said to be objective.

24. In *Rajender Singh Sehrawat v. Union of India* 93 (2001) DLT 417 the Petitioner had challenged to the adverse entries in his ACR in the year 1995-96. One of the grounds on which it was challenged was that Respondent No.3 the Reporting Officer and Respondent No. 4 the Reviewing Officer were biased against the Petitioner on facts while aggrieved with the Petitioner. The Court observed:

“The officer writing the confidential report should show objectivity, impartiality and fair assessment without any prejudices whatsoever with the highest sense of responsibility to inculcate devotion to duty, honesty and integrity to improve excellence of the individual officer/employee.”

“It is the duty of the Reporting Officer and the Reviewing Officer to take care not only that in the assessment of overall performance of a subordinate employee or officer they are not influenced by any personal interest, bias or malice, but to avoid appearance of labouring under such an influence. In other words, it must appear on the face of the record that in assessing overall performance of giving grade to an officer in his ACR, the authorities had acted fairly and without any bias in fact.”

25. In the present case it is not disputed that on account of the Petitioner's written complaints against Respondent No.3, an SCOI was constituted to. The result of the SCOI was Respondent No.3 himself got shifted out of the 144th Battalion. It is unmistakeable that the initiation by Respondent No.3 of two COIs against the Petitioner was triggered by the above action against Respondent No.3 himself. The fact that the two SCOIs against the Petitioner were ultimately ordered to be closed is also an indication that the entire

exercise was not free from bias or malice. Specific allegations of the Petitioner against Respondent No.3 in the petition have not been satisfactorily answered in the common counter affidavit filed on behalf of all the Respondents. In other words, these allegations have gone uncontroverted.

26. In similar circumstances, in its decision dated 9th July, 2015 in WP(C) No. 2825/2012 (*Anil Kumar Akarnia v. Union of India*) this Court in similar circumstances held that there was every likelihood that “the third Respondent had reasons to explain animosity and bias against the Petitioner.” The adverse entries were directed to be expunged.

27. In a decision dated 3rd November, 2017 in WP(C) No. 4889/2016 (*Vivek Srivastava v. Union of India*) the challenge was to the adverse entries in the ACRs of the Petitioner. While setting aside the adverse remarks, the Respondents were directed by the Court to consider the case of the Petitioner for promotion uninfluenced by the recording of adverse remarks in the ACR for the period concerned.

28. In the present case, the Court is satisfied that the downgrading by Respondent No.3 in the APAR of the Petitioner is vitiated by bias and lacks objectivity and is required to be expunged. It is accordingly ordered. As was directed in the case of *Vivek Srivastava (supra)*, the Court directs the Respondents to exclude the adverse entries in the APAR for 2015-16 and proceed on the basis that it would have no effect for the purposes of considering the case of the Petitioner for further promotions.

29. The writ petition is disposed of in the above terms with no order as to costs.

S. MURALIDHAR, J.

I.S.MEHTA, J.

MARCH 12, 2019
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