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

+ **W.P.(C) 213/2016**

COMANDANT RANJEET SINGH RANA Petitioner
Through: Ms. Manisha Singh, Advocate.

versus

UNION OF INDIA & ORS Respondents
Through: Mr. Arun Bhardwaj, Advocate with
Mr. A.K. Rai, Advocate.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE SANJEEV NARULA

ORDER

% **07.03.2019**

SANJEEV NARULA, J.:

1. The Petitioner by way of the present petition under Article 226 of the Constitution of India challenges the down grading of his Annual Performance Appraisal Report (APAR) for the year 2013-14 and seeks consequential reliefs.

Brief Facts

2. Shorn of unnecessary facts, be it noted that the Petitioner joined Indo Tibetan Border Police (ITBP) on 10th December 1991 as Assistant Commandant (earlier known as Company Commander). He was promoted to the rank of Commandant in the year 2008 and took over command of 37 Bn. The next promotional post is DIG and in order to be eligible for consideration, one needs benchmark grading of 7. Petitioner claims that but for the year in question i.e 2013-14, he has consistently achieved the

benchmark grading. The Respondent No. 2 vide letter dated 6th August 2014 conveyed the APAR for the year 2013-14 to the Petitioner wherein he was downgraded from “outstanding” i.e. 8.0 to “good” i.e. 5.6. He made a detailed representation dated 24th September, 2014 against the said appraisal, specifically dealing with all the observations and assessment carried out by the Respondents. The said representation was rejected vide letter dated 14th May 2015. Aggrieved with the rejection, the Petitioner has filed the present petition. Before noting and dealing with the submissions of the parties, certain additional facts, need to be noticed. The APAR and the grounds for rejection of the representation made by the Petitioner against the downgrading, make reference to the following displeasure notes and memos, also impugned in the present petition:

- i) DG's displeasure note dated 18th February 2014
- ii) DG's displeasure note dated 16th May 2014.
- iii) Warning memo dated 29th May 2013 issued by DG, Eastern Frontier.
- iv) Warning memo dated 4th October 2013 issued by DG, ITBP.
- v) Warning memo dated 25th September 2013 issued by DIG (LKO).
- vi) Warning memo dated 9th January 2014.

Submissions of the Parties

3. The Court has heard the learned counsels for the parties at length. Ms. Manisha Singh learned counsel for the Petitioner submits that the APAR in question has not been written as per procedures and instructions for writing the Annual Confidential Reports contained in DoPT Rules . She referred to the APAR and argued that, the downgrading is primarily on account of two displeasure notes. She explained that the displeasure note dated 16th May

2014 pertains to the year 2009-10 when the Petitioner was commanding 37 Bn near Chandigarh and was operating in Ladakh (J & K). She argued that as per the hand book containing procedure and instructions for writing the APAR's, assessment should be confined to Appraiser's performance during the period of report only and incidents happening outside the period should not influence the assessment. This according to her, the aforesaid displeasure note should not be taken into consideration. On merits, her submission was that, a court of inquiry was conducted to assess the loss caused to the Government property on account of the incident of cloud burst. While the said court of inquiry was under progress, the Unit received a memo asking them to send a list of stores required for refurnishing of the Officers mess. In compliance of the said memo, the Petitioner on behalf of the Unit, forwarded a letter dated 11th October 2010 enclosing the list of items required for refurnishing of Officers mess. However, inadvertently, the heading of the list was mentioned as "list of lost and damaged stores" instead of "list of stores required for refurnishing of the Officers mess". Subsequently, certain complaints were received alleging that the Petitioner had indulged in fraudulent activity of forging official records connected with cloud burst incident at Leh. Learned counsel submitted that the complaints were false and the enquiry conducted in this regard absolved the Petitioner of all the charges. The Respondents reviewed the decision vide signal dated 13th April 2012 and directed DIG, Lucknow to hear the charges and decide further the course of action. DIG, Lucknow then forwarded his finding to the Respondents vide letter dated 27th November 2012 and held that none of the charges contained in the charge sheet were sustainable and did not merit any disciplinary action against the Petitioner. After a lapse of one year and

three months, IG [Pers. Dte. General] vide memo dated 31st July 2013 quashed the proceedings conducted by DIG, Lucknow and ordered denovo hearing of charges by DIG (Dehradun). Even in the second ROE , the charges could not be proved and DIG recommended dropping of charges. Despite no adverse findings against the Petitioner, Respondents issued a show cause notice dated 28th February 2014 for issuing DG's displeasure on account of doubtful integrity. The Petitioner submitted his reply and explained that the heading of the letter dated 11th October 2010 was a clerical oversight. It was also pointed out that all the prosecution witnesses had deposed in his favour and even the ROE conducted by the Respondents did not recommend any action against him. The Respondents however disregarded and rejected his explanation and issued DG's displeasure vide memo dated 16th May 2014. This according to the learned counsel was a complete non-application of mind and indicates a preconceived intent to somehow fix the liability on the Petitioner and deserves to be quashed being contrary to the procedures and being wholly arbitrary.

4. The learned counsel then submitted that the second displeasure dated 18th February 2014 is also misconceived and unsustainable. She submitted that the said displeasure note pertains to an incident that happened in Allahabad when the Petitioner was not even associated with 18 Bn. She explained that the said displeasure note was issued holding him responsible for the unfortunate incident that occurred on 8th September 2013 when two personnel/jawans of 18 Bn ITBP were killed in Allahabad purportedly in a red light area. She submitted that the said personnel had visited a civilian area on a validly issued out-pass. The Petitioner had handed over command

of 18 Bn to the Second (In- Command/ I/C), the next Senior Officer on 2nd August 2014 and proceeded on temporary attachment to Dehradun on 3rd August 2013 as per the orders of the Respondents. She submitted that during this period i.e. 3rd August 2013 to 13th October 2013, Petitioner was not commanding the Unit and therefore had no control over 18 Bn. Since the Petitioner was not commanding the unit at the relevant point of time, no fault could be attributed to the Petitioner. Even as per report of SSP, Allahabad, the death of two Jawans did not take place in any prohibited or red light area. The judicial inquiry conducted in respect of the said incident also did give any adverse finding. She further pointed out that the ostensible basis for the displeasure note is an inquiry conducted by DIG (Lucknow). This enquiry, according to her was conducted without any opportunity being afforded to the Petitioner to give a statement or evidence in the matter. Learned Counsel, urged that the allegations contained in the show cause notice are completely unfounded and baseless and the Respondents have not taken into consideration any of the objections raised in the response thereto and the displeasure note thus are unsustainable and liable to be quashed.

5. Learned counsel further submitted that the four memos which are also being cited as a ground for downgrading of the APAR, are also liable to be quashed. She submitted that the said memos do not find mention in the APAR, that was provided to the Petitioner. She submitted that as per settled law, full APAR is required to be served upon the employee in order to enable him to make a representation. Since the said memos were not a part of the APAR, there was no basis for the Petitioner to rely or refer to the same while deciding the representation against the downgrading. The said

memos have no legal effect and should be ignored for the purpose of deciding the grading and calculating the score of 5.6 awarded to the Petitioner. On merits she argued that the memos have been issued for insignificant reasons and the same should not be taken into account while grading the APAR.

6. On the other hand, Mr. Bhardwaj, learned counsel for the Respondents submitted that Respondent's decision is in compliance with the norms and instructions of DoPT for grading the APAR's. He submitted that the displeasure notes were rightly issued and in particular the displeasure note dated 16th May 2014 which relates to grave and serious allegations against the Petitioner. He also submitted that in respect of the issue relating to the request for damaged stores, the matter was investigated more than once. Conducting Court of Inquiry was considered inexpedient and it was decided to go for an administrative action against the Petitioner, as per the advice of additional JAG which ultimately resulted in the issuance of DG's displeasure note dated 16th May 2014. He also urged that the displeasure dated 16th May 2014 was issued in the backdrop of the report by DIG (Lucknow) and the recommendation of IG (Eastern Frontier) and the same cannot be faulted with.

Analysis

7. The main plank of the argument of the Petitioner concerns the two displeasure notes. Since the said notes are the primary ground for downgrading the APAR it is considered appropriate to deal with the rival submissions and contentions of the parties in respect of the two displeasure

notes, independently.

8. DG's displeasure note dated 16th May 2014

The genesis of this aforementioned displeasure note is the incident of cloud burst that occurred on the midnight of 5th of August, 2010 at Leh. This natural calamity damaged several properties of the 37 Bn. A Court of Inquiry was ordered by the Petitioner himself to assess the loss caused to the government property. The findings of the Court of Inquiry were placed before the Petitioner and accepting the same to be correct, the Petitioner put forward the same to the higher authorities, where it was duly vetted through the chain of command. Whilst the Court of Inquiry was under progress, a memo dated 15th September, 2010 was received for sending a list of stores required for refurnishing the officers' mess. The letter issued by the Petitioner in response to the said memo dated 11th October, 2010 is the bone of contention. According to the Petitioner, the title in the said letter was inadvertently mentioned as "list of lost and damaged stores" instead of "list of stores required for refurnishing of the officer's mess". Subsequently on account of a complaint containing allegations against the Petitioner, an enquiry was conducted to verify the accusations. DIG (NW Frontier), submitted a note to IG (NW Frontier) and recommended Court of Inquiry. Thereafter vide memo dated 12th August, 2011, DIG (NW Frontier) was deputed to record the Petitioner's submission. After taking Petitioner's statements into consideration, the said DIG (NW Frontier) vide memorandum dated 22nd November, 2011 observed that he did not find any wrong doing on the part of the Petitioner and cleared him from all the charges. The facts of the case also reveal that subsequently Respondents

reviewed the decision and a fresh enquiry was directed. This time DIG (Lucknow) recorded the statement of the Petitioner and held that none of the charges contained in the charge sheet were sustainable and did not find merit for initiating a disciplinary action against him. After a lapse of one year and three months, yet again, the Respondents quashed the proceedings conducted by DG (Lucknow) and ordered for a denovo hearing of charges this time by DIG(Dehradun).

9. The fact that the Respondent has disregarded the conclusion of enquiry reports, raises a doubt on the manner in which the Respondents have proceeded against the Petitioner. We find no justifiable reasons and none are forthcoming from the Respondents to explain the rationale behind quashing of the earlier enquiries as ordered by the Respondents. All the enquiries were on the same set of facts and there was no fresh ground justifying the Respondents to order another ROE. Be that as it may, DIG (Dehradun) served a charge sheet on the Petitioner. After considering the reply of the Petitioner, the second ROE order was not found to be sustainable and DIG (Dehradun) recommended dropping of most of the charges against the Petitioner and recommended a Court of Inquiry in respect of some of the charges, in the absence of any conclusive proof. The relevant portion of the letter dated 20th January 2014 reads as under:

“4. I, in the capacity of Commanding Officer of the accused would like to draw attention to the R.O.E. so conducted wherein it has been concluded and hence recommended that charge 1,2,3,5,6,7,8,9,10,11,12,13,14,15,19,20,21,22,23,24,25,26 and 28 be dropped on ground of not being supported by evidence on record. Further," for charges 4,16,17,18 and no firm conclusion can be drawn in absence of any conclusive proof with regard to

the veracity of stock register being maintained at TAG HQrs Leh, on which basis, list of lost/damaged items was prepared. Thus veracity of stock register (page 233, ROE) may be ascertained by way of ordering a Court of Inquiry.

5. On the basis of the ROE so conducted I agree with the same and therefore do not concur-with the opinion of the Addl. JAG with regard to charges 1 to 22, on which basis he has recommended further course of action with regard to issuance of displeasure notice to Sh R.S. Rana, Commandant 18th Bn.”

10. However, no Court of Inquiry was conducted. The Respondents continued with their objective of implicating the Petitioner and issued a show cause notice dated 28th February 2014, for issuing DG’s displeasure note. The said show cause notice reads as under:-

“4. AND WHEREAS, the DG, ITBP after going through the ROE and pre-trial advice, arrived at the conclusion that officer should be issued DG’s Displeasure on account of his doubtful integrity as it has been established that he has forwarded a list of items to DY. CAO, Dte Gen ITBP without ascertaining the correctness of the fact, whether the items contained in the list were actually lost/damaged and whether their correct prices as per ledger were mentioned in the list as also without ascertaining that whether or not those items were actually brought to Leh, prior to cloud burst at Leh on 5/6th August, 2010.

5. NOW THEREFORE, it is proposed to issue DG’s Displeasure on the ground of doubtful integrity to Shri Ranjeet Singh Rana, Commandant, 18th Bn. for the above said omission & commission. Shri Ranjeet Singh Rana, Commandant, 18th Bn, is therefore, issued this Show Cause Notice with the direction that he may submit his explanation in writing through proper channel within 15 days of receipt of this notice as to why proposed action of issue of DG’s

Displeasure should not be taken against him. If no explanation is received within the stipulated time, it shall be construed that Shri Ranjeet Singh Rana, Commandant, has nothing to state and order shall be passed ex-parte as deemed appropriate..”

The aforesaid averments cast an allegation against the Petitioner in the following words:-

“on account of his doubtful integrity as it has been established”

11. Even in the counter affidavit and in the submissions advanced by the learned counsel for the Respondents, the displeasure note is sought to be justified and defended on the ground that it is premised on serious and grave allegations against the Petitioner. It is pertinent to note that if the stand of the Respondents is accepted to be correct and all the previous enquiries are to be ignored, there is no plausible explanation forthcoming for not conducting a fresh Court of Inquiry as suggested by DIG(Dehradun). The only justification forthcoming for not doing so is stated in the counter affidavit in the following words:-

“It is respectfully submitted that the charges levelled against the petitioner were fully heard by his commanding officer i.e. DIG (Dehradun) and for the charges 4, 16, 17, 18 & 27, a fresh Court of Enquiry was suggested which did not considered necessary being time barred and decided to dispose the case finally by serving DG’s displeasure as an administrative action as stated in para-3(F).”

12. The aforesaid averments seem to suggest that the disciplinary note was served without due process, as conducting a Court of Inquiry was not found feasible being time barred. Such a procedure followed by the Respondent

being unreasonable and untenable attracts the vice of arbitrariness. In case there is merit in the submission of the Respondents, the Court of Inquiry would have been the appropriate course of action. This was what, the DIG(Dehradun) also recommended. Not having done so on account of an administrative lapse on the part of the Respondents, a displeasure note as an alternative administrative action, cannot withstand judicial scrutiny and deserves to be quashed.

13. There is an additional reason as to why the displeasure note should be set aside. The displeasure note is in respect of an incident of 2009-2010. The displeasure note is entered as the remark in the APAR for the year 2013-14. The displeasure note being an administrative action, if justifiable in the facts and circumstances of the case, could have been issued at the first very instance when the first fact finding enquiry was conducted. No additional or new material or fact surfaced in 2013-14 that entitled the Respondents to issue the displeasure note with respect to an incident that occurred, as admitted by them, in the year 2010.

14. DG's displeasure note dated 18th February 2014

The second displeasure note dated 18th February 2014 was issued to the Petitioner for the aforementioned incident that occurred in Allahabad. Here again, it is not a disputed position that on the date of incident i.e. 8th September 2013, the Petitioner was not associated with 18 Bn. The reason for issuance of displeasure note is that two personnel of 18 Bn were killed in Allahabad, when the said official/jawans visited the civilian area. The facts reveal that at the time, the inquiry into the incident of cloud burst that had

occurred in Leh, J&K was ongoing against the Petitioner. For this reason, he had proceeded on temporary attachment to SHQ (r), Dehradun on 3rd August 2013 and handed over the command of 18 Bn to 2nd I/C Sh. R B S Kushwaha. This attachment continued till 13th October, 2013. Thus, at the time of incident, the Petitioner was not commanding the unit and had no effective control over 18 Bn. It is also noteworthy that the court of inquiry ordered in respect of said incident also did not find any fault with the action of the jawans who were killed, in Allahabad. Meaning thereby, their presence in the area where the incident occurred was not found in violation of any direction or instruction. Even, as per report of SSP, Allahabad, the death of jawans did not take place at any prohibited or red light area. The judicial inquiry conducted in respect of the said incident also did not indict the Petitioner. The DIG (Lucknow), in his inquiry however observed that in the past as well, ITBP Jawans were regularly visiting red light area for immoral activities.

15. This inquiry we are informed is not a court of inquiry as contemplated under the provisions of ITBP Act . It was conducted without affording any opportunity to the Petitioner to give his statement or evidence to prove the contrary. The show cause notice issued for proposing the DIG's displeasure note, also did not enclose the copy of the inquiry. In the facts of this case, Inquiry without affording any opportunity to the Petitioner to contest the charges, in our opinion, could not be relied upon for issuance of a displeasure note. The stand of the Respondents on this issue is also strange. It is stated that since the Petitioner as commanding officer claims praise for his good work during his command, he should also shoulder the

responsibility for untoward incidents that occurred in his unit in his absence. This to our mind, is not a sound explanation to fix the responsibility for the incident that occurred whilst the Petitioner was not holding the command of the 18 Bn. The Respondents also contended that such incident has occurred in past as well and Petitioner ought to have taken necessary steps well in time to avert such incident. Such finding based purely on facts could not have been arrived at without giving an opportunity to the Petitioner to controvert the material that forms the basis of the report of the DIG (Lucknow).

16. In view of the above, the second displeasure note also deserves to be quashed.

Memos dated 29th May, 2013, 25th September, 2013 , 04th October, 2013 and 09th January, 2013.

17. The aforesaid four memos, find mention in the letter dated 14th May, 2015 whereby the Respondents rejected the representation of the Petitioner against the down grading of his APAR. The relevant portion of said order is read as under;

5. While offering comments on the representation of the officer, the Reviewing Officer has clarified that Shri R.S. Rana, Commandant has been issued various memos on the front of Administrative, Training and Security issues but officer failed to improve his way of command to show distinct improvement in his attitude and behave in responsible manner even after written as well as verbal advises issued to him by DIG (J&K) and by Eastern Frontier. The performances of the officer has been assessed according to the attitude, work and conduct of the officer.

Hence, there is no merit in the representation made by the officer.

6. Thereafter duly taking into consideration the said representation of the officer and all relevant facts and evidence on record, the competent authority has found that:-

- i) During IG's visit to 18th Bn w.e.f. 24/04/13 to 26/04/13, the physical standard of unit personnel was not found up to the mark and various other shortcomings were also noticed for which warning vide memo dated 29/05/13 was issued to him by the IG, Eastern Frontier.
- ii) He was issued Warning vide Memo dated 04/10/13 by DG, ITBP for removing name of No. 070314341 CT/GD Jagroop Singh, 18th Bn from 4th All India Police Commando Competition, 2013 and for not sending individual to ITBP Academy for practice.
- iii) Warning vide Memo dated 25/09/13 was issued by DIG (LKO) for not attending his telephone call on 24/09/13 and 25/09/13 and did not call back to his senior officer.
- iv) Warning vide Memo dated 09/01/14 regarding payment of bill of Xerox digital photocopier machine purchased through DGS&D rate contract.
- v) DG's displeasure dated 18/02/14 conveyed to the officer reported upon for not taking suitable action to stop ITBP personnel from indulging in immoral activities and for not adopting precautionary measures such as surprise roll call, reccee or red light area, hard steps to ensure the presence of jawans in the unit complex and to stop their unauthorized entry in

prohibited areas.”

18. The Petitioner has rightly pointed out that the said memos were not entered into the APAR for the relevant year and therefore he did not have the opportunity to deal with the same while making the representation against the down grading. The OM dated 14.05.2009 issued by the Government of India categorically states that the full APAR including the overall grade and assessment of integrity shall be communicated to the concerned officer after the report is complete with the remarks of the reviewing officer and the accepting authority wherever such system is in vogue.

19. In **THDC India Ltd. vs. T. Chandra Biswas** 199 (2013) DLT 284, this Court has held that

"..... providing to an employee gradings without the narrative is like giving a conclusion in judicial/quasi-judicial or even an administrative order without providing the reasons which led to the conclusion. If the purpose of providing ACRs is to enable the employee to assess his performance and to judge for himself whether the person writing his ACR has made an objective assessment of his work, the access to the narrative which led to the grading is a must....."

20. In our opinion besides the non-communication of the remarks, what is more significant is the fact that the relevant APAR also shown to us during the hearing, does not record any remarks concerning the four memos. The numerical over all grading of 5.6 out of 10 given by the Respondent, was

thus without relying or taking the memos into consideration. Since the said memos never formed basis for grading the Petitioner, Respondents cannot be giving a post facto justification for down grading the Petitioner. On this issue, the following observations of the Supreme Court in judgment of **Mohinder Singh Gill and Ors. vs. The Chief Election Commissioner, New Delhi** AIR 1978 SC 851 become relevant:

“8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out.

We may here draw attention to the observations of Bose J. in Gordhandas Bhanji A.I.T. 1952 S.C.

16. Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to effect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.”

21. We thus see no reason why the Respondents should be permitted to rely upon the warning memos for justifying the grading. Besides, Petitioner asserts that the said memos are trivial in nature, and should not have any adverse impact on Petitioner's APAR. For instance, the memo dated 4th

October, 2013 was issued by the DIG, ITBP for removing the name of one of constable from All India Police Commando Competition, 2013 and for not sending him for practice. The Petitioner explained that the said constable was released from competition on account of his marriage. His request was found genuine and his candidature for participating in the event was cancelled. In fact the memo dated 04th October, 2013 was not issued to the Petitioner, but to the commandant. Likewise, the warning memo dated 25th September, 2013 was issued by DIG (Lucknow) to the Petitioner for not attending his telephonic calls on 24th September, 2013 & 25th September, 2013 and not calling him back. The Petitioner explained that on the above noted dates he lost his cell-phone. He had brought the said fact to notice of DIG (Lucknow) in writing. Further, the warning memo dated 09th January, 2014, issued regarding the payment of bill of Xerox photocopier Machine, is allegedly on the ground that payment for the same was made directly to the vendor and not through the AO as per the procedure. Petitioner explained that this aspect was discovered by the unit itself and subsequently rectified by making the vendor refund the payment and later paid through the proper channel. Equally insignificant is the warning memo dated 29th May, 2013. The same was issued allegedly for not finding the physical standard of unit personnel up to mark. The Petitioner had explained that the 18th Bn was a reserve unit and jawans were deployed for various duties like for election, kumbh mela and protection duties and thus in absence of the requisite space there was lack of physical training. As stated earlier, we need not engage much on this issue as the aforementioned memos besides being trivial and inconsequential, have no effect on the overall grading in the APAR for the reasons explained above.

22. Before parting with the judgement, we must note that we are aware of the legal principles for scrutinizing a case of upgradation of the APAR of CAPF personnel. It is settled law that the Court while exercising writ jurisdiction under Article 226 of the Constitution of India does not sit as a court of appeal. Ordinarily the courts would not like to substitute the views expressed by the authorities while appraising the total profile of a personnel. However, if relevant considerations have not been taken note of or irrelevant aspects not eschewed from consideration, the Court would not be without jurisdiction to interfere in the matter. On account of the facts noted and discussed above, the present case is one where we have no hesitation in exercising our writ jurisdiction .

23. In view of the above discussions, the petition is allowed. Accordingly, we direct as under;

- a). The DIG's pleasure notes dated 18th February, 2014 and 16th May, 2014 are quashed. Consequently, the order dated 14th May, 2015 rejecting the Petitioner's representation against down grading is also quashed
- b). The Respondents are directed to reassess the Petitioner's overall grading for the relevant year 2013-14. While reassessing the APAR, Respondents shall ignore the memos dated 29th May, 2013, 25th September, 2013 , 04th October, 2013 and 09th January, 2014 and this exercise shall be completed within a period of three weeks from today. The decision shall be conveyed to the Petitioner within a week thereafter.
- c). Consequential steps for considering the Petitioner for promotion to the

next post, shall the undertaken consequent to the decision taken in para (b) above.

SANJEEV NARULA, J

S.MURALIDHAR, J

MARCH 07, 2019/nk

