

HIGH COURT OF TRIPURA
A_G_A_R_T_A_L_A
WP(C) No. 428 of 2020

1. Suma Chandra Das

-----*Petitioner(s)*

-V-E-R-S-U-S-

1. The Union of India.
Represented by the Secretary, Ministry of Home Affairs, having his office at South Block, New Delhi-110001.
2. The Secretary,
Ministry of Home Affairs, Government of India, having his office at South Block, New Delhi-110001.
3. The Director General,
Border Security Force, having office at Block No. 10, CGO Complex, Lodhi Road, New Delhi.
4. The Deputy Inspector General (Confid),
Border Security Force, having his office at Directorate General Border Security Force, Block No. 10, CGO Complex, Lodhi Road, New Delhi.
5. The Commandant,
133 Bn, Border Security Force, Nalkata, District- Dhalai Tripura.
6. Harjit Singh
Assistant Commandant, 121 Bn, Border Security Force.
7. Sandeep Kumar
Assistant Commandant, STC KMR, Border Security Force.
8. I. Ram Kumar
Assistant Commandant, SHQ TVM, Border Security Force.
9. Ranjeet Kumar
Assistant Commandant, 127 Bn, Border Security Force.
10. Sube Singh
Assistant Commandant, STC C.C PUR, Border Security Force.

11. Rajesh Teluram
Assistant Commandant, 14 Bn, Border Security Force.
12. Anil Kumar
Assistant Commandant, 37 Bn, Border Security Force.
13. Santosh Kumar Das
Assistant Commandant, 30 Bn, Border Security Force.
14. Satwinder Singh
Assistant Commandant, 125 Bn, Border Security Force.
15. Narender Kumar
Assistant Commandant, 116 Bn, Border Security Force.
16. Baljinder Kumar
Assistant Commandant, 177 Bn, Border Security Force.
17. Saty Narain Meghwal
Assistant Commandant, 20 Bn, Border Security Force.
18. Sukhdev Singh
Assistant Commandant, 152 Bn, Border Security Force.
19. Vir Singh
Assistant Commandant, 26 Bn, Border Security Force.
20. Jayanta Kumar Roy
Assistant Commandant, 65 Bn, Border Security Force.
21. Virendra Vikram Gautam
Assistant Commandant, 138 Bn, Border Security Force.
22. G. Kumaran
Assistant Commandant, SHQ JAMMU, Border Security Force.
23. N.Robin Kumar Singh
Assistant Commandant, 10 Bn, Border Security Force.
24. Surender Singh
Assistant Commandant, 130 Bn, Border Security Force.
25. Rakesh Kr Chandolia
Assistant Commandant, 114 Bn, Border Security Force.
26. Sunil Kumar
Assistant Commandant, 194 Bn, Border Security Force.
27. Bharat Bhushan
Assistant Commandant, SHQ S/BANI, Border Security Force.
28. Manish Kumar
Assistant Commandant, 19 Bn, Border Security Force.
29. Sadhan Kr. Biswas
Assistant Commandant, 121 Bn, Border Security Force.

30. Rajesh Kumar
Assistant Commandant, 25 Bn, Border Security Force.
31. Piyush Baidya
Assistant Commandant, 62 Bn, Border Security Force.
32. Somkule Milind
Assistant Commandant, STC CHAKUR, Border Security Force.
33. Rishi Kumar Gautam
Assistant Commandant, 03 Bn, Border Security Force.
34. Satya Narayan
Assistant Commandant, DIG HQ FHQ, Border Security Force.
35. Surendra Singh Meena
Assistant Commandant, 47 Bn, Border Security Force.
36. Devraj Singh
Assistant Commandant, 100 Bn, Border Security Force.
37. Nagendra Singh Naruka
Assistant Commandant, SHQ BKR, Border Security Force.
38. Deepak Maindola
Assistant Commandant, FTR PB, Border Security Force.
39. Pramod Kumar
Assistant Commandant, 176 Bn, Border Security Force.
40. Anup Kumar
Assistant Commandant, 179 Bn, Border Security Force.
41. Thithie Jamestone
Assistant Commandant, FTR M and C, Border Security Force.
42. Pradip Kumar Jha
Assistant Commandant, 17 Bn, Border Security Force.
43. Karni Pal Singh Rathore
Assistant Commandant, SHQ UDAIPUR, Border Security Force.
44. Praveen Chand
Assistant Commandant, 163 Bn, Border Security Force.
45. Heirang KhongjamKiran Singh
Assistant Commandant, 63 Bn, Border Security Force.
46. Ramesh Kumar
Assistant Commandant, 08 Bn, Border Security Force.

-----Respondent(s)

B E F O R E
HON'BLE MR. JUSTICE T. AMARNATH GOUD

For Petitioner(s)	:	Mr. Somik Deb, Sr. Advocate. Mrs. R. Chakraborty, Advocate.
For Respondent(s)	:	Mr. B. Majumder, Asst. S.G.
Date of hearing	:	11.07.2022
Date of delivery of judgment and order	:	12.07.2022
Whether fit for reporting	:	YES

JUDGMENT & ORDER

Heard Mr. Somik Deb, learned senior counsel assisted by Mrs. R. Chakraborty, learned counsel appearing for the petitioner. Also heard Mr. B.. Majumder, learned Asst. S.G. appearing for the respondents.

[2] This present petition has been filed under Article-226 of the Constitution of India for rendering substantive and conscionable justice to the petitioner and for quashing/setting aside the impugned letter dated 20.02.2019 and the impugned order of promotion and the impugned order dated 03.02.2020 and also forthwith revoke the impugned letter dated 20.02.2019 and the impugned order of promotion and the impugned order dated 03.02.2020 to promote the petitioner to the post of Assistant Commandant, BSF with effect from the date of promotion of his juniors.

[3] The brief facts of the present are that on 12.01.2004, the petitioner was appointed to the post of Sub-Inspector in the BSF. Thereafter, in the year 2009, the petitioner was promoted to the post of Inspector, BSF. On 12.08.2012, the APAR of the petitioner was issued. On 01.12.2015, the said APAR was furnished to the petitioner without however intimating as to whether the entries recorded therein were adverse or advisory in nature. On 20.02.2019, the Deputy Commandant, 133 Bn, BSF for and on behalf of the Commandant, directed the petitioner to submit his representation the adverse/advisory remarks. In response

thereto, the petitioner had submitted a representation on 25.02.2019. On 30.03.2019, the various authorities, who issued the APAR, were asked to offer their comments in the case of the petitioner. On 09.05.2019 and 23.05.2019 the said authorities informed that they could recollect anything but, opined to maintain the said entries against the petitioner. Consequent thereto, the petitioner was not considered for promotion to the post of Assistant Commandant; per contra, his juniors were promoted. Disposing the representation of the petitioner, the Deputy Inspector General (Confid.), Director Border Security Force, issued an order dated 03.02.2020 thereby, rejecting the prayer of the petitioner, for upgradation of the APAR. Hence, this petition has been preferred by the present petitioner.

[4] Mr. Somik Deb, learned senior counsel assisted by Mrs. R. Chakraborty, learned counsel appearing for the petitioner has submitted that the petitioner initially on 12.01.2004 was appointed to the post of Sub-Inspector, BSF and thereafter, in the year 2009, the petitioner was promoted to the post of Inspector, BSF. Presently, the petitioner is discharging his duties as Inspector in the 145 Bn. BSF, Salbagan, Agartala. With regard to the annual performance assessment of the petitioner for the period of stretching from April, 2011 to March, 2012 an Annual Performance Assessment Report (APAR, for short) was issued on 12.08.2012.

[5] He has submitted that the said APAR dated 12.08.2012 was issued in the year 2012, but the same was not communicated to the petitioner at that stage. Only on 01.12.2015 the said APAR dated 12.08.2012 was furnished to the petitioner without however intimating as to whether the entries recorded therein were adverse or advisory in nature. At a later stage, the Deputy Commandant, 133Bn. BSF for and on behalf of the Commandant, 133Bn, BSF issued a letter dated 20.02.2019, thereby

enclosing a copy of the APAR dated 12.08.2012 and further informed the petitioner that the entries recorded therein as adverse/advisory in nature.

[6] Mr. Deb, learned senior counsel has further contended that by the said letter dated 20.02.2019 the petitioner was directed to submit his representation within 15 days, from the date of communication thereof, against the said Adverse remarks and further informed that if the competent authority after examining the same finds that the remarks were justified, the representation is frivolous, a note would be made in the performance Assessment report of the petitioner to the effect that he did not take the said remarks in good spirit. It has been further argued that in response to the said letter dated 20.02.2019, the petitioner had submitted a representation dated 25.02.2019 contending that for the period stretching from 01.04.2011 to 31.03.2012 while he was posted at Govindapali, Malkangiri, Orissa, he had discharged his duties and tasks with utmost sincerity and during that period no untoward incident has happened. By the said representation dated 25.02.2019 the petitioner was further contended that even though, the APAR of the said period was issued in the year 2012, but the same was not communicated to him at that stage. Furthermore, by the said representation disagreeing with the remarks, entered against the petitioner, he had prayed for upgradation of the said APAR.

[7] Pursuant to the submission of the said representation vide letter dated 11.03.2019, the same was forwarded to the Special Director General, Eastern Command, BSF, Kolkata, for necessary action. In the said letter dated 11.03.2019, it was further recorded that while the departmental promotion committee was proceeding for making promotions of the officers, from the rank of Inspector of Assistant Commandant, the APAR acknowledgment, regarding the communication of the adverse remarks of the petitioner was not found, consequent whereunto, vide the letter dated 20.02.2019, the same was communicated to the petitioner.

[8] For proper disposal of the case of the petitioner, his representation dated 25.02.2019 along with other connected documents were forwarded to the Frontier Headquarter, Guwahati. Situated thus, prayer for upgradation of the APAR, the petitioner had submitted a further representation dated 26.03.2019 before the Inspector General Frontier Headquarter, Guwahati. Mr. Deb, learned senior counsel has submitted that for quick disposal of the representation of the petitioner reference dated 29.03.2019 the Frontier Headquarter, Guwahati had asked for comments of the initiating Authority, Deputy Commandant, 176Bn, BSF, the Reviewing Authority and the Technical Authority on the remarks, entered in the APAR of the petitioner. Vide letter dated 30.03.2019 issued by the Deputy Commandant, 133 Bn. BSF, the same was communicated to the said concerned authorities for offering their comments in connection therewith.

[9] It has been further contended that on perusal of the Combined Seniority List of Inspector, BSF of the year 2019, the petitioner has been placed at Sl. No.421 of the said list which manifestly reveals that the petitioner was eligible to be considered for promotion to the post of Assistant Commandant. The said seniority list of promotion was made thereby promoting the officers holding the posts of Inspector to Assistant Commandant. It has been further stated that even the officers who were junior to the petitioner were promoted to the said post of Assistant Commandant, but the petitioner was not promoted.

[10] On the other hand, disposing the representation of the petitioner, submitted for upgradation of his APAR, the Deputy Inspector General (Confd), Directorate General Boarder Security, New Delhi issued an order bearing reference dated 03.02.2020 thereby rejecting the prayer of the petitioner. Mr. Deb, learned senior counsel has drawn attention of this

Court in Instructions No. 4.5, 4.8 & 4.9 of the APAR Procedure & Instruction, 2012 which applied to all the personnel of the BSF, as under:

“4.5 Representation against APAR: The officer/official concerned shall be given an opportunity to make representation against the entries and the final grading given in the report within a period of 15 days from the date of receipt of the entries in the APAR to the competent authority in writing....”

Adverse/Advisory Remarks

4.8 Communication of adverse/advisory remarks if PARs contain any adverse/advisory remarks, it shall be ensured that adverse/advisory remarks are communicated to the official, duly highlighted and underlined, specifying the nature of remarks whether these are adverse instead writing adverse/advisory along with full APAR as per format given Annexure-IV.

4.9 It is necessary that every government servant should know what his defects are and how could he remove them. Every reporting officer should realize that it is his duty not only to make an objective assessment of his subordinate's work and qualities but also to give him at all times the necessary advice, guidance and assistance to correct his faults and deficiencies.....”

[11] Mr. Deb, learned senior counsel appearing for the petitioner has submitted that the Instruction No.4.5 of the Instructions of 2012 prescribes for giving opportunity of making a representation to a subordinate officer within 15 days from the date of receipt of the entries in the APAR. Even though the entries in the APAR was received by the petitioner on 01.12.2015 as would be evident from the receipt dated 01.12.2015 but, no such opportunity of making a representation there against was provided to the petitioner.

[12] It has been further contended that the APAR relates to the performance assessment of the petitioner of the year 2011-2012, which was issued on 12.08.2012 and the petitioner was given opportunity to make a representation there against only on 20.02.2019, which is wholly unsustainable. As per prescriptions, contained in Instructions No.4.9 of the Instructions of 2012, APAR with remarks are issued to the subordinate officers, to make acquainted about their defects and so that that could be

removed by them. But in the case of the petitioner the adverse/advisory remarks was provided to the petitioner after elapse of a period of about 7 years from the date of issuance therefrom, and hence, it can be safely concluded that the same was not issued by the respondents, with the intention of giving a chance to the petitioner to know his defects.

[13] As per the prescriptions contained in Instruction No.4.8 of the Instructions of 2012, the APAR along with the adverse/advisory remarks shall be communicated to a subordinate officer, thereby specifically recording the nature as to whether they are in the nature of adverse entry or advisory entry, instead of noting adverse/advisory, in the format given at Annexure-IV thereof. In the instant case the APAR and the impugned letter dated 20.02.2019 thereby giving the petitioner the opportunity of making a representation there against were not issued, in conformity with the prescriptions, contained in Instruction No.4.8 and Annexure-IV of the Instructions, 2012 inasmuch as the said remarks was styled as “Adverse/Advisory”, without specifying the nature of the remark as to whether the same was adverse/advisory in nature.

[14] He has further averred that it reveals from the letter dated 09.05.2019 by which the initiating Authority and the Reviewing Authority of the APAR gave their comments, it would manifestly reveal that they also failed to remember as to under what circumstances remarks were entered in the APAR against the petitioner and hence, without recollecting anything, the said authorities just opined to maintain the said adverse remarks.

[15] He has submitted that had the petitioner was given opportunity to make representation at the relevant point of time when the APAR was issued i.e. in the year 2012, then he would have been debarred from his legitimate promotion. The officers, who have juniors to the

petitioner, were promoted to the post of Assistant Commandant but, the petitioner was denied promotion.

[16] It is an established principle of service jurisprudence that even a downgrading in the Annual Confidential Report can be treated as an adverse entry and therefore, before recording such downgrading in the Confidential Report, the concerned employee is to be cautioned so that he can remedy his defects/shortcomings and only after administering such caution a downgrading in the confidential report can be recorded and the concerned employee is entitled to be confronted with such downgrading in the Confidential Report, thereby providing him with an opportunity to persuade the Reporting Officer, to alter the downgrading in the Confidential Report. It is a trite law that a downgrading and/or adverse entry in the Confidential Report can only be acted upon, to the prejudice of the government servant when such downgraded/adverse entry is furnished to the government servant at the earliest possible opportunity, thereby providing him a scope to submit an effective representation against such entry.

[17] In absence thereof, downgraded/adverse entry cannot be acted upon to the prejudice of the government servant. Applying this settled legal principle to the case in hand, the impugned letter dated 20.02.2019, the impugned order of promotion and the impugned order dated 03.02.2020, are liable to be quashed. In the case of the petitioner there has been gross defiance of the settled principles of law and natural justice and hence the impugned letter dated 20.02.2019, the impugned order of promotion and the impugned order dated 03.02.2020 pursuant whereof, the petitioner has not been accorded the benefit of promotion to the post of Assistant Commandant are in gross violation of his Constitutional rights, guaranteed under Articles-14, 16, 19 and 300A of the Constitution of India and hence, are liable to be quashed.

[18] In support of the case of the petitioner, Mr. Deb, learned senior counsel has placed his reliance on a decision of the Apex Court in *2008 (8) SCC 725*, reported in *Dev Dutt v. Union of India and Others*, where the Apex Court observed thus:

“A person getting any of the entries at items (ii) to (vi) should be communicated the entry so that he has an opportunity of making a representation praying for its upgradation, and such a representation must be decided fairly and within a reasonable period by the concerned authority.

16. If we hold that only 'poor' entry is to be communicated, the consequences may be that persons getting 'fair', 'average', 'good' or 'very good' entries will not be able to represent for its upgradation, and this may subsequently adversely affect their chances of promotion (or get some other benefit).

17. In our opinion if the Office Memorandum dated 10/11.09.1987, is interpreted to mean that only adverse entries (i.e. 'poor' entry) need to be communicated and not 'fair', 'average' or 'good' entries, it would become arbitrary (and hence illegal) since it may adversely affect the incumbent's chances of promotion, or get some other benefit.

18. For example, if the bench mark is that an incumbent must have 'very good' entries in the last five years, then if he has 'very good' (or even 'outstanding') entries for four years, a 'good' entry for only one year may yet make him ineligible for promotion. This 'good' entry may be due to the personal pique of his superior, or because the superior asked him to do something wrong which the incumbent refused, or because the incumbent refused to do sycophancy of his superior, or because of caste or communal prejudice, or for some other extraneous consideration.

*19. In our opinion, every entry in the A.C.R. of a public servant must be communicated to him within a reasonable period, whether it is a poor, fair, average, good or very good entry. This is because non-communication of such an entry may adversely affect the employee in two ways : (1) Had the entry been communicated to him he would know about the assessment of his work and conduct by his superiors, which would enable him to improve his work in future (2) He would have an opportunity of making a representation against the entry if he feels it is unjustified, and pray for its upgradation. Hence non-communication of an entry is arbitrary, and it has been held by the Constitution Bench decision of this Court in *Maneka Gandhi vs. Union of India* (supra) that arbitrariness violates Article 14 of the Constitution.”*

[19] To counter the submission the submission of the learned senior counsel, Mr. B. Majumder, learned Asst. S.G. appearing for the

respondents has submitted that in the present case, copy of full APAR for the year 2011-2012 was communicated to the petitioner in order to enable him to submit representation if any within stipulated time. The receipt copy of the said APAR was acknowledge by the petitioner duly signed dated 01.12.2015, but he failed to avail the opportunity and did not represent against entry/or grade of said APAR. However, in order to usher a fair justice and to decide the matter objectively in quasi-judicial manner, adverse remarks endorsed in his APAR was communicated to the petitioner vide 133Bn. BSF letter dated 20.02.2019 with the direction to submit representation, if any within 15 days.

[20] He has further submitted that time prescribed in the circular for communication of the adverse entry is not mandatory but directory. If the adverse entry is not communicated in time, it is not wiped out. If the employee does not make a representation against the adverse entry after communication, it became final.

[21] He has further argued that none of the fundamental/statutory rights of the petitioner has been infringed by the answering respondents as due procedure prescribed under the DOP & TOM No. 21011/1/2005-Estt (A)(Pt.II) dated 14.05.2009 has been followed by communicating the petitioner his full APAR including the overall grade and assessment of integrity on proper receipt duly signed by the petitioner on 01.12.2015.

[22] During scrutiny of confidential record of petitioner for the DPC of transitional vacancy year 2018, no representation against any entry of overall grade of APAR 2011-2012 found available in the dossier of the petitioner. The process has not rendered the petitioner prejudiced. The petitioner however again failed to submit representation within the stipulated time and submit his representation dated 26.03.2019. Notwithstanding with time barred submission of representation by the petitioner, his representation was considered by the FHQ BSF taking into

consideration of comments of Initiating Officer, Reviewing Officer and Tech/Adm. Reviewing Officer and after careful consideration of all facts placed on record.

[23] In support of his submission, he has placed reliance upon a decision of the Apex Court in *AIR 1996 SC 3352*, reported in *Smt. Nutan Arvind, v. Union of India and Another*, wherein, the Apex Court has held thus:

"5. Promotions should strictly be made from such selection list in the order in which the names are finally arranged. The selection list should be periodically reviewed removing from the list names of persons who have been promoted, and including fresh names."

On consideration of the above instructions, this Court had held thus :

"The vacancies which occurred prior to the amended rules would be governed by the old rules and not by the amended rules. It is admitted by counsel for both the parties that henceforth promotion to the post of Sub-Registrar, Grade It will be according to the new rules on the zonal basis and not on the Statewide basis and, therefore, there was no question of challenging the new rules. But the question is of filling the vacancies that occurred prior to the amended rules. We have not the slightest doubt that the posts which fell vacant prior to the amended rules would be governed by the old rules and not by the new rules."

[24] Admittedly, there are laches on the part of the petitioner and equally there are laches on the part of the respondents too. This Court feels that when both are standing on the same footing and the respondents being a government having full-fledged visionary, the laches on their part cannot be taken in a lighter sense, hence, the benefit needs to be extended to the petitioner.

[25] It also falls for a serious consideration with regard to the manner in which respondents-officials functioning as to how the confidential document which is amongst the respondents' officers is made available to the petitioner when the same is not marked to him and the said document is said to be filed in the Court in the present writ petition as a material papers. When the learned counsel appearing for the respondents

has been questioned with regard to the procurement and filing of such document by the petitioner, he had no answer and reading of the affidavit also do not disclose how the petitioner has procured this confidential document and filed before this Court.

[26] It is needless to express any observation by this Court onto this aspect as this Court, feels that the respondents' officials are capable enough to understand the seriousness of the same and take appropriate steps against all concerned.

[27] In view of the above, observations and submissions made by the learned counsel appearing for the parties, this Court is of the considered opinion that the petitioner has made out a case for interference and accordingly, the prayer as sought for by the petitioner in the present writ petition stands allowed. The respondents are directed to consider the case of the petitioner regarding all service benefits, in accordance with law.

[28] In the result, the present petitions stands allowed and thus disposed of.

JUDGE

A.Ghash

