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IN THE HIGH COURT OF DELHI AT NEW DELHI***Date of decision: 29.08.2024***

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W.P.(C) 8027/2019**ARUN KUMAR****.....Petitioner****Through: Mr.Ankur Chibber, Mr.Anshuman
Mehrotra & Mr.Nikunj Arora, Advs.****versus****UNION OF INDIA AND ORS.****.....Respondents****Through: Ms.Abha Malhotra & Ms.Amrita
Sony, Advs. with Mr.Hemendra Kumar, Dpt.
Commdt., BSF.****CORAM:****HON'BLE MS. JUSTICE REKHA PALLI****HON'BLE MS. JUSTICE SHALINDER KAUR****REKHA PALLI, J (ORAL)**

1. By way of the present petition under Article 226 of the Constitution of India, the petitioner, who is serving as a Deputy Commandant in the Border Security Force (BSF), has approached this Court seeking the following reliefs:-

“(i) Issue a writ of certiorari for quashing of order dated 05.10.2015 whereby the petitioner was issued Du-ector General's (DG's) displeasure and for quashing the Annual Performance Appraisal Report (APAR) for the period 01.04.2015 to 31.03.2016 to the extent that it has been recorded that the officer has been issued one DO displeasure and for quashing the order dated 10.01.2019 whereby the respondents rejected the representation of petitioner and for quashing order dated 08.03.2019 whereby the representation made by the petitioner dated 25.01.2019 was rejected; and



(ii) Issue a writ of mandamus directing the respondents to conduct a review DPC in respect of the petitioner to consider him for promotion to the rank of Deputy Commandant as on 06.08.2018 and to consider the petitioner for promotion without the DG's displeasure and if found fit promote the petitioner to the post of deputy commandant w.e.f the date the batchmates of the petitioner were promoted with all consequential benefits; and
(iii) Pass any such orders as the Hon'ble Court may deem fit in the light of above mentioned facts and circumstances of the case."

2. The brief factual matrix, as emerging from the record, may be noted at the outset.
3. The petitioner joined the BSF as an Assistant Commandant on 03.10.2011 and upon completion of his basic training at the Tekanpur Training Centre, he was posted to 22nd BN Dobri, Assam, from where, in 2012, his unit was moved to Rani Nagar, Jalpaiguri, West Bengal.
4. In September 2014, a lady constable named Ms.N.K. (name is not being disclosed to secure her identity) of the 22nd Bn filed a complaint against the petitioner accusing him of sexual harassment.
5. On 24.09.14, in order to examine the said complaint, an Internal Complaint Committee (ICC) was constituted which, after considering the matter at length, concluded that the complaint was not substantiated due to lack of sufficient evidence, therefore, recommended that the case be closed. Despite the decision to close the case of sexual harassment initiated on the complaint of Ms N.K, the respondents issued a show cause notice dated 19.08.2015, requiring the petitioner to explain as to why he was having long telephonic conversations with Ms.N.K at odd hours, especially on



05.08.2014. The petitioner submitted his reply on 08.09.2015, explaining therein that it was Ms. N.K who used to call and message him and despite his telling her that he was not interested in communicating with her, he was compelled to accept her calls as she used to threaten that she would commit suicide in case he did not speak to her. This explanation was not found satisfactory and consequently, the respondents, awarded DG's '*displeasure*' to the petitioner on 05.10.2015.

6. It is the petitioner's case that despite the DG's displeasure having been awarded to him, the petitioner's Initiating Officer, Reviewing Officer and Accepting Officer, while making a note of the DG's displeasure in the petitioner's Annual Performance Assessment Report (APAR) for the period between 01.04.2015 to 31.03.2016, graded him as 'very good'.

7. On 06.08.2018, a Departmental Promotion Committee (DPC) was convened to consider the petitioner's batch for promotion to the post of Deputy Commandant. While the petitioner's batchmates including his juniors were promoted to the said post on 24.10.2018, the DPC found the petitioner unfit for promotion due to the note regarding the DG's displeasure in his APAR for the period between 01.04.2015 to 31.03.2016. However, based on this very same APAR, he was assessed as fit for promotion to the post of Deputy Commandant in the very next DPC and was consequently, promoted to the said post with effect from 23.08.2019.

8. Being aggrieved by the decision of the DPC to declare him unfit for promotion on 06.08.2018, the petitioner submitted a representation dated 25.10.2018, which came to be rejected vide a non-speaking order dated 10.01.2019. The petitioner thereupon made a second representation dated 25.01.2019, which was also rejected vide order dated 08.03.2019, leading to



the filing of the present case.

9. Learned counsel for the petitioner submits that the show cause notice dated 19.08.2015 leading to the DG's displeasure was wholly unwarranted as the respondents had already sought an explanation from the petitioner in this regard, based on which explanation the complaint case was closed. He, therefore, contends that in the absence of any fresh evidence or complaint, the issuance of DG's displeasure was unjustified. Further, he submits that the DG's displeasure could even otherwise not be a ground to deny promotion to the petitioner when he had been graded as 'very good' in the APAR for the very same period and was consequently meeting the benchmark. In any event, the petitioner has been granted promotion in the very next year, i.e., 2019 based on the very same APAR containing the impugned DG's displeasure.

10. Learned counsel for the petitioner contends, that a '*displeasure*' is neither a major penalty under Section 48 nor a minor penalty under Section 53 of the Border Security Force Act, 1968 and is therefore not a prescribed punishment under the Act. By drawing our attention to the O.M dated 27.03.2015 issued by the Department of Personnel & Training (DoPT), he submits that it has been specifically clarified by the DoPT that a '*displeasure*' is not a penalty under Rule 11 of the CCS (CCA) Rules, 1965 and can therefore, not be considered as a ground for denial of promotion. In support of his plea that the DG's displeasure accorded to the petitioner was not akin to any penalty, he places reliance on the decision of a Coordinate Bench in ***O.P. Nimesh v. Union of India, 2018 SCC OnLine Del 12003***. He, therefore, prays that the writ petition be allowed.

11. *Per contra*, Ms.Abha Malhotra, learned counsel for the respondents



while not denying that, on 06.08.2018, the petitioner was denied promotion only on account of DG's displeasure being awarded to him, vehemently opposes the writ petition and submits that the petitioner's plea that the DG's displeasure awarded to him was unwarranted or is liable to be set aside only on account of the findings of the ICC, is wholly misplaced. The petitioner's explanation that he was having long conversations with Ms.N.K as she wanted to discuss her grievances with him, having not been found satisfactory, there is no infirmity with the DG's displeasure awarded to him.

12. She further submits that even though DG's displeasure is not enumerated as a penalty either in Section 48 or under Section 53 of the Border Security Force Act, 1968, it is a prescribed punishment under Rule 176 (A) of the Border Security Force Rules, 1969 which specifically states that displeasures and warnings can be issued to Force personnel. She, therefore, contends that once the DG's displeasure was accorded to the petitioner, the respondents were justified in declaring him as unfit for promotion on that ground alone.

13. Having considered the submissions of learned counsel for the parties and perused the record, we find that the parties are not at variance regarding the factual matrix. In the light of the admitted factual position, two questions arise for our consideration. The first being as to whether the DG's displeasure awarded to the petitioner suffers from any infirmity, and the second being as to whether the DG's displeasure in itself could be a ground to declare the petitioner unfit for promotion even though he was meeting the benchmark of 'very good' in his APAR for the period between 01.04.2015 to 31.03.2016.

14. In so far as the first issue regarding the validity of DG's displeasure is



concerned, we are of the view that it is not for this Court to opine as to what is considered to be appropriate behaviour in the Armed Forces. Having long conversations with a lady constable, at odd hours of the night has to be seen in the context of the factual position. In the present case, the petitioner has sought to justify that he was being compelled to speak to Ms. N.K. due to her threats of committing suicide, but has given no explanation as to why he did not bring these facts to the notice of his superior authorities. We, therefore, find no reason to interfere with the DG's displeasure.

15. Now coming to the second question as to whether the DG's displeasure in itself could be a ground to hold the petitioner unfit for promotion despite his meeting the benchmark, we find that learned counsel for the respondents has vehemently urged that since this displeasure was awarded under Rule 176 (A) of the BSF Rules, the same could not have been ignored and therefore, the DPC was correct in relying on the same to declare him unfit for promotion.

16. Learned counsel for the petitioner, on the other hand, by relying on DoPT's O.M dated 27.03.2015, urged that the O.M. specifically states that a 'displeasure' cannot be considered as a ground for denial of promotion. In order to appreciate the rival submissions of the parties on this aspect, it would be apposite to note the relevant extracts of the said OM, which read as under:-

“OFFICE MEMORANDUM

Dated: 27.03.2015

Subject: Instructions regarding the effect of award of DG's displeasure to officers of the Central Armed Police Forces.



- i) Displeasure is not a penalty enlisted in Rule 11 of CCS (CCA) Rules 1965 and therefore it cannot be considered for denial of promotion.*
- ii) If a displeasure or warning has been given to an officer/member of the CAPF, the Reporting/ Reviewing/Accepting Authority, while writing the Annual Performance Assessment Report (APAR), should take this into consideration and decide to reflect or not to reflect the same based on the improvement or otherwise noticed in the person after receipt of the displeasure or warning.*
- iii) Once the APAR of an officer or member of the CAPF is finalized for the year or the date for finalizing such APAR is over, the displeasure or warning conveyed will become infructuous. “*

17. A bare perusal of the aforesaid extracts shows that it has been categorically directed by the DoPT that ‘displeasure’, in itself, will not be treated as a penalty to deny promotion to any employee. In fact, Clause (3) of the O.M., itself makes it clear that once the APAR of Central Armed Police Forces (CAPF) personnel is finalized for the year or the date for finalizing such ‘displeasure’ is over, the ‘displeasure’ or warning conveyed becomes automatically infructuous. This clearly shows that once the APAR is finalized it is the APAR which will be the basis for assessing the employee’s fitness and not the ‘displeasure’ accorded to him. However, it is expected that the Reporting/ Reviewing/Accepting Officer will take into account the ‘displeasure’ while endorsing APARs of officers/members of the CAPF for the period during which the ‘displeasure’ was accorded, and accordingly assess the officer. It is the assessment made in the APAR which will then prevail and, therefore, the ‘displeasure’ cannot, in itself, be treated as a ground for withholding promotion.



18. This position is further fortified by the decision of the Coordinate Bench in ***O.P. Nimesh (supra)*** relied upon by the petitioner, the relevant extracts whereof read as under:-

“11. From the above it is noted that the two aspects which weighed with the DPC in not finding the petitioner fit for promotion, are; (i) he has not met the benchmark in APAR for the year 2012-2013, and (ii) DG's displeasure in 2012-2013.

12. *On (i) above, there is nothing in the proceedings of the DPC, except stating that DPC in terms of guidelines of DoP&T is required to make its own assessment on the basis of entries in the ACR's, to suggest that DPC had made its own assessment on the basis of the entries in the CRs. Had it been so, it should have depicted in what manner, the petitioner has not met the benchmark. Such an expression, surely would have made the decision more transparent. We also find that the DPC had considered the displeasure communicated to the petitioner on 4th December, 2012 for declaring the petitioner unfit for promotion. As per the DOP&T OM dated 27th March, 2015, which was in place when the DPC was held on 15th July, 2015, it is clear that, “displeasure” is not a penalty enlisted in Rule 11 of the CCS (CCA) Rules, 1965 and it could not have been considered for denying promotion. The relevant part of OM dated 27th March, 2015 is reproduced as under:—*

*“No.I.45026/01/2015-Pers.III Government of India
Ministry of Home Affairs*

*North Block, New Delhi Dated the 27th March, 2015
OFFICE MEMORANDUM*

*Subject : Instructions regarding the effect of award of
DG's displeasure of officers of the Central Armed
Police Forces.*

The undersigned is directed to refer to this Ministry's



letter No. I.45026/25/87-Pers-II dated June 1989 on the subject mentioned above and to issue the following fresh instructions in supersession of the aforesaid letter:—

(i) Displeasure is not a penalty enlisted in Rule 11 of CCS(CCA) Rules, 1965 and therefore it cannot be considered for denial of promotion,

(ii) If a Displeasure or warning has been given to an officer/Member of the CAPF, the Reporting/Reviewing/Accepting Authority, while writing the Annual Performance Assessment Report (APAR), should take this into consideration and decide to reflect or not to reflect the same based on the improvement or otherwise noticed in the person after receipt or the displeasure or warning.

(iii) Once the APAR of an officer or member of the CAPF is finalized for the year or the date for finalizing such APAR is over, the displeasure or warning conveyed will become infructuous.

2. These revised instructions will take effect from the date of issue of this OM. In no case, cases settled before issue of this OM in the light of the instructions dated June 1989 in vogue till now, will be reopened.”

13. Hence the two aspects which weighed with the DPC are clearly untenable and could not have resulted in the petitioner not being recommended for promotion to the post of IG (Medical). It appears, the stand of the respondents, in the counter affidavit, is an after thought only to wriggle out of an unreasoned decision taken to deny promotion to the petitioner.”

19. In the present case, the ‘displeasure’ was conveyed to the petitioner



on 05.10.2015, whereas the APAR is for the period 01.04.2015 to 31.03.2016, which was recorded after taking into account the DG's displeasure awarded to him on 05.10.2015. Once the APAR, wherein the petitioner was assessed as 'very good', was finalized, the '*displeasure*' would, in terms of para no. 1(iii) of the O.M, be rendered infructuous. We are, therefore, of the considered view that the respondents were not entitled to withhold promotion of the petitioner on the ground of having been accorded DG's displeasure alone.

20. In the light of the aforesaid observations and the respondents' own stand that the petitioner was meeting the benchmark for being considered for promotion to the post of Deputy Commandant in the DPC which was held on 06.08.2018 but was found to be unfit only on account of the DG's displeasure dated 05.10.2015, we are of the view that the petition is entitled to succeed.

21. For the aforesaid reasons, while upholding the DG's displeasure dated 05.10.2015, we allow the writ petition by setting aside the orders dated 10.01.2019 and 08.03.2019. The respondents are directed to re-consider the case of the petitioner for promotion as Deputy Commandant with effect from 06.08.2018, by ignoring the effect of the DG's displeasure. As the petitioner already stands promoted as Deputy Commandant with effect from 23.08.2019, in case upon re-consideration of his case, he is found fit for promotion in terms of this order, he will be granted retrospective seniority and notional pay fixation at par with his batchmates. It is made clear that the petitioner will not be entitled to any arrears for the period between 06.08.2018 to 23.08.2019. The exercise in terms of this order will be completed within a period of eight weeks and all consequential benefits



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accruing in favour of the petitioner will be released to him within eight weeks thereafter.

22. The writ petition is, accordingly, disposed of in the aforesaid terms.

(REKHA PALLI)
JUDGE

(SHALINDER KAUR)
JUDGE

AUGUST 29, 2024

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