

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	30.11.2020
Pronounced On	18.12.2020

CORAM

THE HONOURABLE MR.JUSTICE R.SUBBIAH
AND
THE HON'BLE MR.JUSTICE C.SARAVANAN

W.A.No.3970 of 2019
and
C.M.P.No.24872 of 2019

(Through Video Conferencing)

1. Government of India,
Rep. by the Secretary to Government,
Ministry of Defence,
New Delhi.
2. The Director General of Coast Guard,
Coast Guard Headquarters,
National Stadium Complex,
New Delhi.
3. The Commanding Officer,
Coast Guard Station,
Fort St.George,
Chennai - 9.
4. Mr.S.K.Mishra
Commandant.
5. Mr.Waila,
Commandant.

सत्यमेव जयते

Vs.

... Appellants

Md.Abbas Mohideen

... Respondent

Writ Appeal filed under Clause 15 of Letters Patent, to set aside the order dated 29.08.2019 passed by the learned Single Judge in W.P.No.16771 of 2009.

W.P.No.16771 of 2009:

Writ Petition filed under Article 226 of the Constitution of India for issuance of a writ of certiorarified mandamus to call for the records relating to the order passed by the second

respondent in No.OF/1185, dated 21.07.2009 and its consequential order No.AD/100, dated 27.07.2019 passed by the third respondent and quash the same and consequently direct the second respondent to promote the petitioner as Deputy Commandant w.e.f. December, 1995, and as Commandant (Selection Grade) w.e.f. August, 2002, along with XII Batch and pay all consequential and other benefits arising there from and pass such further orders.

For Appellants : M/s.Sunita Kumari
For Respondent : Mr.Nirajan Rajagopalan
for M/s.G.R.Associates.

J U D G M E N T

C.SARAVANAN, J.

The present Writ Appeal has been filed against the impugned order dated 29.08.2019 passed by the learned Single Judge in W.P.No.16771 of 2009.

2. W.P.No.16771 of 2009 was filed for Writ of Certiorarified mandamus to call for the records relating to the order passed by the second respondent in No.OF/1185, dated 21.07.2009 and its consequential order No.AD/100, dated 27.07.2019 passed by the third respondent and quash the same and consequently direct the second respondent to promote the petitioner as Deputy Commandant w.e.f. December, 1995, and as Commandant (Selection Grade) w.e.f. August, 2002, along with XII Batch and pay all consequential and other benefits arising there from.

3. By the impugned order, the learned Single Judge has allowed the said writ petition filed by the respondent and has quashed the impugned proceedings of the 2nd and the 3rd appellants herein dated 21.07.2009 and dated 27.07.2019 with a consequential direction to promote the respondent as Deputy Commandant with effect from December, 1995 and as Commandant (Selection Grade) with effect from August 2002 along with the XII Batch.

4. The appellants were further directed to complete the above exercise including the payment of monetary benefits within a period of 8 weeks from the date of receipt of the order. The respondent had since retired from the service of the appellants Coast Guard on 31.08.2018.

5. For a proper understanding the scope of the dispute, it will be useful to refer to the operative portion of the impugned order passed by the learned Single Judge which reads as under:-

14.In the aforesaid peculiar facts and circumstances of the case, it is more appropriate to look into the two crucial aspects; one, the fifth respondent,

having been perturbed by the action exposed by the petitioner, deliberately with bad intention, refused to include his name for promotion to the post of Deputy Commandant and kept his promotion alone in the sealed cover in December 1995; secondly when the charge sheet dated 15.02.1996 was issued against the petitioner, the respondents have taken a stand that as the disciplinary action against him was being progressed, the recommendations of the Promotion Boards relating to his promotion from 1995 onwards were kept in sealed cover following the instruction of the Government for such cases. This fact was admitted by the respondents in paragraph No.6 of the counter affidavit and the same is extracted below:

"The petitioner in 1995 was assessed for promotion to the rank of Deputy Commandant in accordance with the aforesaid provisions. Since the disciplinary action against him was being progressed the recommendations of the Promotion Boards relating to his promotion from 1995 onwards were kept in sealed cover following the Government instructions for such cases."

15. While dealing with this issue, learned Single Judge of this Court, vide order dated 05.03.2008 passed in W.P.No.36674 of 2003, has clearly held that charge sheet dated 15.02.1996 initiated against the petitioner, due to which his name was kept in sealed cover, came to be dropped and one Mr.S.K.Singh, who was the Commanding Officer, forwarded the Record of Evidence to the Coast Guard Headquarters recommending to drop the charges. For better appreciation, relevant portion of the said order is extracted below:-

"8. On 15.02.1996, Record of Evidence (ROE for short) was started and it was completed during the end of February, 1996.

.....

Mr.S.K.Singh, the sixth respondent was the Commanding Officer, who forwarded the ROE to the Coast Guard Headquarters and it is the stand of the petitioner that he had held that there was no case against the petitioner and recommended dropping the charges."

As the charge sheet dated 15.02.1996 and the consequential disciplinary proceedings initiated

against the petitioner were dropped, it goes without saying that the petitioner was entitled for the next avenue of promotion, that was due on 05.08.1995 as Deputy Commandant along with his XII Batch mates. This aspect was not answered by the respondents either in their counter affidavit or in their rejoinder affidavit filed to the reply affidavit of the petitioner.

16. As highlighted above, it must be reiterated again that by virtue of the order passed by the Hon'ble Division Bench of this Court directing the respondents to reinstate the petitioner as if there was never any order of dismissal against the petitioner, in my considered view, the petitioner is deemed to be in service during the period of dismissal from service as well, and subsequently, when SLP was preferred, the Hon'ble Apex Court also confirmed the order passed by the Hon'ble Division Bench. Thus, the stand of the respondents that since no Confidential Report was initiated on the performance of the petitioner during the period of his dismissal from service, he could not be considered for promotion along with his XII batch mates, cannot be sustained in the eye of law, as he is deemed to be in service in view of specific direction of the Hon'ble Division Bench of this Court stated supra.

17. In fine, for the reasons stated above, the impugned proceedings of the respondents 2 and 3 are set aside and the writ petition is allowed. Consequently, the respondents are directed to promote the petitioner as Deputy Commandant with effect from December, 1995, and as Commandant (Selection Grade) with effect from August, 2002, along with the XII batch. They are further directed to complete the entire exercise, including the payment of consequential monetary benefits, within a period of eight weeks from the date of receipt of a copy of this order. M.P.No.2 of 2009 is closed. No Costs.

6. The impugned order of the learned Single Judge is sought to be assailed primarily on the ground that the direction to promote the respondent as Deputy Commandant with effect from December, 1995 and as Commandant (Selection Grade) with effect from August 2002 along with XII Batch was contrary to the Rule 7

(2) and (3) of the Coast Guard (Seniority and Promotion) Rules, 1987.

7. It is submitted that promotions are subject to seniority and merit and since the respondent's Annual Confidential Report contained adverse remark, the respondent was not eligible for promotion to the rank of Deputy Commandant with effect from December, 1995 or as a Commandant with effect from August, 2002. It is submitted that promotion also cannot be granted as a matter of routine merely because the respondent was reinstated to the service of the Coast Guard.

8. It is further submitted that the question of promoting the respondent to the rank of Commandant (Selection Grade) with effect from August 2002 cannot be justified as the respondent was not in service between 24.10.2003 and 22.04.2009 and to be promoted to the post of Commandant (Selection Grade), the respondent ought to have actually served as a Deputy Commandant for the prescribed period and therefore, the impugned order was contrary to Rule 7 of the Coast Guard (Seniority and Promotion) Rules, 1987. It was therefore submitted that the impugned order was liable to be set aside.

9. It is further submitted that Coast Guard (Seniority and Promotion) Rules, 1987 was amended vide SRO 133 dated 17.09.2004 and therefore, at the time when the services of the respondent was reinstated on 22.04.2009, promotion could not be conferred contrary to the amended provision of the aforesaid Rules as he had not served as Commandant (Junior Grade).

10. It is further submitted that the respondent was promoted as a Deputy Commandant on 21.07.2009 with effect from 27.12.1996 and as a Commandant (Junior Grade) on 11.01.2013 with effect from 11.01.2013 and as a Commandant on 17.04.2018 as per the amended Rules which the learned Single Judge failed to note while passing the impugned order.

11. It is further submitted that the respondent retired from the service of coast guard on 31.08.2018. It is further submitted that the respondent was rightly denied promotion to the rank of Deputy Commandant in the year 1995 as there were adverse marks against him and disciplinary proceedings were under contemplation and a sealed cover procedure was later adopted which decision has been wrongly set aside by the learned single judge vide the impugned order.

12. It is submitted that not all the Assistant Commandants who were promoted as Deputy Commandant in 1995 and 1996 were not promoted as Commandant in 2002 or as Commandant (Junior Grade) and as Commandant. It is submitted that the coast guard

service being an armed force cannot be interpreted to confer promotion contrary to the Rules and therefore promotion cannot be granted as a matter of right to the respondent.

13. It is submitted that promotions were subject to availability of vacancy and merits. It is therefore submitted that promotion of the respondent as Commandant Selection (Grade) with effect from August 2002 as was prayed and allowed vide the impugned order also cannot be sustained.

14. It is further submitted that even otherwise to be promoted as a Commandant Selection (Grade) or later as a Commandant (Junior Grade) under the amended Rules, before being promoted as Commandant under the amended Rules, the respondent should have served as a Deputy Commandant for a period of 2 years with a total 11 years service where as the respondent was dismissed from service of the Coast Guard on 29.10.2003 and was reinstated to the service only on 22.04.2009 and therefore did not qualify for promotion in 2002 retrospectively as a Commandant. Promotions as per the impugned order of the learned single judge would be contrary to the Rules.

15. The learned counsel for the appellants further submitted that the learned Single Judge ought to have considered the Annual Confidential Report (ACR) of the respondent which was submitted before the Court before concluding whether the respondent was entitled for promotion from 1995 and 2002 as Deputy Commandant and Commandant (Selection Grade). Though the Annual Confidential Report (ACR) were filed before the learned Single Judge, the learned single judge failed to consider the same while passing the impugned order.

16. The learned counsel for the appellants relied on the following decisions of the Courts:-

- i. K.Samantaray Vs. National Insurance Co. Ltd., 2004 (9) SCC 286;
- ii. State of UP Vs. Jalal Uddin, 2005 (1) SCC 169;
- iii. Union of India Vs. Ran Singh Dudee, 2018 (8) SCC 53.

17. Defending the impugned order, the learned counsel for the respondent submitted that the impugned order of the learned Single Judge was well reasoned and requires no interference in this appeal. He submitted that the respondent was victimized by superior officers and therefore adverse remarks were made in the Annual Confidential Report (ACR) which resulted in denial of promotion in 1995 along with his contemporaries.

18. It is submitted that the Annual Confidential Report (ACR) for the subsequent years as Assistant Commandant cannot be

the basis for denial for promotion to the rank of Deputy Commandant from December, 1995 or as a Commandant (Selection Grade) from August, 2002, as the respondent was wrongly dismissed from service on 29.10.2003 and was reinstated only on 22.04.2009 by the appellants after SLP filed against the order of the Division Bench of this Court against order passed in W.P.No.36674 of 2003 was dismissed on 20.04.2009.

19. It is submitted that the appellants had unsuccessfully challenged the order dated 05.03.2008 in W.P.No.36674 of 2003 before the Division Bench of this Court. The Division Bench dismissed W.A.No.487 of 2008 vide order dated 10.02.2009 which order was affirmed by the Hon'ble Supreme Court in S.L.P.No.8622 of 2009 vide its order 20.04.2009. Thus, the rights which accrued vide order dated 05.03.2008 of the learned Single Judge of this Court in W.P.No.36674 of 2003 stands affirmed and cannot be diluted by the appellants.

20. The learned counsel for the respondent further submitted that the respondent was never served with his Annual Confidential Report (ACR) and therefore, same cannot be relied unfairly to deny promotion to the respondent as Deputy Commandant and Commandant (Junior Grade).

21. It is further submitted that the alleged above remarks in Annual Confidential Report (ACR) has been raised for the first time in this appeal. It is submitted that since promotion was denied without furnishing the Annual Confidential Report (ACR) and since such denial was due to victimisation, reliance placed on Annual Confidential Report (ACR) cannot be made on it for the first time in this appeal. The learned counsel for the respondent therefore prayed for dismissal of this present Writ Appeal. The learned counsel for the respondent relied on the following cases:-

- i. Dev Dutt Vs. Union of India & Ors, 2008 (4) SCC 725;
- ii. Abhijit Ghosh Dastidar Vs. Union of India, 2009 (16) SCC 146 : 2010 (1) SCC (L&S) 959;
- iii. Sukhdev Singh Vs. Union of India, 2013 (9) SCC 566 : 2014 (1) SCC (L&S) 279;
- iv. Prabhu Dayal Khandelwal Vs. Chairman, UPSC, 2015 (14) SCC 427.

22. We have considered the arguments advanced by the learned counsel for the appellants and the respondent. We have also perused the records. The dispute in this writ appeal has a chequered history.

23. The respondent initiated multiple proceedings before the Orissa High Court and later before this High Court in the light

of the disciplinary proceedings. It is not necessary to delineate the details of the previous litigations in this Judgment.

24. We will however briefly touch upon the career progress and setbacks of the respondent for the purpose of a proper disposal of this appeal. The respondent was subjected to disciplinary proceedings which came to be initiated against him.

25. The respondent was earlier charge-sheeted on 30.07.1996 and thereafter again on 10.08.1999 for the same charges. The 2nd departmental proceeding was initiated against the respondent as the previous proceeding could not be completed in time. It culminated in an order dated 29.10.2003.

26. The respondent was dismissed from Coast Guard service on 29.10.2003. At the time of dismissal, the respondent was still serving as an Assistant Commandant.

27. The respondent therefore challenged the aforesaid dismissal order successfully in W.P.No.36674 of 2003 before this Court. W.P.No.36674 of 2003 was filed for issuance of writ of certiorari calling for the records of the Coast Guard Court constituted by the second respondent (2nd appellant herein) in connection with the proceedings of the Coast Guard Court dated 29.10.2003 and quash the same.

28. W.P.No.36674 of 2003 was allowed by a learned Single Judge of this Court on 05.03.2008. The operative portion of the said order reads as under:-

29. If it is normal disciplinary proceedings in terms of persons holding civil posts and having protection under Article 311(2) of the Constitution of India, this Court might have taken liberal view both on the grounds of limitation and the necessity to have a second enquiry. But whereas in view of the peculiar statutory provision, this Court is bound to uphold the two objections raised by the petitioner.

30. In the light of the above, the writ petition will stand allowed and the impugned order dated 29.10.2003 will stand set aside. In view of the same, the petitioner is entitled to get restored to his service with all consequential benefits as if there was no order of dismissal.

29. As per the said order, the respondent was to be given all consequential benefits as if he was in service and had not been dismissed from the service.

30. The appellants unsuccessfully challenged the said order in W.A.No.487 of 2008 and in S.L.P.No.8622 of 2009. W.A.No.487 of 2008 was dismissed on 10.02.2009 while S.L.P.No.8622 of 2009 was dismissed on 20.04.2009.

31. The respondent was thereafter reinstated on 22.04.2009 as an Assistant Commandant in compliance of the order dated 05.03.2008 in W.P.No.36674 of 2003.

32. Therefore, the point that falls for consideration in this Writ Appeal is whether the respondent was entitled for promotion as was prayed in W.P.No.16771 of 2009 and granted and/or whether the appellants are justified in their plea to deny the promotion to the respondent?

33. The impugned order of the learned Single Judge is inspired from the reasoning of the order dated 05.03.2008 in W.P.No.36674 of 2003.

34. Though the said writ petition dealt with the other issues which could otherwise touch on the correctness of the disciplinary proceedings initiated against the respondent, they are not relevant for the purpose of this appeal. This issue has attained the finality with dismissal of writ appeal and S.L.P. preferred by the appellants herein.

35. It will suffice to state that the respondent was denied promotion to the rank of a Deputy Commandant in the year 1995 along with his batchmates. At that time, unamended Coast Guard (Seniority and Promotion) Rules, 1987 was in force.

36. Therefore, to test the correctness of the reasoning adopted in the impugned order of the learned Single Judge, we shall refer to relevant Rules.

37. Rule 7 of Coast Guard (Seniority and Promotion) Rules, 1987 prescribes the Rules for promotion to different ranks. When the respondent initially became eligible for promotion to the rank of Deputy Commandant in the year 1995, Coast Guard (Seniority and Promotion) Rules, 1987 was in force.

38. It had replaced Coast Guard (Seniority and Promotion) Rules, 1986. In 1995, there were only four Sub - Clauses to Rule 7. It read differently. By the time the respondent was reinstated the said Rule read differently with an amendment in 2002 and 2004. Meanwhile, an intermediate post of Commandant (Junior Grade) was created in 2002.

39. At the inception, Rule 7(1) to (4) of Coast Guard (Seniority and Promotion) Rules, 1987 was similar to the Rule 7 (1) to (4) of the Coast Guard (Seniority and Promotion) Rules, 1986. Later Sub - Rule 5 was inserted to Rule 7 of Coast Guard (Seniority and Promotion) Rules, 1987 vide SRO 86 dated 03.04.2002.

40. Still later Rule 7(1) to (4) were substituted vide SRO 133 dated 17.09.2004. For the sake of clarity, both unamended and amended provision are reproduced below:-

Table:-

I	II
Rule 7 as it stood in 1987.	Rule 7 from 17.9.2004
7. Promotion Rules. - [(1) Officers shall be eligible for promotion against the vacancies occurring in the respective branches to which they belong.	7. Promotion Rules. - [(1) Officers shall be eligible for promotion against vacancies occurring during a financial year in the respective branches and cadres to which they belong.
(2) The promotion of officers to the rank of Deputy Commandant shall be made on the basis of their seniority subject to fitness.	(2) The promotion of officers to the ranks of Deputy Commandant and Commandant (Junior Grade) shall be made on the basis of their seniority subject to fitness and possession of requisite qualifications contained in the relevant Annexure to these rules.
(3) The promotion of officers to the rank of Commandant and above shall be made on the basis of merit with due regard to seniority.	(3) The promotion of an officer to the rank of Commandant and above shall be made on relative merit based selection within the eligible batch of officers of his cadre to which he belongs and subject to possession of requisite qualifications contained in the relevant Annexure to these rules."

I	II
(4) The promotion of officers to the rank of Commandant and above shall be on acting basis. They will be confirmed from the date of their promotion on rendering satisfactory service for a period of one year in the higher rank. The service shall be assessed from the Annual Confidential Report rendered on the officers.]*	(4) The Promotion of Officer to the Rank of Commandant and above shall be on acting basis. They will be confirmed from the date of their promotion on rendering satisfactory service for a period of one year in the higher rank. The service will be assessed from the Annual Confidential Report rendered on the officer.]***
[(5) All reports of Coast Guard Officers of the rank of Commandant(JG) and Commandant will undergo a "Performance Appraisal Review" at CG HQ by a Performance Appraisal Review Board (P ARB) with a view to analyse instance of wide deviations from their previous overall carrier profile. The Reporting and Reviewing Officers will be required to support very high or very low grading in the remarks column. At Coast Guard Headquarters the numerical grades may be suitably moderated on the recommendation of PARB with the approval of the Director-General Coast Guard so as to bring the same in tune with officers demonstrated past performance]**.	

* SRO 6E, dated 26.04.1987.

** SRO 86, dated 03.04.2002.

*** SRO 133, dated 17.09.2004.

41. Though Sub Rule (5) to Rule 7 of the aforesaid Rules was inserted as early as 03.04.2002 vide SRO 86, dated 03.04.2002, its full impact could not be given effect until Sub Rule (1) to (4) to Rule were amended on 17.09.2004 vide SRO 133, dated 17.09.2004. There was no post of Commandant (Junior Grade) till 17.09.2004 under the Rules though vide MF-OF/0206 dated 09.09.2002, it was highlighted that the based on the V CPC, a new rank of Commandant (JG) was introduced in the Coast Guard (on the patterns of BSF) vide Government Sanction dated 20.04.2001.

42. In MF-OF/0206 dated 09.09.2002, it was further clarified that even though the new post of Commandant (Junior Grade) was created in April 2001, DPC for promotion could not be conducted so far in absence of Recruitment Rules (RRs) prescribing the

eligibility conditions, etc. A proposal for restructure of the entire CG officer's cadre / revision of time limits for promotion to various ranks was also under consideration.

43. Therefore, CGHQ floated a separate proposal for revision of RRs for the entire cadre [including Commandant (Junior Grade)] which was under consideration in MOD on file No.CP/0247 (submitted to DS(N) today). As per the time limits proposed in the draft RRs, a total commissioned service of 11 years was prescribed for promotion to the new rank of Commandant (Junior Grade). As per guidelines issued by DOP & T, a period of 10 years service is required for promotion to a post in the rank of Commandant (Junior Grade).

44. When MF-OF/0206 dated 09.09.2002 was issued, there were only 55 officers awaiting for being promoted to the rank of Commandant (Junior Grade). It was therefore decided that only those officers who have put in 12 years service at that time instead of 10 years prescribed by the DOP & R will be promoted. It was further stated that after finalisation of the RRs, all remaining eligible officers could be considered for promotion. In the circumstances, it was stated that in principle approval can be granted for holding DPC for promotion to the rank of Commandant (Junior Grade) in Coast Guard.

45. When MF-OF/0206 dated 09.09.2002 was issued, the respondent had already served the Coast Guard Service for 13 years as an Assistant Commandant and was facing disciplinary proceedings.

46. It is not clear whether the proposal in MF-OF/0206 dated 09.09.2002 was acted upon and Deputy Commandant were promoted as Commandant (Junior Grade) even though Recruitment Rules had not been amended. If it was, we are of the view that the respondent also should have been promoted with other officers as Commandant (Junior Grade) along with his batch match. We shall give reasons in the course of this order.

47. By the time, the respondent was re-instated on 22.04.2009 after the dismissal of the SLP on 20.04.2009, Rule 7 of the Coast Guard (Seniority and Promotion) Rules, 1987 had been fully amended to give effect to proposal in MF-OF/0206 dated 09.09.2002. From 17.09.2004, Rule 7 of the Coast Guard (Seniority and Promotion) Rules, 1987 reads as in Column No.2 to the above Table.

48. It should be remembered that under both the amended and unamended Rule 7 of the Coast Guard (Seniority and Promotion) Rules, 1987, promotions to the higher post were against vacancies. However, different yardstick and considerations were

prescribed for promotion to the different ranks in the hierarchy of the Coast Guard Service.

49. Since the respondent joined as an Assistant Commandant in the year 1989 with the Coast Guard, he became eligible to be promoted as Deputy Commandant in the year 1995 after having served as an Assistant Commandant the required period of 6 years.

50. As per unamended Rule 7(2) of the Coast Guard (Seniority and Promotion) Rules, 1987 as it stood upto 03.04.2002, and also after the amended on 17.09.2004, the promotion to the rank of Deputy Commandant was on the "basis of seniority and fitness" alone. Annexure 1 to the Coast Guard (Seniority and Promotion) Rules, 1987 was substituted for the first time in 2004 along with Sub Rules(1) to (4) to Rule 7 as in Column 2 to the above Table. Therefore, the respondent was eligible to be promoted to the post of Deputy Commandant along with his batchmate in December, 1995.

51. In this connection, it will be useful to refer to paragraph No.11 of the decision of the Hon'ble Supreme Court in Union of India Vs. Rajendra Singh Kadyan, (2000) 6 SCC 698. The Hon'ble Supreme Court held as under:-

11. The hierarchy in the Army and the method of selection and promotion to various posts starting from the post of Lieutenant and going up to the post of the Chief of the Army Staff will clearly indicate that the posts of Lieutenant, Captain and Major are automatic promotion posts on passing the promotion examination irrespective of inter se merit, whereas the posts from Major to Lt. Colonel, Lt. Colonel to Colonel, Colonel to Brigadier, Brigadier to Major General and Major General to Lt. General are all selection posts filled up by promotion on the basis of relative merit assessed by the designated Selection Boards. From Lt. General (Corps Commander) to Army Commander is a non-selection post to which promotion is made subject to fitness. It is a promotion subject to fitness in all respects, although the rank remains the same. From the post of Army Commander to that of the Chief of the Army Staff, it is by promotion for which no specific criteria have been laid down. There have been precedents where the seniormost Army Commanders have not been appointed as the Chief of the Army Staff. Selection implies the right of rejection depending upon the criteria prescribed. Selection for promotion is based on different criteria

depending upon the nature of the post and requirements of the service. Such criteria fall into three categories, namely,

1. seniority-cum-fitness,
2. seniority-cum-merit,
3. merit-cum-suitability with due regard to seniority.

52. For promotion to the rank of Deputy Commandant, the appellants were not required to maintain Annual Confidential Report (ACR). However, it was maintained and produced for our perusal. We perused the same for the period 1994-95. It indicates promotional potential of 5.2 by the initiating officer. There it was observed that the respondent had problem with his Commanding Officers and B.O.E. proceedings had been already initiated and therefore, the respondent was found "not fit" for promotion.

53. There is however no record of Annual Confidential Report of the respondent for the period 1995-96. Yet, the respondent was promoted as Deputy Commandant (Tech) with effect from 27.12.1996 on his reinstatement to service on 22.04.2009.

54. The next Annual Confidential Report is of the respondent for the year 1998-99. The Commandant as the Initiating Officer gave a score of 7.0 to the respondent in the Annual Confidential Report and recommended promotion of the respondent to the post of Deputy Commandant.

55. However, the Reviewing Officer gave a score of 5.0 and concluded that the respondent was over assessed and remained occupied with filing of court cases and had not contributed anything constructive nor was productive to the service.

56. Thus, the Annual Confidential Report of the respondent are ambivalent and not conclusive and indicates that some of the senior officers of the respondent had personal dislike towards the respondent and therefore denied promotion which was legitimately due to the respondent. In armed force service as also in any other public service there is not scope for the superiors to act with bias. Personal likes and dislikes of the superiors cannot dictate the careers of the subordinate officers.

57. It is not clear on what basis the respondent was promoted as Deputy Commandant (Tech) with effect only from 27.12.1996 and not from December 1995 as promotion to the rank of Deputy Commandant was subject to seniority and fitness alone. It was not based on any other criteria. Therefore, Annual Confidential Report for the aforesaid period although prepared by the appellants were irrelevant.

58. The expression "basis of seniority and subject to fitness" in Rule (2) of the unamended Rule as also in the amended Rules did not refer to fitness as per Annual Confidential Report although such reports were being maintained by the appellants.

59. The promotion was subject to the seniority and fitness simplicitor. Therefore, there was no question of any reference to Annual Confidential Report for promoting the respondent under the provisions of the Coast Guard (Seniority and Promotion) Rules, 1987.

60. In our view, the appellants ought to have promoted the respondent as Deputy Commandant (Tech) along with his batchmates with effect from 06.12.1995 as the issue stands not only concluded in terms of the decision of this Court's order dated 05.03.2008 in W.P.No.36674 of 2003 but also in the light of our observation that the Annual Confidential Report was not to be relied to deny the promotion to the respondent and in view of the express language in Rule 7(2) of the Coast Guard (Seniority and Promotion) Rules, 1987.

61. We therefore conclude that the respondent was to be notionally promoted as a Deputy Commandant in August, 1995 along with his batchmates. We therefore do not find any error in the impugned order of the learned Single Judge in allowing the relief to the respondent by directing the appellants to promote respondent to the rank of the Deputy Commandant with effect from 06.12.1995 along with his batchmates with consequential relief. Accordingly, to that extent, the impugned order of the learned Single Judge is upheld.

62. Having partly answered the issue, we shall therefore now proceed to examine the correctness of the impugned order of the learned Single Judge as far as grant of the 2nd part of the relief, i.e, whether the respondent was entitled to be promoted to the rank of Commandant (Selection Grade) from August, 2002 along with his batchmates. We have difficulty in upholding that portion of the order which seeks to allow the relief to the respondent.

63. In August 2002, Rule 7(1) to (4) had not been fully amended. It still read as in Column N.1 to the above Table along with Sub Rule 5 as in the last row to the above Table. Sub Rule (5) had been inserted w.e.f. 03.04.2002. It however could not have been fully implemented for another two year till the amendment on 17.09.2004 vide SRO 133 dated 17.09.2004.

64. Even as of August, 2002 the unamended Coast Guard (Seniority and Promotion) Rules, 1987 was in force with a partial modification vide SRO 86 dated 03.04.2002.

65. If the respondent was promoted along with his batchmates as Deputy Commandant in the year 1995, he would have been eligible for the next promotion to the rank of the Commandant in the Year 1997 itself. However, such promotion was to be on the "basis of merit with due regard to seniority" under Rule 7(3) of the unamended Rules.

66. The respondent has also not prayed for being promoted to the rank of Commandant from 1997. In his writ petition, the respondent had prayed for being promoted to the rank of Commandant only from August 2002 along with his batchmates.

67. In 2002, promotion to the rank of Commandant was from the rank of Deputy Commandant. It was to be on the "basis of merit with due regard to seniority". Thus, it required assessment. Unamended Rule 7(4) also contemplated reliance on Annual Confidential Report (ACR) for such promotion. It was required for assessing merits of an officer for considering promotion to the higher post. There was no Annual Confidential Report (ACR) the respondent as a Deputy Commander in 2002.

68. Promotion to the rank of Commandant (Junior Grade) could not have considered at that time as Rule 7(1) to (4) of the unamended Rule were still in force. As mentioned elsewhere above, only vide amended Rule 7(1) to (4) of the said Rules was amended vide SRO 133 dated 17.09.2004 and an intermediate rank of Commandant (Junior Grade) was grafted into Rules.

69. Since the respondent was not promoted in time and continued to serve as Assistant Commandant and was embroiled in several litigations with the appellants, there was no material to assess his merit in terms of unamended Rule 7(3) of the Rules for promoting him as Commandant in 2002.

70. Under the amended Rules, a candidate joining the services of Coast Guard as an Assistant Commandant was eligible to be promoted to the rank of a Deputy Commandant on completion of 6 years service.

71. A Deputy Commandant could be promoted to the rank of a Commandant (Junior Grade) on completion of 11 years of service of Coast Guard after serving a minimum period of 2 years as a Deputy Commandant.

72. A Commandant (Junior Grade) could be promoted to the rank of a Commandant on completion of 15 years of service in the Coast Guard after serving a minimum period of 2 years as a Commandant (Junior Grade). However, under the Rules different criteria has been fixed for promotion to these ranks/posts.

73. The Annual Confidential Report was not required to be referred either for promoting the respondent to the rank of a Deputy Commandant in 1995 under the unamended or to the rank of a Commandant (Junior Grade) under the amended Rules.

74. Under Rule 7(2) of the amended Rules with effect from 17.09.2004, the promotion of officers to the ranks of Deputy Commandant and Commandant (Junior Grade) were to be made on the basis of their:-

- (i) Seniority;
- (ii) Subject to fitness; and
- (iii) Possession of requisite qualifications contained in the relevant Annexure to the rules.

75. Under Rules 7(2) of the amended Rule, promotion to the rank of Deputy Commandant as also to the rank of a Commandant (Junior Grade) was on the "basis of seniority" subject to fitness and possession of requisite qualifications prescribed in the Rules. It did not require any assessment based on the Annual Confidential Report (ACR) of an officer serving in the rank of a Deputy Commandant.

76. Thus, promotions to the rank of both a Deputy Commandant and that of a Commandant (Junior Grade) were to be on the basis of seniority subject to fitness and possession of requisite qualification contained in the relevant Annexure to the Rules alone.

77. From a perusal of the records, it appears that promotions were conferred to officers serving in the rank of Deputy Commandant to the rank of a Commandant (Junior Grade) based on MF-OF/0206 dated 09.09.2002 even prior to amendment to the Rules on 17.09.2004 vide SRO 133, dated 17.09.2004.

78. Though, this was contrary to the Rules as it stood then till 17.09.2004, the decision was taken by the highest authority under the echelon of the Coast Guard Service in the Ministry of Defence. The respondent cannot be discriminated.

79. In our view, delayed and belated promotion of the respondent to the rank of a Commandant (Junior Grade) with effect from 11.01.2013 was neither in terms of amended Rule 7 vide SRO 133 dated 17.09.2004 nor in terms of MF-OF/0206 dated 09.09.2002.

80. Therefore, the submission of the learned counsel for the appellants that the rank of a Commandant (Junior Grade) was introduced between the rank of a Deputy Commandant and the rank of a Commandant w.e.f. 18.09.2002 and promulgated later vide SRO 130 dated 11.08.2004 into the Coast Guard (General) Rules, 1986 and SRO 133 dated 17.09.2004 and therefore promotion cannot be given to the respondent earlier lack merits particularly if respondent's batchmates and juniors were promoted earlier as per MF-OF/0206 dated 09.09.2002.

81. Therefore, the respondent also deserved to be promoted as a Commandant (Junior Grade) as per MF-OF/0206 dated 09.09.2002 with his batchmates. If MF-OF/0206 dated 09.09.2002 was not implemented earlier, the respondent atleast deserved to be promoted as per the amended Rules with effect from 17.09.2004 as a Commandant (Junior Grade).

82. Under these circumstances, we are of the view that the respondent who was dismissed from service on 29.10.2003 and reinstated on 22.04.2009 ought to have been promoted to the post of Commandant (Junior Grade) notionally as per MF-OF/0206 dated 09.09.2002 if it was implemented without any discrimination. If MF-OF/0206 dated 09.09.2002 was not implemented earlier, the respondent ought to have been promoted by the appellants as per amendment to Coast Guard (Seniority and Promotion) Rule 1987 as amended vide SRO 133 dated 17.09.2004.

83. Only promotion to the rank of Commandant and above was to be made on relative merit based selection within the eligible batch of officers of his cadre to which such officer belongs and subject to possession of requisite qualifications contained in the relevant Annexure to the Rules as per Rule 7(3) of the amended Rule as in Column II to the above Table.

84. As per the Hon'ble Supreme Court in K.Samantaray Vs. National Insurance Company Limited, (2004) 9 SCC 286, nobody has a right to be promoted. They only have a right to be considered for promotion. Therefore, though the appellants have wrongly denied promotion to the rank of a Commandant respondent earlier, it cannot be helped under the circumstances.

85. As per Rule 7(4) of the amended Rules, promotion to the rank of a Commandant and above shall be on acting basis. The promotions were to be confirmed from the date of promotion on rendering satisfactory service for a period of one year in the higher rank. The service is assessed from the Annual Confidential Report of such officers.

86. Promotion to the rank of a Commandant is merit based selection within the eligible batch of officers of his cadre to which such officer belongs and subject to possession of requisite qualification contained in the relevant Annexure to the Rules. For such promotion to the rank of a Commandant, Annual Confidential Report was relevant as is evident from reading Sub Rule 4 to the Rule 7.

87. Thus, for being promoted to the higher of rank of a Commandant, respondent ought to have served a minimum 2 years as a Commandant (Junior Grade) coupled with a cumulative period of 15 years in Coast Guard Services.

88. Since the respondent had not served in the rank of a Commandant (Junior) for two years and did not have the required Annual Confidential Report (ACR) in the rank of a Commandant (Junior) for two years for being promoted to the rank of a Commandant earlier, he cannot be conferred promotion earlier.

89. Further, as per Sub-Rule (5) to Rule 7 of the amended Rules, all reports of the Coast Guard Officers of the rank of Commandant(JG) and Commandant are to undergo a "Performance Appraisal Review" at CG HQ by a Performance Appraisal Review Board (PARB) with a view to analyse instance of wide deviations from their previous overall carrier profile.

90. The Reporting and Reviewing Officers were required to support very high or very low grading in the remarks column. At Coast Guard Headquarters, the numerical grades were to be suitably moderated on the recommendation of PARB with the approval of the Director - General Coast Guard so as to bring the same in tune with officers demonstrated past performance.

91. Dealing with a similar situation the Hon'ble Supreme Court in Lt.Col. K.D.Gupta Vs. Union of India and Others, 1989 Supp (1) 416 in paragraph No.8 held as follows:-

8. The respondents have maintained that the petitioner has not served in the appropriate grades for the requisite period and has not possessed the necessary experience and training and consequential assessment of ability which are a precondition for promotion. The defence services have their own peculiarities and special requirements. The considerations which apply to other government servants in the matter of promotion cannot as a matter of course be applied to defence personnel of the petitioner's category and rank. Requisite experience, consequent exposure and appropriate review are

indispensable for according promotion and the petitioner, therefore, cannot be given promotions as claimed by him on the basis that his batchmates have earned such promotions. Individual capacity and special qualities on the basis of assessment have to be found but in the case of the petitioner these are not available. We find force in the stand of the respondents and do not accept the petitioner's contention that he can be granted promotion to the higher ranks as claimed by him by adopting the promotions obtained by his batchmates as the measure.

92. This view was followed by the Hon'ble Supreme Court in Union of India and Others Vs. Colonel Ran Singh Dudee, (2018) 8 SCC 53. The Hon'ble Supreme Court in paragraph No.30 further observed as under:-

30. It may be that the respondent was wrongly proceeded against and punished by the General Court Martial. He was also awarded sentence of imprisonment and lost out nine years of service. The prejudice is quite apparent. However, sympathy cannot outweigh the considerations on merit. He has received time-scale promotion to the rank of Colonel after having put in 26 years of regular service. But if he was not found suitable for empanelment by way of selection, the matter must end there.

93. As per the decision of the Hon'ble Supreme Court in Abhijit Ghosh Dastidar Vs. Union of India and others, 2009 (16) SCC 146, non communication of Annual Confidential Report (ACR) in armed force service is not fatal when promotions are denied based on the same. Therefore, mere non communication of the Annual Confidential Report (ACR) would not entitle the respondent an automatic promotion to the rank of a Commandant as was prayed and allowed vide impugned order.

94. That apart, Coast Guard Service is an armed force service within the meaning of the Coast Guard Service Act, 1978. Therefore, promotion to the post of a commandant earlier cannot be countenanced in absence of Annual Confidential Report (ACR) . Further, when law requires a particular thing to be done in a particular manner, it should be done in that manner.

95. We are therefore of the view that non communication of Annual Confidential Report was not fatal for not granting promotion to the rank of the Commandant to the respondent in the light of the above judgment.

96. Therefore, the respondent cannot be given promotion in the rank of a Commandant either from year August 2002 as was prayed, or from September, 2004 or 2006 since the was reinstated only on 22.04.2009 as there was neither a Annual Confidential Report (ACR) for the respondent as a Commandant (Junior Grade) nor was there any exposure of the respondent in the Coast Guard Service as a Commandant (Junior Grade). To confer promotion earlier would be contrary to Rule 7(3) to (5) of the Coast Guard (Seniority and Promotion) Rules, 1987.

97. In our view, the respondent could neither be promoted as a Commandant under the old rules within 2 years, i.e, neither from 1995 of his notional promotion to the rank of Deputy Commandant in 1997 nor from August, 2002 as was prayed by him and allowed in the impugned order.

98. The respondent was promoted only on 17.04.2018 as a Commandant at the fag end of his career based on a favourable Annual Confidential Report (ACR) on 24.02.2017. Therefore, to mitigate the harshness, we are of the view that the respondent may be notionally promoted from the said date as a Commandant. This we say so, because the respondent was denied promotion earlier for no fault of his.

99. Since the respondent has also retired from the service of Coast Guard on 31.08.2018, we are of the view, no prejudice will be caused to the appellants and other serving officers of the Coast Guards if the respondent is given all attendant monetary benefits and privileges as a Commandant from 24.02.2017 as he was unnecessarily subjected to humiliation and denied dignity while in service.

100. In the light of the above reasoning, we are of the view that the impugned order of the learned Single Judge promoting the respondent to the post of Commandant from August 2002 cannot be upheld. We therefore dispose this Writ Appeal filed by the appellants with the following observations:-

- i. The respondent shall be treated to have been notionally promoted to the rank of a Deputy Commandant along with his batchmates in December 1995 in terms of Rule 7(2) of the Coast Guard (Seniority and Promotion) Rules, 1987 as it stood in 1995.
- ii. The respondent shall be treated to have been notionally promoted to the rank of the Commandant (Junior Grade) along with his batchmates in terms MF-OF/0206 dated 09.09.2002 or with effect from 17.09.2004 with the amendment to the Rules vide

SRO.133 dated 17.09.2004, whichever was implemented earlier without discrimination.

- iii. The promotion of the respondent as Commandant shall date back to 24.02.2017, being the date on which the respondent was found fit to be promoted from the rank of a Commandant (Junior Grade) to the rank of a Commandant.
- iv. The appellants shall make necessary changes in the Service register and pension records of the respondent and pay the arrears of all monetary benefits to the respondent from the respective dates of the notional promotions together with interest at 7.5% per annum, within a period of eight weeks from the date receipt of a copy of this Judgment.

101. No cost. Consequently, connected Miscellaneous Petition is closed.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

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To.

- 1.The Secretary to Government,
Government of India,
Ministry of Defence,
New Delhi.
 - 2.The Director General of Coast Guard,
Coast Guard Headquarters,
National Stadium Complex,
New Delhi.
 - 3.The Commanding Officer,
Coast Guard Station,
Fort St.George,
Chennai - 9.
- +1 CC to M/s. Sunitakumari, Advocate sr 41806.

W.A.No.3970 of 2019 and
C.M.P.No.24872 of 2019

LN(CO)
SP(25/01/2021)