



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

%

Reserved on: 23rd-March, 2023

Pronounced on: 18th July, 2023

+

W.P.(C) 2673/2016

MANUDEV DAHIYA

..... Petitioner

Through: Mr. Ankur Chhibber, Mr. H.S. Tiwari, Mr. Anshuman Mehrotra, Mr. Nikunj Arora, Mr. Arjun Panwar & Ms. Samridhi Bhatt, Advocates.

versus

UNION OF INDIA THROUGH DG ITBP

..... Respondent

Through: Mr. Anil Soni, CGSC for UOI.

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J

1. The petitioner has filed the present petition under Article 226 of the Constitution of India seeking to issue a writ of certiorari for quashing the Annual Performance Assessment Report (*hereinafter referred to as "APAR"*) for the period between 19.06.2014 to 08.11.2014 and also to quash the Orders dated 08.08.2015 and 10.12.2015 and conduct a review DPC for promotion of the petitioner to the rank of Dy. Commandant with all consequential benefits.

2. The petitioner was appointed as an Assistant Commandant/GD on



16.04.2009 with the Indo-Tibetan Border Police (*hereinafter referred to as "ITBP"*). He was posted with 35th Battalion of the ITBP at Almora from where he was transferred and posted with 39th Battalion ITBP at Greater Noida, in the month of June, 2014. During the period of posting with 39th Battalion ITBP, the petitioner diligently participated in all the activities with keenness, rendered outstanding performance and successfully performed the duties of Adjutant, Company Commander and Assistant Commandant (Intelligence/Ops) which is a Unit responsible for security of the Rashtrapati Bhavan.

3. In November, 2014, after considering the course profile, skill and ability of the petitioner, the respondent posted the petitioner with the ITBP Academy as a panelled Instructor. During that period as well, the petitioner was given "*Very Good*" grading in the APAR for the remaining period, starting from November, 2014 to 31.03.2015. The petitioner was also given Appreciation Letter by the Office of Inspector General/Director Academy which itself is demonstrative of the outstanding performance of the petitioner.

4. It is asserted that the while writing the impugned APAR, the Appraisal Officer failed to reflect the conduct, character and capability of the petitioner thereby, damaging his entire future career prospect in the Organization.

5. The petitioner has stated that despite having an outstanding career graph, when the petitioner was stationed under the command of the Commandant Mr. Rajesh Kumar Tomar at 39th Battalion during the period w.e.f. 19.06.2014 to 08.11.2014, the petitioner's entire professional enterprise and initiative was marginalised and his career profile/record



was downgraded without any cause whatsoever. As per the APAR of the period 19.06.2014 to 08.11.2014, the overall numerical/numeral grading of the petitioner was given as “0” (zero), despite having earned the appreciations of the appraisal officers.

6. The petitioner has further contended that the comments of the Reviewing Officer are completely erroneous as the incidents relied upon, are not even part of the relevant period and have been made totally out of context and outside his purview.

7. Further, the Countersigning/Accepting Authority made the endorsement affirming the comments in a mechanical manner without independently confirming the factum of the observations made by the Reporting Officer and the Reviewing Officer which itself speaks of non-application of mind by completely overlooking the past track record and in total disregard to the competence of the petitioner while appraising the petitioner. The Accepting Authority has endorsed the views of the first Appraising Officer/ Reviewing Officer which is totally contrary to official Rules/records.

8. The petitioner being aggrieved, made a detailed ***Representation dated 08.08.2015*** before the Competent Authority i.e., Office of the Inspector General, Central FTR, wherein not only did he challenge the basis of findings and the imputations but also highlighted the *mala fide* and bias being committed by the Appraising/Reporting Officer Commandant, Mr. Tomar.

9. The petitioner had also claimed that the respondent had failed to comply and adhere to the stipulations mentioned in the Memorandum No.I-17015/12/Insts/APAR Cell/2010/-1007 dated 01.12.2014 and other



similar instructions issued by the Ministry of Home Affairs from time to time regarding preparation and maintenance of APAR of officers. Further, the observations are in total contravention of the Guidelines of the Government of India P & T Manual, Volume-III. Moreover, the respondent also violated the Guidelines laid down under D.P. & A.R. O.M. No. 51/3/74 dated 22.06.1975.

10. The Office of Directorate General of the respondent disposed of the Representation *Vide* Order dated 06.10.2015 in a routine, mechanical manner with the observation “*there is no merit in the representation and hence dismissed*”, without assigning any reason thereof.

11. The petitioner filed ***Review Petition dated 15.11.2015*** before the Office of Inspector General (HQs). However, the Review Petition was also dismissed by the respondent in total violation of the principles of natural justice. The Reviewing officer, DIG SC Mamgain added his own remark in the reviewing column stating that “*He took less interest in battalion activities and remained unsuccessful in clearing the screening tests*”, which is completely false as the screening test was conducted in March-April 2015 and the Petitioner was not posted under his command during that time. The occurrence of March-April, 2015 cannot be mentioned in the APAR of June-November 2014.

12. The petitioner has further claimed that the impugned Assessment for the period June, 2014 till November, 2014, by asserting that the Reporting Officer had failed to assign any reason as to why and how the petitioner was granted “0” (zero), when his overall performance is “outstanding”. In fact, the subsequent APAR issued immediately after the petitioner was transferred to ITBP Academy for the period starting from



end of November, 2014 till 31.05.2015, has given totally different picture as the rating jumped to “Very Good”, which itself speaks of *mala fide* and bias on the part of the Reviewing/Assessing Officer for the period when the petitioner was posted to 39th Battalion.

13. It is submitted that the Commandant Sh. Rajesh Kumar Tomar was competent to write the APAR of the petitioner for 3 months and 2 days only as he was either on leave or deputed for other work during the impugned period, whereas he has written it for 4 months and 24 days which is the period between 19.06.2014 to 08.11.2014 for the following reasons:

“a. Petitioner was relieved from the 35th Battalion on 19.06.2014 and was taken on strength on 39th Battalion after the journey period of 12 days. He was nominated for tactics of 44 Course at CVP NPA Hyderabad w.e.f 30.06.2014 to 11.07.2014 and he reported in advance on 28.06.2014 and reported back on 30.06.2014. Hence, the petitioner was not under the direct supervision of the commandant Rajesh Tomar.

b. Petitioner reported to 22nd Battalion ITBP Tigree, Delhi for Police Commemoration Day on 08.10.2014 and remained there till 21.10.2014.

c. Petitioner availed 5 days special Earned Leave between 28.10.2014 to 01.11.2014 for participating in the Police Commemoration Day Parade 2014.”

14. The petitioner has further submitted that Mr. Rajesh Tomar kept the three-month APAR of the Petitioner pending with him for more than 6 months and submitted it just before the cut-off date. During this period the Petitioner represented against no Award for Police Commemoration Day and asked for an interview with DG ITBP for Mr. Tomar’s wrong doings.



He had also filed a written complaint against Mr. Tomar to DG ITBP on **22.04.2015** in which he mentioned some corruption charges and requested for an enquiry against him. Consequently, this had annoyed the Officer who became prejudiced and inimical towards the Petitioner and Mr. Tomar thus, fabricated the documents to paint an adverse report against the Petitioner by preparing some Show Cause Memos which were never received or shown to the petitioner.

15. The petitioner has claimed that the eligibility for the next promotion to Deputy Commandant is six years of service as an Assistant Commandant. The petitioner became eligible for next promotion on 01.01.2015 as per the old Recruitment Rules on the basis of his APAR for the period between 2009 to 2017. The Promotion List was published on 27.08.2017 and his immediate junior and immediate senior had been promoted but he had been denied promotion only on the ground of Mid-term APAR with adverse remarks.

16. The petitioner has thus challenged the impugned APAR for the period of six months from June, 2014 till November, 2014 as being arbitrary, illogical, capricious and lacking complete application of mind thereby leading to gross violation of right to equality and principle of natural justice, and has sought that the impugned APAR be set aside with consequential benefits.

17. **The respondent in its Counter-affidavit** has explained that the petitioner has not disclosed that he was served with four memos, namely, Memo No. 582-83 dated 29.09.2014, Memo No. 528 dated 27.08.2014, Memo No.534 dated 29.08.2014 and Memo No.533 dated 28.08.2014 by the Commandant, 39th Battalion during the period from 19.06.2014 to



08.11.2014.

18. The petitioner was awarded overall numerical grading 3.69 points (which scores to zero) for the impugned period and remarks given in the pen-picture/handwriting of the Reporting Officer reads as under:

“He worked as Coy Comdr ‘B’ Coy. He is tall with good health. He needs to be motivated to work positively. Sometime, he fabricated the facts and misguide the seniors. His attitude towards weaker section is good.”

19. The APAR was reviewed by the DIG, SHQ (Delhi) who also awarded the overall numerical grading 3.69 points to the petitioner. The APAR was accepted by the IG, Central Frontier, ITBP who fully agreed with the remarks of the Reporting/Reviewing authorities and awarded overall numerical grading “Zero” to the petitioner.

20. The respondents have asserted that in terms of the instructions of DoP&T *vide* its O.M. dated 14.05.2009, the petitioner was duly given an opportunity to make representation against the entries and final grading within fifteen days from the receipt of letter, *vide* Central Frontier ITBP Police Memo No. ITBP/CF/GOs/APAR/2014-15-318 dated 15.07.2015. The petitioner made the Representation dated 08.08.2015 against the adverse remarks and “zero” grading. However, after taking into consideration all the relevant facts and evidence on record, the Competent Authority rejected the Representation as being devoid of merit. The decision thereof was conveyed to the petitioner *vide* Letter dated 06.10.2015.

21. The first Appeal dated 15.11.2015 filed before the IG (HQs) was rejected by the Competent Authority in terms of DoP&T Guidelines dated 02.09.2014, and the decision thereof was conveyed to the petitioner *vide*



Letter dated 10.12.2015.

22. It is admitted that the petitioner was given Appreciation Letter dated 03.06.2014 for his contribution made during the Field Committee Meeting at HQs Northern Frontier, Seemadwar, Dehradun in connection with the recommendations for 7th Pay Commission but it is claimed that it did not fall in the period of APAR under review.

23. It is asserted that the APAR of the petitioner for the period 19.06.2014 to 08.11.2014 was initiated by the Reporting Officer, Commandant, 39th Battalion, ITBP, reviewed by DIG, SHQ (Delhi) and accepted/countersigned by the IG, Central Frontier, ITBP. While offering comments on the APAR, the Reporting Officer clarified that the remarks and overall numerical grading given was purely based on his work output, personal attributes and functional competency, and the said comments of the Reporting Officer were confirmed by the Reviewing Authority.

24. The clarification given by the DoP&T conveyed by the Ministry of Home Affairs *vide* U.O. No. I-45020/7/2014-Pers-II dated 02.09.2014 states that where the first Appeal has been rejected by the Competent Authority, there is no provision for a '*second representation*' against adverse remarks/below benchmark grading in an APAR. Hence, the petitioner was not given the opportunity to make the second representation.

25. The respondents have thus, submitted that the petitioner is guilty of concealment of facts as he has not filed the Memos issued to him during the period 19.06.2014 to 08.11.2014. The respondent has maintained transparency whilst providing redressal to the petitioner and the allegations of *mala fides* levelled against the respondent, are unwarranted.



The present petition may thus, be dismissed with exemplary costs.

26. **The petitioner in his Rejoinder** has denied all the contentions of the counter-affidavit filed by the respondent and re-affirmed his contentions as made in the present petition.

27. **Submissions heard and Written submissions** filed on behalf of both the parties perused wherein the same submissions have been reiterated as made in the petition and the counter-affidavit, respectively.

28. The petitioner, while being posted for the period from 19.06.2014 to 08.11.2014 with the 39th Battalion ITBP at Greater Noida was given the overall numerical/numeral grading as “0” (zero) which has been challenged by way of the present Writ petition.

29. The object of writing the confidential report was explained by the Supreme Court in State Bank of India vs. Kashinath Kher (1996) 8 SCC 762 to be two-fold i.e., *first* to give an opportunity to the officer to remove deficiencies and to inculcate discipline. *Second*, it seeks to serve improvement of quality and excellence and efficiency of public service.

30. The significance and importance of writing an APAR for an officer whose promotion and career progression depends essentially on the APARs, has been emphasized in Shri Tarsem Kumar vs. Union of India and Others 2014 SSC OnLine Del 1899. The Division Bench of this Court observed that Promotion is the only incentive in a service career. In the absence of any promotion to a higher rank, not only the growth and development of the individual officer stops but equally the department or the institution gets affected. Stagnation of an employee, without there being any chance of promotion to further higher rank, could well deter the employee from taking any initiative to achieve higher targets, goals and



objectives for the ultimate development and growth of the department and office which his office serves. The Annual Confidential Report (ACR/APAR) is a vital mode of assessment of the performance of an officer in the previous year. It is through this document that the suitability of an officer's promotion and career advancement is adjudged.

31. In Shri Tarsem Kumar (supra), the Court further held that while writing an APAR, the guidelines and the instructions issued by the Competent Authority must be scrupulously adhered to as any casual or cavalier approach of the designated officer can jeopardise the service career of the 'assessed officer'. The Reviewing Officer, while writing the APAR, must reflect that the objective of the assessment exercise is to develop an officer so that he or she can realise his or her potential. It is not meant to be a battle but a development process, a cumulative effort that ensures optimal outcomes. The endeavour of each appraisal must be to present the truest picture of the appraisee apropos his/her performance, conduct, behaviour and potential.

32. In State of UP vs. Yamuna Shanker Mishra (1997) 4 SCC 7, the Supreme Court re-emphasized that the officer entrusted with the duty to write confidential report, has a public responsibility to write the confidential report on the basis of material available.

33. While the importance of writing APAR for the serving Officer is extremely important for the career progression yet, as a general principle which needs no reiteration, it is only the Administrative Authority which has the expertise to determine whether a candidate is fit or not for a particular post and the court has no expertise. Assessment of performance and recording of APAR/ACR of an employee is the job of the



Administrative Authority of the particular employee and once the ACR is recorded by the superior Authority in accordance with the procedure, a court of law is not required ordinarily to sit over like an appellate authority. The Apex Court in Swapan Kumar Pal vs. Achintya Kumar Nayak (2008) 1 SCC 379 observed that the power of judicial review of the decision of Administrative Tribunal is very limited. While exercising the power of judicial review, the courts must limit their role and interfere only if any legal error has been committed in the decision-making process. It cannot enter into the merits of the decision. Furthermore, while exercising the power of judicial review, the courts should not sit as an appellate authority and must remain confined to see whether the decision has been made in accordance with the settled principles of law.

34. Accordingly, in the light of the importance and significance of writing the APARs and the limited grounds on which the Courts may interfere as observed above, it would be pertinent to consider the averments of the petitioner.

35. The detailed instructions regarding preparation and maintenance of APAR have been given in the Office Memorandum bearing No.I-17015/12/2010/APAR Cell-1007 dated 01.12.2014 which provides the manner of filling up all the columns of APAR/CR form and the same shall be forwarded to Reviewing Officer and thereafter, the same shall be finally accepted by the Controlling Officer. The Instructions make it crystal clear that the assessment must be made with objectivity which should get reflected in the Assessment. Clause 21 of the Office Memorandum dated 01.12.2014 provides as under:

“XXI. The Reporting and Reviewing Officer are not



reflecting displeasure/warning given to officer during initiation and reviewing of the APAR of officers. Emphasis should be on making an objective assessment of an individual reflected through his/her APAR.”

36. The first ground of challenge to the APAR raised by the petitioner is that of bias and dislike against the Reporting Officer, namely, Mr. Rajesh Tomar. The petitioner has explained that after his posting under Mr. Rajesh Tomar, he gave a Written Complaint dated 22.04.2015 wherein he mentioned about some corruption charges against Mr. Rajesh Tomar and requested for an inquiry against him. He also expressed an apprehension that Mr. Rajesh Tomar may not fill his APAR or may spoil the same and requested to be relieved from his command. The petitioner also made a Representation on non-receipt of Award for Police Commemorative Day. His apprehension turned out to be true when Mr. Rajesh Tomar submitted his APAR giving Zero in the APAR after seven months of his submitting resume/self-reappraisal to him on 07.11.2014.

37. The petitioner's challenge to the impugned APAR for the period of about five months from 19.06.2014 to 08.11.2014 can be best appreciated by referring to his APARs for the previous years and subsequent months which read as under:

Period	Remarks of Reporting Officer & Grade	Remarks of Reviewing Officer & Grade	Remarks of Countersigning/Accepting Authority & Grade	Final Grade
01.04.2013 to 31.03.2014	(Rishi Raj Singh, Commandant) Mr. Manudev is a committed and	(Amit Prasad, DIG) I agree with the (illegible word) given by the Reporting	(I.S. Negi, IG) The countersigning/Accepting Authority has agreed with the remarks of the	



	dedicated officer. He takes initiatives and can lead his company effectively in peace and hostilities. He is honest and is capable of making systematise change in the system. He can achieve effective results. Grade: 8.3	Officer. Grade: 9	Reporting/Reviewing Officer. Grade: 9	9
19.06.2014 to 08.11.2014	(Rajesh Tomar, Commandant) He worked as Coy Comdr. 'B' Coy. He is tall with good health. He needs to be motivated to work positively. Sometime he fabricates the facts and is misguide the seniors. His attitude towards weaker section is good. Grade: 3.69	(S.C. Mangain, DIG) He took his interest in Bn. activities. Physically also he could not qualify screening of NSG. His attitude towards weaker section is fair. Grade: 3.69=0	(P.K. Dhasmana, IG) The Countersigning/Accepting Authority has agreed with the remarks of the Reporting/Reviewing Officer. Grade: 0	0
09.11.2014 to 31.03.2015	(Anil Kumar Phool, Commandant) A young, energetic, polite, disciplined & hardworking officer. He performed the	(Davinder Singh, DIG) A young and energetic officer. He takes initiative in his work and training activities	(Harbhajan Singh, IG) The countersigning/Accepting Authority has agreed with the remarks of the Reporting/Reviewing Officer. "Grade (7)"	



	assigned duties with zeal & dedication. His attitude towards weaker section has been fair & just. Grade: 7.84	in Academy. Positive towards weaker section. Grade: 7.84=7		7
01.04.2015 to 31.03.2016	(Manish Kumar, Commandant) A young and promising officer. He is the high in approach and constructively adopts challenges. Very positive outlook. Articulate as instructor sincere in efforts. At times reaches to conclusion but that's due to young and positive views and eagerness to seek results. Open to improving and has done multitasking works with equal sincerity. Fair & Judicious. Grade: 8.97	(Davinder Singh, DIG) A young, sincere, fine and hardworking officer. He fits well with the team. He is energetic and takes interest in assigned work. Grade: 8.97	(I.S. Negi, IG) The Countersigning/Accepting Authority has agreed with the remarks of the Reporting/Reviewing Officer. Grade: 8.97	8.97

38. The perusal of the APARs of before and after the impugned period shows that they were all *Good/Very Good* except for the impugned period of about five and a half months wherein petitioner has been rated “Zero”.



39. The APAR for the impugned period from 19.06.2014 to 08.11.2014 shows that the said APAR was forwarded by the Reporting Officer, Mr. Rajesh Tomar, Commandant with 3.69 grading which was accepted by the Reviewing Officer, Mr. S.C. Mamgain and thereafter by the Countersigning/Accepting Authority, Mr. P.K. Dhasmana, Inspector General, Central Frontier, ITBP.

40. The petitioner was assigned various jobs from August, 2014 to October, 2014 such as planning and executing “*My Earth My Duty*” and of the *Raising Day Parade* in the Campus of 39th Battalion. He was also asked to participate in the prestigious National Function on the Police Commemoration Day Parade, 2014 at the National Police Memorial, Delhi. In addition to this, he was assigned the extremely prestigious and honorary assignment to hold the Martyr Memorial Book, which is considered. All the tasks executed by the petitioner were appreciated and the same were also published in the ITBP Samachar (Magazine of the ITBP). Moreover, the petitioner was also assigned the duty of being In-charge of Security and Traffic Management during Director General Parade and Raising Day Parade at the 39th Battalion on 22.10.2014 and 24.10.2014 respectively.

41. These adverse remarks thus need to be appreciated in the light of the previous illustrious career and meritorious awards of the petitioner which he had received from time to time, and also his outstanding gradings for the previous and the subsequent period, as not disputed by the respondents.

Service of Memos:

42. The Reporting Officer, Mr. Rajesh Tomar while making the adverse



remarks, gave no instances or no explanatory circumstances from where such inference had been drawn by him. The respondents however, have relied upon four Memos dated 27.08.2014, 28.04.2014, 29.08.2014 and 29.09.2014 that were found in the file of the petitioner, to justify the Adverse Remarks.

43. The Supreme Court in the case of State of U.P. v Yamuna Shanker Mishra (*supra*), explained that at times, the facts and circumstances may not be on record but the conduct, reputation and character acquire public knowledge or notoriety and may be within his knowledge, and the officer before forming an adverse opinion, the Reporting Officer should share and confront the concerned officer with the said and then make it part of the record. This gives an opportunity to the erring/corrupt officer to correct the errors of the judgment, conduct, behaviour, integrity or conduct/corrupt proclivity. If despite being given such an opportunity, the officer fails to perform his duties or improve himself, the same may be recorded in the confidential report and can be supplied to the concerned officer, so that he may have an opportunity to know the remarks made against him and also to give him an opportunity to make an appropriate representation to the higher authorities in case he feels aggrieved.

44. Thus, what is significant is that if any unacceptable conduct or behaviour which may not necessarily be documented, is observed by the Reporting officer, it should be communicated and opportunity given to the appraisee officer to explain before it being made a basis of adverse report. This is also in consonance with the principle of natural justice of being heard before being condemned.

45. There is nothing on record to show that these four Memos now



relied upon by the respondents, were ever served or brought to the knowledge of the petitioner or any explanation was sought from him or any warning was ever given and ever advised to improve his conduct during the aforesaid period of almost five months, by the Reporting Officer. This supports the petitioner's claim that he had no knowledge of the Memos till he received the copy of the APAR for the impugned period.

46. This stands further corroborated by the Additional Affidavit filed by the respondents wherein it is admitted that there is no entry in respect of service of those four Memos/Advisories in the Commandant's Dispatch Register, and only Mr. Rajesh Tomar can confirm whether the same were served on the petitioner. It is further stated that Mr. Rajesh Tomar, Commandant, 39th Battalion, ITBP has since been dismissed from Service pursuant to the sentence awarded by the General Force Court. The respondent Nos. 1 and 2 do not have knowledge about the service of the four Memos to the petitioner.

47. In the Government, it is not the individual officers who bear testament to the affairs of the Departments but it is the record which speaks. Mr. Tomar may have been terminated and he may have ceased to be a part of the Respondents, but his official acts necessarily have to be supported by record.

48. As observed in the case of Shri Tarsem Kumar (supra) writing of Appraisal Reports is a serious business on which the career progression of a person depends. In Sukhdeo vs. Commissioner, Amaravati Division (1996) 5 SCC 103, the Supreme Court, while making a reference to Kashinath Kher (supra), observed that it would be salutary for the



Controlling Officer to give prior sufficient opportunity in writing by informing him of the deficiency noticed before writing adverse remarks against the assessee officer.

49. In Abhijit Ghosh Dastidar vs. Union of India (2009) 16 SCC 146, the Supreme Court observed that un-communicated entry in ACR should not be taken into consideration while denying the promotion.

50. The Division Bench of this Court in Commandant Ranjeet Singh Rana vs. Union of India and Others 2019 SCC OnLine Del 7528, held that any adverse remark or any Memorandum cannot be made a basis of writing an APAR when it has neither been communicated, nor any explanation is sought from the concerned officer.

51. The Record of the respondents speaks for itself that these Memos prepared by Mr. Rajesh Tomar, were never served or brought to the knowledge of the petitioner giving him an opportunity to explain or improve his conduct. This corroborates the stand of the Petitioner that the Reporting Officer Mr. Rajesh Tomar, was inimical towards him and had intentionally prepared those Memos subsequently while writing the APAR after seven months of submission of self appraisal Form by the petitioner, merely to support and justify the adverse remarks. The lackadaisical explanation that there are no record of service of Memos leads to the inevitable conclusion that the Record was clandestinely prepared by Mr. Tomar with an ill motive and an element of Bias on account of the complaint of corruption made by the petitioner against him.

52. This practice of subsequent justifications for APAR has to be deprecated in no uncertain words. In this context, the Apex Court in the decision of Gordhandas Bhanji A.I.T. 1952 S.C. observed that the Public



Orders made by Statutory Authority cannot be construed in the light of the explanations which may be subsequently sought to be given about what was intended and what was in mind, or what was intended and the conduct those who make such orders must be construed objectively with reference to the language used in the order itself.

53. We find that these Memos could not have been considered while writing the APAR for the impugned period since they were never served upon the petitioner.

Grounds taken in the Memos for down grading:

54. The respondents have not been able to show that the Memos were ever served upon the petitioner but additionally we may also consider the justifications for down grading the APAR is reflected in the four Memos. To get better insight of these reasons, the contents of the four Memos may be appreciated.

55. The ***First Memorandum dated 27.08.2014*** reads as under:-

“
Memorandum

It has been come into notice of undersigned authority that in the leave register of your coy 'B' 30 days E/L have placed of Regtl No. 870021422 ASI/GD Radheshyam Yadav. It has been observed here that there should be separate column & page to show E/L & C/L but both kind of leave is being placed at a place, which is not a fair exercise to maintain record of leave.

2. It seems in perspective of your above cited actions, that there is no interest to perform liabilities towards your coy & duty also.

3. Henceforth, it is being warned to you that such kind of negligency towards work/liability not to be repeated in future & perform all the assigned tasks properly & encourage to your under hand to do the same.



Sd/- 28.08.14
Commandant
39th Bn, ITBP

To,
Regtl No. 111111138 Sh. Manudev Dahiya,
AC/GD, (B) Coy Commander”

56. The only grievance in this Memorandum is that in the Leave register, separate columns were not maintained indicating Earned Leaves and Casual Leaves. This act was asserted to be negligent and reflective of petitioner having no interest to perform his liabilities towards his coy and duty also. Merely because of said two columns had not been made separately in the Leave register cannot by any interpretation, be said to be an act of negligence or dereliction of duty. We find that the petitioner himself had sought an amendment of the leave sanctioning procedure but had been specifically turned down by the Reporting Officer, Mr. Rajesh Tomar.

57. This act of the petitioner does not point towards and deficiency in his competence.

58. The **second Memorandum dated 28.08.2014** reads as under: -

“

Memorandum

As a meeting of all officers being held on dtd 28-08-2014 in the chamber of undersigned authority. It was told by you in meeting that ceiling fan in your office is out of order, but later on, after dispersal of meeting, it was observed in running condition by undersigned authority along with Sec-In-Command, Quarter Master.

2. In this case, it seems that either you are not checking things properly or you are placing false factor to senior officers. Being a member of well-disciplined force, it is



neither desirable nor admissible.

3. *Hence you are hereby warned that in future, put up always true facts & figures & also cherish your character & behavior. Show your interest towards your coy also.*

*Sd/- 28.08.14
Commandant
39th Bn, ITBP*

*To,
Regtl No. 111111138 Sh. Manudev Dahiya,
AC/GD, (B) Coy Commander”*

59. From the plain reading of the Memorandum dated 28.08.2014, it is clear that while a Meeting was being held in the chamber of the Reporting Officer, Mr. Rajesh Tomar, Commandant, the petitioner had complained that the ceiling fan of his office was not functioning though it was found to be in running condition. Mr. Tomar concluded that the petitioner was putting false averments against his Officer which was not desirable of a member of disciplined force and was advised to cherish his character and behaviour.

60. The averments and the contents of this Memo again makes it evident that the alleged misconduct was misconstrued as an affront against Mr. Tomar. Because of the mistrust and animosity that was pervasive interse them, every act of the Petitioner was over exaggerated and displayed over sensitivity. By no stretch of interpretation can this alleged incident be construed as dereliction of duty by the petitioner.

61. The ***third Memorandum dated 29.08.2014*** reads as under:-

“
Memorandum
*As most of the personnel of your coy has been departed
for transfer to various units/formations, whose broken period
APAR of the yr 2014 to be sent to concerned*



units/formations, which is still pending.

2. *In this case, pse clarify how many personal kit-inventory of your coy has been submitted to Quarter Master Branch & remaining one also. As most of personnel have been transferred to Extreme Hard Area (EHA) so it takes lot of time to deliver kit-inventory in such areas & due to lack of kit inventory no person is able to get clothings.*

3. *Henceforth, pse let us aware to know that how many personnel of your coy has been transferred out & also clarify status of sent kit-inventory & fulfilled APAR. All these cited above should be placed till 1600 hrs on dtd. 30.08.14 to undersigned.*

Sd/- 28.09.14
Commandant
39th Bn, ITBP

To,
 Regtl No. 1111111138 Sh. Manudev Dahiya,
 AC/GD, (B) Coy Commander ”

62. This memo merely conveys to the respondent to clarify how many Personnel of the coy of petitioner have been transferred and status of Kit-inventory and fulfilled APAR. Only information was sought and there is no imputation of negligence or dereliction of duty.

63. The **fourth Memorandum dated 29.09.2014** reads as under: -

“

Memorandum

As per daily routine, interview on dtd. 26-09-14 at 0900 hrs. was being faced by force personnel those reported to unit after Leave/Course in front of undersigned authority. It was asked to you who permitted to avail 14 days C/L to those personnel. You informed that Steno intimated to sanction 60 days E/L & 14 days C/L. Later it was disclosed as false statement made by you.

2. *Moreover, a noting with DFA put up by you on Estt. file stating that in order to make easier & clear leave*



availing procedure of posted strength to be amended. It was informed by undersigned, that there is no need to change & follow as per past practice in which sanction power of 60 days E/L & 10 days C/L is being given to company Commanders. Later it was also intimated to you that you have wasted stationary & precious time of this office as engaged in preparation of baseless DFA & Noting.

3. As cited above, it seems, that you are liar & wrongful facts produced by you, which is neither desired nor admissible being as a disciplined force member.

4. Hence warning for the same is being given to you that in future, produce only realistic & true facts on behalf of superior officers. You are advised to improve your behavior & work.

*Sd/-
Commandant
39th Bn, ITBP*

*To,
Sh. Manudev Dahiya,
AC/GD, 39th Bn, ITBP
Copy to-*

1. To paste in personnel file of concerned officer.”

64. This memo in fact reflect the initiative taken by the petitioner in preparation of DFA & Noting and also to suggest changes in procedure for improvement of administration but was interpreted by Mr. Tomar, that the Reporting is wastage of stationary & precious time of the office. It is further written that petitioner is a liar *and advised to* produce only realistic & true facts on behalf of superior officers. He was advised to improve his behaviour & work. Again, the bias of Mr. Tomar against the petitioner is self manifested in this Memo as well.

65. In view of above, the above-mentioned four Memos do not corroborate that the petitioner lacked any motivation or that he was



fabricating facts and misguiding senior officers. Rather, from the said four Memos, three of these are dated 27.08.2014, 28.08.2014, 29.08.2014 i.e. were given consecutively within three days while the fourth Memorandum was issued on 29.09.2014 i.e., after a month. We are compelled to note that the manner of issuing the memos and their content clearly reflects that the Reporting Officer was purposely trying to find faults in the working of the petitioner.

66. Moreover, when the petitioner was having a “*very good/outstanding*” APAR for the previous and subsequent period, it leaves one perplexed as to what were the circumstances that led to grading as ‘0’ zero in the impugned APAR of five months. As already discussed above, the alleged instances neither reflected any dereliction of duty nor any insubordination towards the Reporting Officer, prompting to such down grading of APAR. The extraneous circumstances like the complaint by the petitioner against Mr. Tomar inducing a bias in recording the impugned APAR, is self evident.

67. In the case of Sukhdeo (supra) the Supreme Court observed that while making remarks, the officer must eschew from making vague remarks as it can jeopardise the service of the subordinate officer. He must bestow careful attention to collect all correct and truthful information and give necessary particulars when he seeks to make adverse remarks against the subordinate officer whose career prospect and service may be put in jeopardy.

68. The averments of bias and unfairness in recording the impugned APAR as have been alleged by the petitioner, is also corroborated by the observations made in the Memorandum dated 31.08.2015, produced by



the petitioner along with his written arguments. The Controlling Authority i.e., Inspector General, Central Frontier, ITBP had considered the Representation made by the petitioner in respect of his adverse remarks in APAR for the period 19.06.2014 to 08.11.2014. It was recorded in the Memorandum that the comments had been sought from the Reporting Officer and the Reviewing Officer. The Reporting Officer justified the remarks and produced the Memos, and the Reviewing Officer, Mr. S.C. Mamgian, Deputy Inspector General, Delhi also supported the comments of the Reporting Officer. However, the Inspector General noted that on going through Memos issued to the petitioner by the Reporting Officer seem to be not alarming, but a routine affair of check and balance and to ensure smooth conduct of the Unit activities by an administrative authority of the unit. It was further observed that the Reporting Officer who is expected to immediately send the APAR of the petitioner who proceeds on transfer, kept the APAR resume for almost six months for unknown reasons. The Reviewing Officer should have also immediately reviewed and submitted the APAR of the petitioner separately without waiting for APARs of other GOs for the year 2014-15.

69. It was further observed that the petitioner herein had submitted a Letter dated 08.04.2015 seeking personal interview explaining loopholes in SPG/NSG Pre-Screening Module Test with some suggestions. The petitioner also submitted another Application dated 22.04.2015 to Director General, ITBP. The conclusion was thus, drawn that these activities may have annoyed the Reporting Officer to record an adverse APAR and down-grading the performance of the petitioner/officer. After noting various distinctions and the appreciation letters which had been given to



the petitioner, it was observed that “*the Reporting Officer and the Reviewing Officer have not made an objective assessment of the petitioner/officer for such a short period of time of his stay in the unit*”. It was recommended that the request of the petitioner to upgrade his APAR may be accepted by the Competent Authority. This Memorandum dated 31.08.2015 issued by Mr. P.K. Dhasmana, Inspector General, Central Frontier, ITBP further reinforces that the Reporting Officer and the Reviewing Officer were biased against the petitioner while recording the Impugned APAR for the period from 19.06.2014 to 08.11.2014.

70. Similar facts as in the present case, were considered by the Apex Court in the case of M A Rajshekhar vs. State of Karnataka (1996) 10 SCC 369, and found that the integrity was not doubted and service work was also found satisfactory of the assessee officer. However, the remarks were made that he does not act dispassionately when faced with dilemma. It was observed that while making such remarks, specific instances from where such inferences drawn must be mentioned and conveyed so that the concerned Officer would have an opportunity to correct himself of the mistake. Where such an opportunity is not given and no instances are mentioned, it would be evident that such adverse remarks were not consistent with law.

71. Reference may also be made to the decision in Mohinder Singh Gill vs. The Chief Election Commissioner, New Delhi (1978) 1 SCC 405, wherein the Supreme Court observed 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.

72. In Sanjeev Dhundia vs. Union of India & Ors. W.P.(C) 3533/2020 decided on 21.12.2020 by the Division Bench of this Court, similar allegations of bias while recording the adverse remarks were taken. It was found that the APARs for the previous period were good and suddenly for one year i.e., 2018-19, the grading was dropped with no apparent reason which established the bias on the part of the Reporting Officer. It was further observed that when no written advisories were issued to the petitioner to perform his performance, it cannot be concluded that the petitioner continued with unsatisfactory performance despite caution and opportunity to improve to substantiate adverse remarks given to him.

73. In Sanjay Doval vs. Union of India 2019 SCC OnLine Del 11500, the Division Bench of this Court observed that the petitioner was found to be having unblemished track record for over 22 years with an adverse entry being limited only to the impugned period of eight months between 01.04.2011 and 27.12.2011. The future promotion was withheld only on account of adverse remarks for the short period of DPC. The adverse remarks were found to be unjustified in the given circumstances and it was held that the adverse remarks were not justified and were expunged and the Review DPC was directed to be constituted.

74. We, in the given factual scenario are compelled to observe that while the significance of APAR in the career progression can never be over emphasized, yet such whimsical conduct and that too, from those who are members of disciplined Force, is difficult to comprehend. The Members of the Force face extreme challenging situations in the face of



extreme adversity and their survival is only in there camaraderie and being together. Such hierarchical personal animosity as evident from this intermediate APAR of five months, is not only morale dampener for a competent Officer but is detrimental to the entire Force.

75. Similar facts as in hand came up for consideration in Insp./GD Krishna Rajak vs. Union of India &Ors. W.P.(C) 5288/2012 decided on 28.08.2012, wherein the Division Bench of this Court observed that since the competent authority has totally misapplied its mind being of the opinion that no useful purpose would be served to direct the competent authority to reconsider the ACR. It was, therefore, directed by the court that the Review DPC be held to exclude the expunged APAR to consider the suitability of the petitioner for promotion within four months and if the petitioner is found fit for promotion, he shall be promoted with all consequential benefits of seniority, pay fixation etc.

76. In Ramanand Prasad Singh vs. Union of India (1996) 4 SCC 64, again emphasized in the context of grading, that discretion lies essentially with the DPCs/Selection Committees and the court should not generally interfere. The Selection Committee may not necessarily be adopting the same grading as is given by the Reporting Officer/Reviewing Officer in respect of each candidate, but may sit on independent assessment on the basis of overall confidential dossiers of the officers in the zone of consideration. It thus does not evaluate the confidential report dossier of an individual in isolation.

77. Similar observations were made by the Apex Court in M.V. Thimmaiah vs. UPSC (2008) 2 SCC 119 and Union of India v. S.K. Goel (2007) 14 SCC 641.



Conclusion:

78. We thus conclude from the aforesaid discussion that the Commandant Mr. Tomar when faced with complaint dated 22.04.2015 making allegations of corruption against him, took out his irritation by writing an adverse APAR and also prepared Memos to justify his adverse remarks. The Memos which never were served or brought to the knowledge of the petitioner, have been relied upon by the respondents as a post facto justification for down grading the petitioner while writing the APAR. We therefore do not hesitate to hold that these four Memos had been created merely to justify the adverse report by the reporting Officer. We are compelled to observe that Mr. Rajesh Tomar, Commandant, 39th Battalion has acted with extreme bias and has not even stopped from preparing documents/memos with the sole objective to ruin the career of the petitioner who has been deprived of the promotion that he deserved. The superior Officers are expected to demonstrate leadership and should be a Guide and a mentor for the subordinate Officers. The conduct of Mr. Rajesh Tomar reeks of vindictiveness and malice towards the petitioner. However, we refrain ourselves from recommending any action against Mr. Rajesh Tomar considering that he has already been dismissed from the service. Before concluding, we hereby advise all the concerned that while taking action against any subordinate officer/personnel, it has to be borne in mind that no one is above law and if such orders are challenged before the Court, the Court certainly will not hesitate to take action against the erring officer.

79. A copy of this Judgment be circulated by the concerned Director



General of Police in all the CAPFs for information and advice.

80. Accordingly, we hereby allow the present petition, as the court finds no justification in the adverse remarks for the period between June 2014 and 08.11.2014 and direct that they be expunged. A direction is also issued to the respondents to conduct a review DPC to consider the case of the Petitioner for promotion to the rank of the Deputy Commandant and if so found fit to grant him the promotion from the date his immediate juniors were promoted, with all consequential benefits.

81. The present petition along with pending application (s), if any, is disposed of.

(NEENA BANSAL KRISHNA)
JUDGE

(SURESH KUMAR KAIT)
JUDGE

JULY 18, 2023
S.Sharma