

Sumer Singh Vs. Union of India and Another

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Court : Delhi

Decided On : May-09-2012

Judge : Anil Kumar & Sudershan Kumar Misra

Appeal No. : W.P.(C) No. 558 of 1994

Appellant : Sumer Singh

Respondent : Union of India and Another

Judgement :

ANIL KUMAR, J.

1. The petitioner, who was not recommended for promotion to the post of Deputy Commandant from the post of Assistant Commandant by the DPCs held on 29th October, 1991; 24th November, 1992 and 17th November, 1993, has sought directions to the respondents to produce the service dossier and other relevant records and has sought perusal of the same and to quash the “displeasure” dated 16th April, 1991 given by the Director General of the Border Security Force and for expunging the adverse remarks in his ACR for the period ending 31st March, 1992. The petitioner has also prayed that on quashing the `displeasure’ given by the Director General, Border Security Force and on expunging the adverse remarks from his ACR for the period ending 31st March, 1992, he be given promotion, pay and allowances and other benefits from the date his immediate juniors had been promoted. The petitioner has also prayed for compensation for

humiliation and dishonour shown to him on the basis of false and malafide complaints against him.

2. Brief facts relevant for the decision of the present writ petition are that the petitioner was an Assistant Commandant in Border Security Force during the relevant period that is 1991, 1992 and 1993 till he was promoted to the post of Deputy Commandant on the recommendation of the DPC held in November, 1994. Pursuant thereto, he was promoted to the said post in June, 1995.

3. The petitioner had joined the Border Security Force in 1986 and after completion of his training period he had been declared best trainee officer and was awarded the "sword of honour" by the Home Minister. He had also been awarded "sword of honour" by Director General, BSF for command footing contingent during Republic Day Parade in 1989. The petitioner disclosed that he was also awarded Inspector General's "commendation" for best performance in 1988 and 1989.

4. According to the petitioner, while on duty in Punjab he had apprehended hard core militant Sukhvinder @ Bhinder Singh and in July, 1991 his company had apprehended other terrorist Buta Singh and had also seized one tractor and ammunition in encounter in which he had played very important role. He had saved the lives of 64 persons of a company from ambush of militants near the village of Harvan (JandK) by putting his own life in danger. He also disclosed that he had apprehended a top organizer of JKLF (Sokat) and had participated in "hot spring expedition". His performance was good on the academic side in various courses conducted by the BSF and the Army.

5. On 25th April, 1990 a Court of Enquiry was ordered by the DIG, BSF, Shillong on the complaint of an Assistant Director (G), Shillong in respect of a car No.DEA 986 which was auctioned on 25th August, 1988 by 25 Bn. BSF to Mr.Rampat son of Sh.Bhoop Singh, Village and Post Office Kangan Teri, New Delhi in a public auction for an amount of Rs.19,404/-. The said car was purchased from Sh.Rampat by the father of the petitioner Sh.Ami Lal for an amount of Rs.32,000/- which was gifted by the petitioner's father to the minor son of the petitioner Jitender. The said car was taken by the petitioner which was gifted to his minor

son to 22 Bn. BSF, which was located in 1988 at Shillong, as the petitioner was posted there. The car gifted to the son of the petitioner Jitender was later on sold for a consideration of Rs.40,000/-, and according to the petitioner, the car though was gifted to his son was sold with the consent of his father and the sale consideration was remitted to Sh.Ami Lal, petitioner's father.

6. The allegations which were made in the Court of Enquiry were that the petitioner had purchased the said car for Rs.25,000/- without obtaining permission from the authorities concerned and had brought the said car in a seven tonner vehicle of BSF by Constable Gurbaksh Singh of 22 Bn., BSF and got it repaired in the workshop of BSF which was later on sold to a khasi lady. The Court of Enquiry, however, found the allegations contrary to the order which was made regarding the Court of Enquiry. The Court of Enquiry, however, blamed the petitioner under Rule 18(3) of CCS (Conduct) Rules for not intimating within one month of receiving and sale of car and recommended that the petitioner be "cautioned" for the said omission.

7. Consequently, a show cause notice dated 26th February, 1991 was issued to the petitioner for award of Director General's "displeasure" for violation of Rule 13(4) and 18(3) of CCS (Conduct) Rules for accepting gift over the prescribed limit and transacting sale of car without permission or information of the competent authority.

8. The petitioner replied to the show cause notice, by reply dated 13th March, 1991, contending, inter-alia, that though he had not obtained permission for accepting the car as a gift by his minor son from his father, nor had taken the permission for its sale by his minor son, however, this was done by him on account of ignorance of complicated rules and regulations. He disclosed that his father has land holdings who has his own income from farming and other resources and the petitioner is the only son of his father. The petitioner also has only one son and consequently, the father of the petitioner had gifted the car to his only son on his last birthday. The petitioner also disclosed that he came to know about his father having purchased the car from Sh.Rampat, who had purchased it in auction, when he had gone to Delhi in the month of 1988-1989 in connection

with the Raising Day and Republic Day Parade.

9. The petitioner alleged that he could not distinguish the minor differences being the sole heir of his father's property out of innocence and ignorance and he had sent the car to Shillong. Regarding sale of the car, the petitioner disclosed that since he had been directed to go on deputation to NSG, therefore, with the consent of his father he had sold the car. Even the entire sale consideration was remitted to his father. In the circumstances, the petitioner sought that a compassionate view be taken in the right perspective as irregularity, if any, was not done deliberately and without any ill motives.

10. By order dated 16th April, 1991, the Director General after considering the reply to the show cause notice found the explanation given by the petitioner unsatisfactory and awarded his "displeasure" for violation of Rule 13(4) and 18(3) of CCS (Conduct) Rules, 1964.

11. Against the "displeasure" of the Director General, which was communicated to the petitioner, he made a representation to the Central Government on 22nd January, 1992. The representation made by the petitioner was, however, rejected by the Central Government by order dated 14th October, 1992.

12. A Departmental Promotion Committee was held to consider the promotion of the petitioner and other Assistant Commandants to the rank of Deputy Commandant. The said DPC took into consideration the ACRs for the past five years i.e 1986-1987; 1987-1988; 1988-1989; 1989-1990 and 1990-1991 that is the record of the officers upto 31st March, 1991. The DPC held on 29th October, 1991 did not recommend the petitioner for promotion. Consequently, about 138 officers junior to the petitioner were promoted to the rank of Deputy Commandant on 5th February, 1992, and another batch of 25 juniors on 19th February, 1992.

13. The petitioner was transferred to 192 Bn. BSF on its Raising Day under the command of Sh.S.D.Sharma in 1990. The petitioner contended that all of a sudden a letter dated 27th January, 1992 was served upon him intimating "you are warned for your misuse of Government transport and rendering false certificate" by the Inspector General. Though the petitioner made a representation against the

said letter dated 27th January, 1992, however, his representation was rejected holding that his representation could not be accepted being devoid of merits.

14. The petitioner disclosed that another DPC was held on 24th November, 1992. The DPC held on 24th November, 1992 also did not recommend the petitioner for promotion to the rank of Deputy Commandant. The petitioner alleged that he had not been communicated any adverse remarks and since he was not recommended for promotion to the rank of Deputy Commandant, he was again superseded by another batch of 165 officers junior to him.

15. According to the petitioner, in November, 1992, an adverse entry in his ACR for the period ending 31st March, 1992 was made stating therein, "but he has been given a warning for misuse of Government transport and giving false certificate". Since the adverse remarks were not communicated to the petitioner in November, 1992 in which the DPC had taken place, the petitioner could not make representation against the adverse remarks. Therefore, the DPC held on 24th November, 1992 considered the adverse remarks against him and he was not recommended for promotion.

16. The petitioner had made a representation against the adverse remark which was communicated to him in December, 1992 by a letter dated November, 1992. His representation was rejected by a one sentence order "rejected being devoid of merit".

17. The petitioner also contended that he could not have made a representation in time as the adverse remarks was communicated by letter dated 13th November, 1992 which were served upon the petitioner on 4th December, 1992 though the DPC was held on 24th November, 1992. Consequently, the petitioner was again superseded by another batch of about 164 juniors to the rank of Deputy Commandant based on the recommendations of the DPC held on 24th November, 1992.

18. That on the queries made by the Civil Police to the Border Security Force, a letter dated 27th September, 1993 making allegation of misuse of transport and giving false certificate was sent. Since the adverse remarks against the petitioner

were not expunged, another DPC held on 7th November, 1993 also did not recommend the petitioner for promotion to the rank of Deputy Commandant and recommended promotion of another batch of junior officers.

19. Later on, adverse remarks made against the petitioner were expunged pursuant to the letters received from the police intimating that from the records available with the police station it has been revealed that the vehicle number as had been complained by the BSF was not seized on or before 15th May, 1991 or thereafter by the police station Sadar Gazipur. Consequent to part expunging of the adverse remarks, the only adverse remark which had left in the ACR of the petitioner was "need to be kept under observation". The petitioner contended that the remaining adverse remarks had no meaning and no basis as the words regarding misuse of transport and giving false certificate which was in the ACR of 1991-1992 did not survive as the relevant adverse remarks had been expunged by order dated 27th December, 1993.

20. Despite the representations made by the petitioner his grievance was not addressed. The petitioner had contended that the 'displeasure' dated 16th April, 1991 could not be considered by the DPC held on 20th October, 1991 as it had to consider the petitioner's ACR up till 31st March, 1991. There is no rule or regulation to include the alleged 'displeasure' dated 16th April, 1991 in the ACR which was up to 31st March, 1991.

21. The subsequent DPCs held on 24th November, 1992 and 17th November, 1993 could not consider adverse remarks given to him as they were expunged and whatsoever was left was, in fact, could not be construed as an adverse remarks. On failure to get any redressal and consideration of the petitioner for promotion without the displeasure note and the adverse remarks from the dates his juniors were promoted, the petitioner filed the above noted writ petition on 29th January, 1994 detailing the facts and, inter alia, on the grounds that the 'displeasure' and warning were based on the malicious designs of 'G'Staff whose involvement in allowing the smuggling activities on Indo-Bangladesh border was unearthed by the petitioner. He alleged that on 22nd October, 1989, the 'C'company of 22 Battalion BSF commanded by the petitioner had seized 19 boats and apprehended 5

Bangladesh nationals, who on interrogation had revealed that they were allowed to enter the Indian territory by the company commander of BSF Inspector (G) Kundan Singh, which was reported by the petitioner to the Commandant 22 Bn. BSF in writing. According to the petitioner, no action was taken against Kundan Singh. Rather he was posted to N and M Sector as Inspector (G). It was unearthing of involvement of 'G'branch of BSF that all the staff of Frontier Head Quarters AMM and N became against the petitioner and they made various false complaints against him. But on enquiries all of them were found to be false and no action was taken initially against the petitioner.

22. The Court of Enquiry initiated on 25th April, 1990 was also on the complaint of Assistant Director (General) Shillong who was bent upon ruining the career of the petitioner because he had revealed the nefarious activities of 'G'branch.

23. The petitioner contended that before the DPC held on October 29, 1991 there were no adverse remarks and the 'displeasure' awarded by the Director General on 16th April, 1991, which was also not granted in accordance with the policy for grant of displeasure, in any case, it could not be considered and consequently, there was no material before the DPC for not recommending the case of the petitioner for promotion to the rank of Deputy Commandant. The petitioner was not recommended because the 'displeasure' by the Director General was taken into consideration by the said DPC.

24. The petitioner also challenged the proceedings of subsequent DPCs held on 24th November, 1992 and 17th November, 1993 on the ground that they could not have taken into consideration the adverse remarks against him, as first the adverse remarks were not communicated and thereafter when they were communicated after the DPC had already held in 1992, they were expunged and whatsoever was not expunged did not tantamount to adverse remark, and the DPC held in 1993 had nothing before it against the petitioner so as not to recommend the case of the petitioner for promotion to the rank of Deputy Commandant.

25. Regarding the displeasure given by the DG, Border Security Force, the petitioner asserted that gift taken or given by a blood relation with which the

Government servant has no direct nexus, cannot be termed as “gift” and did not tantamount to any misconduct and did not require prior permission from the respondents as the gift by the father of the petitioner to his minor grandson was for the benefit of the family only.

26. Challenging the DPCs held on 29th October, 1991, 24th November, 1992 and 17th November, 1993, the petitioner contended that his previous meritorious record of five years could not be ignored for alleged technical violation of not informing the authorities about the gift of the car by his father to his minor son which also he had to sell as he had been transferred to NSG and his minor son had to move with him. The petitioner contended that there is no justification to supersede him by 400 junior officers and ignoring the awards and other meritorious works done by the petitioner.

27. The writ petition is contested by the respondents, who filed a counter affidavit dated 30th November, 1994 of Brig.K.K.Chaturvedi, DIG and Comdt. BSF, T.C.S.Hazari Bagh (Bihar). The respondents admitted the facts pertaining to the petitioner and various other averments made by the petitioner except that a SCOI was ordered by the DIG, BSF, Shillong to enquire into the circumstances under which the petitioner while serving in 22 Bn. BSF acquired an Ambassador car registration No.DEA 986 at the auction held at 25 Bn. BSF on 25th August, 1988 for an amount of Rs.19,404/- in the name of his son and conducting other illegalities in the transaction which ended in the sale of the said car at Shillong. The respondents admitted that the car was purchased in the auction by Sh.Rampat, who had later sold it to the father of the petitioner Sh.Ami Lal for a consideration of Rs.32,000/-. The father of the petitioner had transferred the car in the name of the minor son of the petitioner as a gift, which was sold to a civilian at Shillong on 2nd October, 1989. The respondents disclosed that the petitioner had not obtained permission for accepting the car as a gift in the name of his minor son from his father and thus had violated provision of Rule 13(4) and 18(3) of the CCS Rules. According to the respondents, the Court of Enquiry found the petitioner blameworthy as the petitioner had accepted the gift in the name of his minor son over the prescribed limit, and the car in the name of his minor son was also sold without the permission or information to the competent authority and DG of the

BSF. Consequently, the displeasure was communicated by the Director General, BSF by order dated 16th April, 1991.

28. The respondents also alleged that the DPCs of 20th October, 1991, 24th November, 1992 and 17th November, 1993 had taken into consideration the displeasure awarded to the petitioner in 1991 and the adverse entries recorded in his ACR for the period ending March, 1992 while not recommending his promotion to the rank of Deputy Commandant. The respondents denied that the adverse remarks recorded in the petitioner's ACR for the period ending 31st March, 1992 were reflected in his ACR and not communicated to the petitioner. The respondents categorically averred that the adverse remarks recorded for the period ending 31st March, 1992 were communicated to the petitioner by letter dated 13th November, 1992 well before the DPC was held on 24th November, 1992.

29. The respondents also relied on the letter dated 28th June, 1989 of the Government of India contending that the 'displeasure' awarded to an officer could debar him for promotion for a period up to two years from the date of award of 'displeasure' depending upon the nature of delinquency or irregularity. The respondents denied that the petitioner had performed heroic deeds and caught black-sheep of the Force, who was helping the smugglers in the nefarious activities.

30. The respondents admitted that 'G' company of 22 Bn. had apprehended 5 Bangladesh nationals along with 19 boats in Balat area. The respondents, however, contended that there was nothing on record to show that Inspector (G) Kundan Singh had allowed Bangladesh nationals to enter the Indian Territory. Regarding the transfer of Inspector (G) Kundan Singh, it has been contended that it was purely on administrative grounds due to his long stay in the area. The respondents also refuted the involvement of said Inspector on the ground that there is nothing on record to prove his involvement or the involvement of 'G' personnel with the smugglers. The respondents also denied that 'G' staff of Ftr Hqr AMMandN were against the petitioner and the false reports were filed against him.

31. Regarding the displeasure note to the petitioner, the respondents disclosed that Car No.DEA 986 registration papers disclosed that the car was never transferred in the name of the father of the petitioner after it had been purchased by Sh.Rampat. Relying on Rule 18(3) of CCS (Conduct) Rules, it was asserted that any Government servant belonging to Group 'A' and 'B' entering into transaction in respect of movable property either in his own name or in the name of any member of his family have to report the same to the competent authority, if the value of the property exceeds Rs.2000/- (now 10,000/-) within one month. The respondents also contended that the petitioner also failed to disclose the gift to his minor son in violation of Rule 13(4) of CCS (Conduct) Rules as the value of the gift was more than Rs.75/-. The respondents contended that the representations made by the petitioner to the Director General and Ministry of Home Affairs were rejected after detailed consideration and due application of mind by the competent authority. It was also disclosed that an appeal was filed by the petitioner to the President of India which was also considered and rejected and rejection of the appeal was communicated to the petitioner by the letter dated 8th July, 1993. Regarding consideration of 'displeasure' by the DPC held on 29th October, 1991, the respondents relied on the instruction contained in para 3(ii) of Government of India, Ministry of Home Affairs O.M No.I-45026/1/25/87-Pers-II dated 28th June, 1989. The respondents admitted that before the DPC held on 20th October, 1991 there was no adverse remarks in his ACR. The respondents, however, asserted that besides the DG's displeasure, warnings were issued to him in 1991 for indiscretion in inviting unwanted elements like smugglers to a party arranged by him on the eve of his departure from BOP Balat which was taken into consideration in terms of para 6.2.3 of DOPT O.M dated 10th April, 1989. The respondents disclosed that the petitioner had represented against issue of warning and had also demanded holding of an enquiry, however, it was not felt necessary by the competent authority.

32. In para 2(xiii) of the parawise reply the respondents categorically asserted that the petitioner was conveyed adverse remarks endorsed in his ACR for the year 1991-1992 by letter dated 13th November, 1992 well before holding of DPC on 24th November, 1992. The averment made in the counter affidavit is as under:-

“2(xiii) In fact, the petitioner was conveyed adverse remarks endorsed in his ACR for the year 1991-92 vide HQ DG BSF letter dated 13.11.1992 well before holding of the DPC on 24.11.92.”

33. The respondents have also justified the adverse remarks though they were allegedly expunged on humanitarian grounds, as there was no certificate from the Superintendent of Police, Hazaripur (Bihar) and the certificate was issued by incharge Police Station, Sadar Gazipur and not Hazipur and the letter from District Magistrate, Collectorate Mujaffarpur dated 20th October, 1993 revealed that one log book of Jeep No.BPL-2380 was available with them. However, it did not mention about the seizure of the vehicle but only availability of the log book of the said civil jeep No.2380 BPL with the Deputy Collector of District, Muzaffarpur. The respondents contended that there could be no logical reason of log book being available with them even after the release of the vehicle from seizure. The respondents also denied the grounds raised by the petitioner in support of his pleas and contentions for seeking relief as prayed in the writ petition. The respondents relied on the instructions regarding the effect of award of 'displeasure' to the officers of the para Military Forces dated 28th June, 1989 which is as under:-

“Subject: instructions regarding the effect of award of DG's displeasure to officers of the para Military Forces.

Sir,

I am directed to say that the Government have been considering the question of what should be the effect of award of DG's displeasure to officers of the para military forces on the promotional prospects of the awardee of such displeasure.

02. Displeasure is not a punishment. It is generally awarded in cases where there is evidence of delinquency or irregularity, but it is not considered worthwhile to institute formal disciplinary proceedings. There may also be cases where the delinquency or irregularity is of a trivial nature or where there are extenuating circumstances which would not justify initiation of formal disciplinary proceedings; in other cases, the time and expense involved in conducting such proceedings

would not be commensurate with the delinquency or irregularity and therefore, displeasure is awarded.

03. It has been observed that the procedure followed in different para military forces in the matter of awarding displeasure or its effect is not uniform. The matter has been considered in the light of the comments of heads of para military forces and the following decisions have been taken.

i) Displeasure of the DG should be awarded after obtaining the explanation of the officer, through a formal order. The order should be conveyed to the officer.

ii) The confidential report of the officer for the period during which the displeasure has been awarded should have a record of the fact of award of such displeasure.

iii) If the displeasure has been recorded in the CR for a period prior to the normal period of consideration of CRs by the DPC, it should be ignored.

iv) If the displeasure falls within the period of consideration of CRs by the DPC, the facts and circumstances of the case leading to the award of displeasure should be placed before that DPC. The D.P.C should apply its mind to these facts and circumstances and take a view whether there has been any element of dishonesty, pecuniary gain, abuse of power or authority, moral turpitude. If any of these elements is present, then, taking a serious view of the matter, the DPC should not consider the officer for promotion for a period of one or two years from the date of award of the displeasure, as it may consider appropriate. In case the displeasure has been awarded for routine or trivial infraction of the rules and instructions, the DPC may take a more lenient view and include the officer in the panel of promotion.

v) In case where an officer who has been awarded displeasure during the period of consideration of CRs is either included in, or excluded from. The panel for promotion, the DPC must record a brief note as to why he has been so included/excluded.

04. It is requested that these instructions may be strictly adhered to when cases of promotion of officers are considered by the DPC in future.

05. This issues with the concurrence of the Department of Personnel and Training vide their note dated 24.05.1989 on F.No.1-45026/25/87-Pers. II.”

34. The respondents also relied on para 6.2.3 of O.M dated 28th August, 1989 which is as under:-

6.2.3. Before making the overall grading after considering the CRs for the relevant years, the DPC should take into account whether the officer has been awarded any major or minor penalty or whether any displeasure of any competent officer or authority has been conveyed to him as retired in the ACPs, The DPC should also have regard to the remarks against the column on integrity.

6.3.1. The list of candidates considered by the DEC and the overall grading assigned to each candidate, would form the basis for preparation of the panel for promotion by the DPC. The following principles should be observed in the preparation of the panel.

(i). Having regard to the levels of the posts to which promotions are to be made, the nature and importance of duties attached to the posts a bench mark grade would be determined for each category of posts for which promotions are to be made by selection method. For all Group C Group B and Group A posts upto (and excluding) the level of Rs.3700-5000 excepting promotions for induction to Group A posts or services from lower groups, the bench mark would be 'Good'. All officers whose overall grading is equal to or better than the bench mark should be included in the panel for promotion to the extent of the number of vacancies. They will be arranged in the order of their inter se seniority in the lower category without reference to the overall grading obtained by each of them 'provided that each one of them has an overall grading equal to or better than the bench mark of Good.

Wherever, promotions are made for induction to Group A posts or Services from lower grades, the bench mark would continue to be Good. However, officers graded as Outstanding would rank on block senior to those who are graded as Very good and officers graded as very good would rank on block senior to those who are graded as 'Good' and placed in the select panel accordingly upto the number of vacancies, officers with same grading maintaining their inter se seniority

in the feeder post.

(ii) In respect of all posts which are in the level of `3700-5000 and above, the benchmark grade should be and very good'. However, officers who are graded as Outstanding would rank on blue senior to those who are graded as Very good and placed in the select panel accordingly upto the number of vacancies, officers with same grading maintaining their inter se/ seniority in the feeder post.”

35. The petitioner refuted the pleas and contentions raised by the respondents in their counter affidavit and filed a rejoinder dated 23rd March, 1995. The petitioner placed reliance on Government of India MHA O.M No.25/18/59 Ests (A) dated 28th August, 1959 and MHA Department of Per and AR OM No.11013/13/78 Est (A) dated 11th September, 1978 and quoted the relevant portion which is as under:-

"Transaction entered into by the spouse or any other member of family of a Govt. servant out of his or her own funds (including stridan, gifts, in heritance etc.) as distinct from the funds of the Govt. servant himself, in his or her name and in his or her own right would not attract the provisions of sub rules (2) and (3) of rule - 18 CCS".

36. The petitioner again emphasized that the displeasure note given on 16th April, 1991 could not be considered by the DPC held on 29th October, 1991 as the said DPC was not entitled to consider anything after 31st March, 1991. The petitioner reiterated that he was not given an opportunity to make representation against the adverse remarks given in 1992 as adverse remarks were conveyed to the petitioner on 4th December, 1992 vide letter No.C-14011/91/90/CC/Pers/BSF/417 dated 13th November, 1992 whereas the DPC was held on 24th November, 1992.

37. The petitioner reiterated the complaints given by him to Inspector General, BSF, Shillong against the 'G'personnel, which according to him indicated that he had tried to unearth the misdeeds of persons of 'G'persons. The petitioner emphasized the complaints made by him which were not investigated. The allegations made by the petitioner in his complaint dated 9th May, 1990 are as under:-

“4. During the month of Oct '89, I was performing the duties of '3' Coy Comdr which was deployed at Balat Sub Sector. In my presence no body have dare to do some hunky punky. Even 'G' rep too try to keep away from me. On 16th Oct '89, I got a message from Bn HQ that I have been detailed as continent Comdr of BSF Raising day parade. On 19th Oct'89 I left for Bn HQ from BOP for parade. In my absence Inspr 'G' Kundan Singh was convinced that Sumer Singh, AC is out till Feb. He got the opportunity and got indulged with BD Nationals in mal practices. With the result on 23 Oct '89 some BD Nationals advertently crossed the I/B with boats in Belat river and entered into Indian territory by the approval of Inspr 'G'. Our patrol party raided in river and able to apprehend 10 BD nationals and 19 boats well inside Indian Territory. During interrogation it has been revealed that they had got the permission from Inspr 'G'. A complaint was sent to HQ(Comdt) from BOP about the incident. An inquiry was conducted by Sh. M.L.Purohit 2/IC 22 Bn BSF. It has been proved in the inquiry that Inspr 'G' Kunden Singh was involved with smugglers. But no action has been initiated by AD(G) so far. I am sending a photostate copy of above mentioned. inquiry sooner. It clearly indicates that such type of persons are having upper hand of AD(G) and getting help from all sides there it shows that AD(G) may also be involved with these persons because on many occasions I have seen Inspr 'G' used to send some items from border for AD(G). For your confirmation I am attaching one photostate copy of a slip signed by Inspr for demand of fish for AD(G). I have seen myself and even I can tell in front of them also that 'G' Staff used to send chickens, fish, milk powder end other smuggled items to AD(G) almost daily. You may detail any person who will visit to 'G' staff houses then you will find how luxuries life they are living. Which is beyond their economical power. AD(G) used to sell chickens, fish to civilian out of them which were being sent by 'G' staff from border free of cost.

5. Sir I know if a GD Officer says/tells about some facts about any 'G' person, nobody believes on him whereas a 'G' person irrespective of any rank says something wrong or produce concocted story everybody consider his words of mouth as fact(RAMBAN) this is the fate of GD persons.

6. In continuation to above, the movement AD(G) got the inquiry proceedings completed by), Sh M L Furohit 2/IC 22 Bn BSF. He called Insp. 'G'and briefed him

before the ball comes into their court, better to push it in other court. He did intentionally because he was party with Inspr 'G'. Further he consulted other 'G' persons of his staff also about the strategy for defending the case. Otherwise 'G' Branch will carry bad name or stigma on his face. Your honour after this indoor meeting he sent back Inspr Kundan Singh for collection of some dates and name of patrol/Ambush parties from registers so that they could prepare a well defended concocted story. Accordingly Inspr 'G' did so and a story was made/prepared in AD(G) Office and a complaint was submitted in back date by Inspr 'G' in the relation of inquiry conducted by Sh M L Furohit for the purpose to save their skin.

7. Sir, I can assure you that Inspr 'G' was the main agent of AD(G) who collects money from border and further handed over to AD(C). Inspr 'G' purchased a new scooter and after some days he sold the same to a civilian in Shillong. As per CSR 18, a class 'C' govt. employ also required to info the department whenever he sells/purchase any moveable/immovable property more than Rs.5,000/-. But Inspr 'G' Kundan Singh did not info/seek permission from department in transaction of his scooter. AD(C) was in picture but he never brought the matter in light. With these things you can well imagine the extent of involvement of AD(G) with 'G' staff. Sir for their own defence they want to spoil some poor fellow like me, who always take steps against dishonest persons and always speak against corrupt persons like AD(C). Sir this AD(C) will never produce the true things in front of you. He is a great dramatist always he will put a fake and sketchy picture.

8. The same complaint was signed by AD(G) in back date and further sent to your office with well designed story. A SCOI had been ordered and hope it has been completed by the Comdt 108 Bn.BSF. He included more than 30 persons (civilian/BSF) in his report for evidence. All the witnesses were tried by presiding officer and recorded their statement. During the inquiry he did not find even a single clue against me. He has submitted his SCOI proceedings with his opinion to Sec HQ SHG. A photostat copy of said proceedings also being sent on getting."

38. The petitioner has also produced the copies of various recommendations for awards to the petitioner and the reports about his completing the courses successfully and with honors.

39. During the pendency of the above noted writ petition, the petitioner was, however, promoted to the post of Deputy Commandant by order dated 16th June, 1995 and he assumed the charge of the said post. Thereafter, the petitioner was promoted from Deputy Commandant to the Second-in-Command by order dated 16th June, 2003 and he assumed the charge of the said post on the same date. From the post of Second-in-Command the petitioner was promoted to the post of Commandant on 12th June, 2007 and he assumed the charge of the post of Commandant on 12th June, 2007.

40. The petitioner placed on the record of the writ petition the subsequent facts by an additional affidavit dated 22nd July, 2010. The petitioner also asserted in the additional affidavit that Sh.Lakhwinder Singh Bal and Sh.K.N.Suyal were the petitioner's immediate juniors and consequently, all other officers below Sh.Suyal were also junior to the petitioner. According to the petitioner, Sh.Sunil Mohan Mehta IRLA No.32319 was the petitioner's immediate senior in the year 1991. The petitioner also disclosed the promotion given to the petitioner's immediate junior Sh.Lakhwinder Singh who was promoted to the post of Deputy Commandant on 5th February, 1992; to the post of Second-in-Command on 14th October, 1998; to the post of Commandant on 24th June, 2002 and to the post of DIG on 23rd November, 2009.

41. The petitioner also disclosed that his ACRs for the year ending 31st March, 1987; 31st March, 1988; 31st March, 1989 and 31st March, 1990 and 31st March, 1991 were graded Very Good and the first DPC was held in October, 1991. The petitioner reiterated that the adverse remarks given in 1992 were communicated to him on 4th December, 1992 after the DPC was held on 24th November, 1992. The additional facts disclosed and all the pleas and contentions raised in the additional affidavit dated 22nd July, 2010 were not refuted by the respondents as no response to the said additional affidavit was filed by the respondents.

42. This Court has heard the learned counsel for the parties and has also perused the writ petition, the counter affidavit and the rejoinder affidavit along with the documents filed by the parties. The respondents have also produced the extracts of the minutes of DPC held on 29th October, 1991; 24th November, 1992 and 17th

November, 1993. Perusal of the minutes of 29th October, 1991 reveals that the DPC had taken into consideration the Director General's `displeasure'dated 16th April, 1991. This is not disputed that the said DPC, in accordance with rules, had to consider the ACRs of the petitioner for five years from 1986-87 upto 1990-91, i.e. the record of the petitioner upto 31st March, 1991. If that be so, then, how, the DG's displeasure dated 16th April, 1991 could be considered by the DPC held on 29th October, 1991 has not been explained. Learned counsel for the respondents is unable to show any rule, regulation, or office memorandum stipulating that DPC would be entitled to consider any displeasure or warning given before the meeting of DPC.

43. If the `displeasure'dated 16th April, 1991 could not be considered by the DPC held on 29th October, 1991 then, the recommendation of the said DPC not recommending the petitioner for promotion to the post of Dy. Commandant cannot be sustained. In any case, as per the Instruction dated 28th June, 1989 regarding the effect of the award of displeasure, it cannot be disputed that it is not a punishment, as displeasure is awarded where there is evidence of delinquency or irregularity, however, it is not considered worthwhile to institute formal disciplinary proceedings. The Instruction dated 28th June, 1989 also stipulates that if the displeasure falls within the period of consideration of CR by the DPC, the facts and circumstances of the case leading to the award of `displeasure'should be placed before that DPC. Admittedly, the displeasure did not fall within the period of consideration of the CR for the DPC held on 29th October, 1991 which had to consider the ACRs upto the period 31st March, 1991. The above noted Instruction also contemplates that if the displeasure during the period of consideration of CR is either included in or excluded from the DPC, then it should have recorded the reason as to why such officer had been so included or excluded. In any case, the DPC held on 29th October, 1991 could not have taken into consideration the `displeasure'dated 16th April, 1991 which was given after 31st March, 1991, and also as the DPC had not recorded the reason explaining as to why the petitioner had been exclude on account of the said `displeasure'. Under instruction dated 28th June, 1989, as the displeasure was held not to be punishment and it could be acted only if it was on account of dishonesty, pecuniary gain, abuse of power or authority or moral turpitude for a period of two years only. Admittedly, the alleged

`displeasure' was on account of not informing the authorities about the gift of the car by the father of the petitioner to the minor son of the petitioner and thereafter, for sale of the car by the son of the petitioner and remitting the entire sale consideration to the father of the petitioner. Rather OM dated 11th September, 1978, relevant portion of which is quoted hereinbefore, contemplates that if the transaction was by the family member of the Government servant out of his own funds distinct from the funds of Government servant then the provision of Sub Rule (2) and (3) of the Rule 18 of CCS Rules will not be attracted. Another relevant factor is that the plea of the respondents is that the Car no. DEA 986, which was purchased by Sh. Rampat in an auction, was not transferred to the father of the petitioner. If the car was not transferred to the father of the petitioner, then the father of the petitioner could not gift it to the son of the petitioner and son of the petitioner also could not sell it so as to attract violation of CCS Rules contemplating information of the authorities of the gift being received by the son of the petitioner and later on, son of the petitioner selling the said vehicle. In the circumstances, the `displeasure' could not be granted to the petitioner, it could not be even taken into consideration for the purposes of recommendation for promotion even for two years and, in any case, the DPC held on 29th October, 1991 could not have taken it into consideration.

44. Consequently, the recommendation of the DPC held on 29th October, 1991 taking into consideration the `displeasure' of the Director General dated 16th April, 1991 cannot be sustained as the recommendation for excluding the petitioner would be contrary to the instruction and rules and beyond the period for which the DPC could take into consideration the ACRs of the petitioner.

45. Perusal of the minutes of the DPC held on 29th October, 1991 pertaining to the petitioner also reveals that it had taken into consideration a warning to the effect that the petitioner was indiscreet in not ensuring that unwanted elements like smugglers are not to be invited in the party arranged by him on the eve of his departure from the BOP Balat Area and consequently, the IG AMM and N had warned the officer to be careful in future. The said warning was not communicated to the petitioner. The DPC of 29th October, 1991 also considered the uncommunicated and adverse remarks to the effect 'needs to be kept under

watch'in the ACR for the period 14th April to 28th September, 1990. If the alleged warnings and adverse remarks were not communicated to the petitioner, they ought not to have been placed before the DPC and could not be taken into consideration by the said DPC.

46. OM No.51/3/69-Ests. (A) 27th September, 1969 and D.P. and A.R.,OM No.51/5/72-Ests, dated 20th May, 1972, clarifies regarding the warning, admonitions, reprimand, etc. which are administered in the course of normal day to day work by the superior officers. The said OM contemplates that "representations against warnings" or "communication of the displeasure of the Govt." or "reprimand" which are recorded in the confidential report of the Govt. servant should be dealt with in accordance with the procedure laid down for dealing with the representations against adverse entries in confidential report, unless an opportunity had already been given to the officer concerned to make a representation in the matter relating to the relevant incident or faults and such representation had been duly considered and a decision taken before the "warning" or "reprimand" was administered or the 'displeasure of the Govt.'" communicated to him.

47. The said adverse remark "needs to be kept under watch" appears to be without any basis on perusal of the ACRs of the petitioner which have been produced by the respondents. In any case, the said adverse remark, even if it is considered to be an adverse remark, was not communicated to the petitioner. The warning was also not communicated to the petitioner contrary to the instructions detailed in the above noted OMs and therefore, ought not to have been placed before the DPC, nor the DPC should have considered the same.

48. OM No.21011/1/81-Estt.(A), dated 5th June, 1981 also contemplates the procedure for placing the warning in the dossier of an officer and its consideration by the DPC, which is as under:-

"19. Mention of warnings/reprimands in CRs- Questions have been raised from time to time regarding the stage at which a mention about warnings, admonitions, reprimands, etc., administered in the course of normal day to day work by superior officers should be mentioned in the confidential report of the official to whom the

warning, reprimand, etc, has been administered. As there seems to be some doubt in this regard the position is clarified in the following paragraph:-

2. there may be occasions when a superior officer may find it necessary to criticize adversely the work of an officer working under him or he may call for an explanation for some act of omission or commission and taking all circumstances into consideration, it may be felt that while the matter is serious enough to justify the imposition of some formal punishment or censure, it calls for some formal action such as the communication of a written warning/displeasure/reprimand. Where such a warning/displeasure/reprimand is issued, it should be placed in the personal file of the officer concerned. At the end of the year, the reporting authority, while writing the confidential report of the officer, may decide not to make a reference in the confidential report to the warning/displeasure/reprimand, if, in the opinion of that authority, the performance of the officer reported on after the issue of the warning or displeasure or reprimand, as the case may be, has improved and has been found satisfactory. If, however, the reporting authority comes to the conclusion that despite such warning/displeasure/reprimand, the officer has not improved, as the case may be, in the relevant column in Part III of the form of confidential report relating to assessment by the reporting officer and, in that case, a copy of the warning/displeasure/reprimand referred to in the confidential report should be placed in the CR Dossier as an annexure to the confidential report for the relevant period. The adverse remark should also be conveyed to the officer and his representation, if any, against the same disposed of, in accordance with the procedure laid down in the instruction issued in this regard.”

49. The alleged warning regarding the petitioner being indiscreet in not ensuring that unwanted elements like smugglers are not invited in the party arranged by him on the eve of his departure was not communicated to the petitioner. Therefore, the petitioner could not make any representation against the same. This warning which was incorporated and not communicated has to be seen in view of the specific complaint made by the petitioner against G Company of 22 Bn. The petitioner had specifically stated in his complaint dated 9th May, 1990 that in his absence, Inspector Kundan Singh indulged in malpractices resulting in certain

Bangladeshi nationals advertently crossing the national border with boats and in Belat river and entered in the Indian territory. Some of them being apprehended during the interrogation had revealed that they had got the approval from BSF Inspector (G). The petitioner in his complaint categorically stated that the inquiry conducted by Sh.M.L. Purohit concluded that Inspector (G) was Kundan Singh involved with smugglers, still no action was initiated by AD (G). The official of the said "G" Company, therefore, became against the petitioner and made false complaints against the petitioner which, however, were found to be incorrect and consequently, no action was taken against the petitioner. The petitioner also produced a photostat copy of the slip signed by the Inspector for demanding fish from AD (G) yet surprisingly no action was taken rather the respondents without producing the report of the inquiry and any other relevant material has simply denied in the counter affidavit filed in the petition that whatsoever was stated by the petitioner is not correct. The petitioner has produced the copies of the complaint made by him, the contents of which are revealing and which have been simply brush aside by the respondents in their counter affidavit. In the circumstances, it will be reasonable to infer that the uncommunicated warnings and the adverse notes were perhaps intentionally incorporated in the summary produced before the DPC held on 29th October, 1991 in order to deprive the petitioner his recommendation for promotion by the said DPC.

50. In these facts and circumstances, it is inevitable to infer that the DPC held on 29th October, 1991 ought not to have been taken into account the displeasure of the DG and uncommunicated adverse remarks of, "needs to be kept under watch" and the alleged warnings dated 12th February, 1991 into consideration while assessing the petitioner for recommendations to the post of Dy.Commandant. In the circumstances, the petitioner shall be entitled for a review DPC which will take into consideration his five ACRs for the period 1986 -87 to 1990-91 and in case the review DPC finds the petitioner to be fit for recommendation, then the petitioner shall be entitled for promotion as Dy.Commandant from the date his immediate junior was appointed as Dy.Commandant in February, 1992 or such relevant dates.

51. The respondents did not deny categorically the plea of the petitioner that though the adverse remarks ending the period 31st March, 1992 were communicated to the petitioner by letter dated 13th November, 1992, however, the said letter was received by the petitioner on 4th December, 1992 after the DPC was held on 24th November, 1992. No reason has been disclosed as to why the remarks could not be communicated to the petitioner prior to holding of the DPC and thus depriving the petitioner his right to make a representation and to get it considered by the respondents.

52. The respondents have not denied a categorical assertion by the petitioner that the letter dated 13th November, 1992 was delivered to him on 4th December, 1992. That averment of the petitioner has not been denied and nothing has been produced by the respondents to show that the letter dated 13th November, 1992 was delivered by the petitioner before the DPC held on 24th November, 1992. In any case, even if for some reason it can be inferred that the letter was, in fact, delivered to the petitioner prior to holding of DPC on 24th November, 1992, it is apparent that he was not given sufficient time to make a representation against the adverse remarks and the representation of the petitioner which he had made had not been considered before the DPC held on 24th November, 1992.

53. It is apparent that the respondents have conveniently skirted the relevant issues. The petitioner has categorically contended in the writ petition that adverse remarks which were not communicated to him and against which he was not given enough time to make a representation and before holding the DPC his representation was not decided and such adverse remarks could not be considered by the DPC held on 24th November, 1992. The inevitable inference, in the facts and circumstances, is that on behalf of the respondents an incorrect affidavit has been filed that the adverse remarks were communicated to the petitioner prior to holding of DPC on 24th November, 1992.

54. The respondents, however, admitted that the petitioner had made a representation against the adverse remarks given in 1992 by his letter dated 23rd December, 1992 which was allegedly considered in detail. His representation was considered and rejected and rejection was communicated to the petitioner by letter

dated 19th April, 1993. The respondents admitted that a second representation was made by the petitioner against the adverse remarks to the Director General which was allowed on alleged humanitarian grounds. The adverse remark for “for misuse of Government transport and giving false certificate” was expunged and the petitioner was informed accordingly by letter dated 27th December, 1993. This was again done after 17th November, 1993 when the third DPC which had also not recommended the case of the petitioner had already taken place.

55. It is apparent that the first representation against the adverse remarks made in 1992 was rejected and the adverse remarks were communicated to the petitioner after the DPC was held on 24th November, 1992. The representation was rejected and the second representation was considered and the adverse remarks were expunged, however, these remarks were expunged after the DPC was again held on 17th November, 1993 and were communicated to the petitioner by letter dated 27th December, 1993.

56. The respondents have contended that the second representation could not be considered under the rules, however, the learned counsel for the respondents has failed to show any rule or regulations under which the second representation could not be considered. The respondents though has considered the second representation and expunged the remarks on the plea that it was done on the humanitarian grounds. However, perusal of the communication sent by the concerned police officials it is apparent that such remarks were contrary to the records of the police authorities, and in the circumstances, the respondents had no option but to expunge the remarks.

57. The ground has been taken that the adverse remarks were expunged on the humanitarian ground. It appears to be a calculated and designed plan first not to communicate the adverse remarks before holding of the DPCs and thereafter, rejection of the representation and deciding the second representation in the teeth of the record of the police authorities only after another DPC was held on 17th November, 1993. The pleas of the respondents give an impression that the adverse remarks were communicated in time as representations were considered, rejected and subsequently, allowed on humanitarian grounds, however, in the

totality of the facts and circumstances and considering the records which were contrary to the adverse remarks given, the inevitable inference is that the adverse remarks were given to spoil the promotion prospects of the petitioner. The plea that the adverse remarks were expunged on humanitarian grounds is also misleading. In any case, once the adverse remark was expunged it could not be taken into consideration but from the record it is apparent that both the DPCs held on 24th November, 1992 and 17th November, 1993 had taken them into consideration depriving the petitioner recommendation for promotion to the post of Deputy Commandant.

58. The adverse remark “needs to be kept under observations” which was retained even after expunging of the adverse remarks also does not have any basis. Learned counsel for the respondents is unable to explain that if the adverse remarks i.e. warning for misuse of Govt. transport and giving false certificate was expunged as it was not found to be correct, based on the communication received from concerned police authorities then, how, could the adverse remarks “needs to be kept under observation” survive.

59. Normally, the courts, in exercise of its jurisdiction of judicial review under Article 226 of the Constitution of India, does not have to re-appreciate the facts, however, in the present facts and circumstances, the above noted reasons are so compelling that this Court has no option but to quash even the ‘displeasure’ and warnings given to the petitioner during the relevant period of 1991 which were taken into consideration by the DPC held on 29th October, 1991, 24th November, 1992 and 17th November, 1993.

60. In the totality of the facts and circumstances, the displeasure of the Director General given on 16th April, 1991 and the warnings and adverse remarks in the ACRs are quashed and expunged. The respondents are directed to hold the review DPC for the petitioner to consider him for promotion from the post of Assistant Commandant to the post of Dy. Commandant, and in case the review DPC finds the petitioner to be fit for promotion then to promote the petitioner from the date the immediate junior of the petitioner was promoted to the post of Dy. Commandant. The petitioner shall also be entitled for all the consequential

promotional pay allowances and other benefits. The writ petition is allowed in terms hereof. The petitioner shall also be entitled for a cost of Rs.30,000/- against the respondents. Cost be paid by the respondents within a period of one month. The Review DPC should also be held by the respondents within three months, and in case the review DPC recommends the petitioner for promotion, the petitioner be given promotion to the post of Dy. Commandant from the date his immediate juniors were promoted within one month thereafter. With these directions the writ petition is allowed with costs.

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