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**(2024) 02 DEL CK 0026**

**Delhi High Court**

**Case No:** Civil Writ Petition No. 2078 Of 2022

Kuldeep Sharma

APPELLANT

Vs

Union Of India & Ors.

RESPONDENT

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**Date of Decision:** Feb. 9, 2024

**Acts Referred:**

- Constitution of India, 1950 - Article 226

**Hon'ble Judges:** V. Kameswar Rao, J; Saurabh Banerjee, J

**Bench:** Division Bench

**Advocate:** Saahila Lamba, Ripu Daman Bhardwaj, Kushagra Kumar, Abhinav Bhardwaj

**Final Decision:** Disposed Of

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### **Judgement**

Saurabh Banerjee, J

1. As per facts involved, the petitioner, an Assistant Sub-Inspector (Ministerial) in the Border Security Force [Hereinafter referred to as 'BSF'], communicated the adverse remarks recorded in his Annual Performance Appraisal Report [Hereinafter referred to as 'APAR'] for the period from 01.04.2011 to 31.03.2012 and was also required to make a representation qua the same vide letter dated 17.12.2012 issued by the Commandant of 32 BN of BSF [Hereinafter referred to as 'Commandant'].

2. On 09.01.2013, the petitioner made a representation to the Commandant, which was rejected by the Deputy Inspector General, Station Headquarters, [Hereinafter referred to as 'DIG, SHQ'] BSF Jammu, vide order dated 03.04.2013.

3. Thereafter, the petitioner made other representations too, which, on 05.12.2018, were rejected by the Spl. Director General [Hereinafter referred to as 'DG'] (Western Command), BSF. Undeterred, the petitioner once again made another representation before the DG, BSF on 06.09.2016 assailing the legality of the order dated 05.12.2018 as also the concerned APAR. This also, as before proved to be of no avail.

4. As such, the petitioner approached this Hon'ble Court by way of a writ petition being W.P.(C) No.2794/2021 against the respondents and the same was disposed of by this Court vide order dated 02.03.2021 directing the respondents to decide the second representation made by the petitioner by way of a

reasoned order within a period of 8 weeks without being influenced by order dated 03.04.2013.

5. The said representation was also rejected by the DIG SHQ BSF Jaisalmer (North) vide impugned order dated 23.04.2021 in light of fresh comments received from the Initiating Officer [Hereinafter referred to as 'IO'], the Reviewing Officer [Hereinafter referred to as 'RO'] and the Accepting Authority [Hereinafter referred to as 'AA'].

6. Hence, the petitioner vide the present petition under Article 226 of the Constitution of India seeks quashing of the impugned order dated 23.04.2021 and also a direction to the respondents to expunge the adverse remarks and upgrade his concerned APAR.

7. Learned counsel for the petitioner submits that the only rationale for the adverse remarks/ downgrading the concerned APAR is that during the period under report, petitioner had remained either on leave or under treatment due to his psychotic disorder ailment and also did not assume any individual charge due to poor knowledge of office work because of which the IO and AA had graded the petitioner as 'Average', albeit, without serving upon the petitioner any memo, advisory or like even though the RO had graded the petitioner as 'Very Good'.

8. Learned counsel for the petitioner further submits that there was an apparent conflict between the grading given by the IO and RO because even though the IO had graded the petitioner as 'Average', the RO had graded the petitioner as 'Very Good'. In light of these circumstances, she submits that it was incumbent upon the AA to specify on what basis it agreed with the grading of the IO and disregarded that of the RO.

9. Learned counsel for the petitioner then submits that the IO was not authorized to initiate APAR of petitioner inasmuch as APAR of the petitioner, then a Head Constable, was required to be initiated by an Inspector whereas in the present case the concerned APAR was initiated by a Sub-Inspector. In view thereof, she submits that although the IO has stood by the adverse remarks given by him in the concerned APAR in question he has also opined that competent authority may consider upgradation of the concerned APAR in view of long service career of petitioner, especially in light of the extraordinary conduct of the petitioner and the same is evident from the fact that he has received a total of 13 rewards and has received 'Very Good' grading in all APARs for the period of 2012-2013 to 2018-2019.

10. Per Contra, learned Central Government Standing Counsel for respondents submits that upon coming to know about the adverse remarks made against the petitioner, the petitioner made a representation on 09.01.2013, which despite being forwarded to the competent authority was dismissed vide order dated 03.04.2013. Then, in light of the Pers Dte (Confidential Section) L/No. A-28018/40/2014/CS/Pers/BSF/3251-3521 dated 12.09.2014 and the Department of Personnel and Training OM No. 12011/1/2010-Est(A), dated 13.04.2010, he submits that no second appeal/ representation against the adverse remarks/below bench mark grading in APAR can be entertained after the first appeal/representation has been decided by the competent authority.

11. Learned CGSC further submits that despite the above, the representation made to the DG BSF vide letter dated 06.09.2019 was also examined and rejected by DIG SHQ, BSF, Jaisalmer vide order dated 03.10.2019 as also that though in compliance of order dated 02.03.2021 passed by a Co-ordinate Bench of this Court, fresh comments of IO, RO and AA on the concerned APAR were obtained, however, the competent authority finding no merit therein rejected the same.

12. This Court has heard the learned counsel for the parties and has also perused the documents on record.

13. The facts herein reveal that apart from the concerned APAR, the petitioner is having an unblemished long-standing career of fourteen years, in which he has discharged his duties to the satisfaction of the authorities.

14. Facts also reveal that the petitioner was not served with any notice qua his APAR though it is also a matter of settled law and practice that though, no notice is required at the time of appraisal of the performance of any personnel like the petitioner, however, at the time of recording of any adverse remarks, particularly down-grading of such personnel like the petitioner, notice is required to be served for giving the said personnel an opportunity to present his case either in the form of representation or reply. Not being so, there is a violation of the principle of natural justice and of the principle of audi alteram partem.

15. More so, since as per Swami's Compilation on Confidential Reports of Central Government Employees, the APAR system is meant for improving the performance of the personnel as also for assessing potentialities and for providing appropriate feedback for correcting deficiencies and improving performance. In fact for any man in the uniform like the petitioner herein, APAR has sufficient meaning and value. Any improper assessment having adverse impact is most likely to have an immense bearing on his career progression. In effect, the purpose of informing any such personnel like the petitioner qua whom adverse remarks are being recorded, is to afford such personnel an opportunity to correct the errors in the judgment of the officer writing the report.

16. In this regard reliance is placed upon judgment of the Hon'ble Supreme Court in Sukhdeo v. Commissioner Amravati Division (1996) 5 SCC 103 wherein it was held as under:

*"6. ... It would be salutary that the controlling officer before writing adverse remarks would give prior sufficient opportunity in writing by informing him of the deficiency he noticed for improvement. In spite of the opportunity given if the officer/employee does not improve then it would be an obvious fact and would form material basis in support of the adverse remarks. It should also be mentioned that he had given prior opportunity in waiting for improvement and yet was not availed of so that it would form part of the record. ..."*

17. Not to lose sight that the above view has also been reiterated by the

i. M.A. Rajasekharaiah vs. State of Karnataka and Anr. (1996) 10 SCC 369;

ii. State of UP vs. Yamuna Shanker Mishra and Anr. (1997) 4 SCC 7; and

iii. Dev Dutt vs. Union of India and Ors. (2008) 8 SCC 725.

18. That, as no such notice was ever served upon the petitioner at any stage is an admitted position, the same is against the very basic enshrined principle of natural justice as also audi alteram partem. Even otherwise, the concerned APAR is neither reflecting any change in circumstances nor any specific instances of non-performance or variation in the duties of the petitioner or like. In fact, in the opinion of this Court, the same is neither sufficient nor satisfactory and is rather arbitrary. Such general APARs are not sufficient to conclude anything adverse, more so, as there should be something more, may be not contending any details/reasons but definitely and at least more speaking having some meaning. This Court finds that the concerned APAR, is general, nothing short of being vague and the respondents were required to tread with more caution and care.

19. For the foregoing reasons and factual matrix involved, the petition is allowed and the order dated 23.04.2021 is quashed and set aside. As a corollary, the respondents are directed to expunge the adverse remarks and the grading of 'Average' in the APAR of the petitioner for the period from 01.04.2011 to 31.03.2012 and to grant all the consequential benefits to the petitioner including a revised benchmark grading of 'Very Good', within a period of eight weeks from today, after following due procedure in accordance with law.

20. Accordingly, the present writ petition is disposed of in the above terms, with no order as to costs.