

(1990) 12 MP CK 0014

Madhya Pradesh High Court (Gwalior Bench)

Case No: M.P. No. 1386 of 1989

Mohinder Singh Chhikara

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision: Dec. 14, 1990

Acts Referred:

- Constitution of India, 1950 - Article 14

Citation: (1991) MPJR 18 : (1991) 36 MPLJ 725 : (1991) MPLJ 725

Hon'ble Judges: Shacheendra Dwivedi, J; R.C. Lahoti, J

Bench: Division Bench

Advocate: H.N. Upadhyaya, for the Appellant; N.P. Mittal, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

R.C. Lahoti, J.

The petitioner, a Commandant in B.S.F., seeks quashing of an adverse entry in the Annual Confidential Report for the year ending 31st December 1986 as also of the orders, Annexures P/12, R/4 and P/14, rejecting the representations made by the petitioner.

The entry under challenge (Annexure P/8) reads as under :-

".....He was averse to touring."

The petitioner has placed on record a number of documents seeking to demonstrate that during the period expiring 31st December 1986, and even before, the petitioner was not enjoying sound health but in spite of that he was given such postings and assignments, with such duties, as he could not have undertaken on account of his ill-health. He did make several prayers for giving appropriate postings with due regard to his ill-health and disabilities. He was examined by the Medical Board also from time to time. However, the superior officials were not considerate

to the expectations of the petitioner. The petitioner also submits that on the facts and in the circumstances in which the petitioner was placed during the year 1986, the adverse entry was unwarranted and unjustified.

What is not disputed is that the adverse entry made by the Deputy Director, Personnel, having been communicated to the petitioner, he made a representation (Annexure P/9), but it was rejected. He made yet another representation (Annexure P/11) to the same authority. The representation contained a prayer that in the event of the representation not finding favour with the addressee, the petitioner be permitted to move to the higher authorities for justice. The Deputy Director, Personnel, rejected the representation vide order dated 7-4-1-1989 (Annexure p/12) observing that the representation having once been rejected there was no provision for further representation to the same authority. Dauntless the petitioner made yet another representation (Annexure P/13) addressed to the Secretary, Ministry of Home Affairs, Government of India, through proper channel. The channel, instead of forwarding the representation, rejected the same, vide order dated 6-6-1989 (Annexure P/14) saying that it was barred by time.

On behalf of the respondents all the material averments made in the petition have been denied. It is submitted that the entry in question in the confidential roll was rightly and bona fide made and the representations were rightly rejected.

It is common ground that the matter as to confidential report of the employees in B. S. F. is governed by the Instructions issued by the Personnel Directorate, H. Q. D. G., B. S. F., New Delhi, contained in a leaflet entitled "Border Security Force - ACRs Procedure and Instructions, 1983". The relevant extracts therefrom are quoted hereunder :-

"13(b) Confidential Report- means confidential report assessing the performance, character, conduct and qualities of every member of the Service usually written for each calendar year or financial year as the case may be as specified by the Government (ordinarily within 2 months of the close of the said year).

(c) Confidential Roll- means the compilation of the confidential reports written on a member of the Service and includes such other documents as may be specified by the Central Government, by general or special order, in this behalf.

It is the duty of the Reporting Officers to be objective in assessing an officer's capabilities and performance. The report should, therefore, not only be objective but also give a true measure of the officers' performance.

In communicating remarks to the officer reported upon, the following procedure should be adopted :-

(a)...

(b) Where an adverse entry is made, whether it relates to a remediable or to an irremediable effect (including a reference to the communication of a "warning" or "displeasure of the Government" or a "reprimand" it should be communicated under the order of, and wherever possible, by an officer superior to the one to whom the remarks are communicated. In the case of an officer holding the post of Secretary to the Government of India (which term includes Additional Secretary and Special Secretary) such remarks will be communicated by the Cabinet Secretary. In all these cases, substance of the entire report including what may have been said in praise of the officer, should also be communicated, and

(c)..."

"57. A member of the service who has been communicated adverse remarks may represent to the authority higher than reviewing authority, against the adverse remarks communication to him within 3 months of its receipt by him.

"63. A further representation against the orders of competent authority rejecting a representation against adverse remarks may be considered by a superior authority administratively, provided that the further representation is made within six months of the orders communicating the rejection of the original representation."

It is submitted by the learned counsel for the petitioner that the adverse entry in C. R. was not warranted looking to the circumstances in which the petitioner was placed and in which he was required to perform his duties including the touring ones; that the representation was not satisfactorily considered; and that the subsequent representation was unauthorisedly rejected by the competent authority while it should have been forwarded to and disposed of by the superior authority.

At the very outset it may be stated that the contention of the petitioner that he was not communicated with the adverse entry in the C. R. does not merit any consideration factually and deserves to be rejected outright because several documents placed on record, showing the correspondence between the petitioner and the respondents, between the date of the entry and the filing of this petition, go to show that such a grievance was not raised at any time before filing of the petition. Moreover, if the entry was not communicated there would have been no occasion for the petitioner to have made the representation as also the subsequent representation.

The well recognised and accepted practice of making annual entries in the confidential reports of subordinate officials by superior ones has a public policy and purposive office-procedure behind. It is one of the recognised and time tested modes of exercising administrative and disciplinary control by a superior official over his subordinates. It casts an obligation on the superior officer to keep a continuous watch and vigil over the performances of his subordinates and continue to make an assessment of quality and quantity in performance and of progress of the employee round the year and then to make a record in objective manner of

assessment impressions formulated. The entry is not to work as a teaching cane. The superior officer has also to act as a guide and philosopher of his subordinates. The entry in the confidential rolls cannot be a reflection of personal whims, fancy or prejudices, likes or dislikes, of the superior. The entry is supposed to reflect a note of objective assessment coupled with an effort at guiding the employee assessed with an idea of securing an improvement in his performance where need be; to admonish him with an idea of shortcomings found being removed, and appreciating him with an idea of toning up and maintaining his imitable qualities, by patting on his back. An entry consisting of a few words or a few sentences is supposed to reflect the sum total of the impressions formulated by the superior officer who had the opportunity of forming those impressions in his mind by having an opportunity of looking at his subordinate round the period under review. In the very nature of things, the process is complex and the record of impressions so formulated is a result of multiple factors simultaneously playing on both the sides. Though the record of performances throughout the period under review may be made available to any one else (the Court, for the matter of that) yet such other person will not be in a position to rewrite the entry or to substitute his own impression with justification in place of the record made by the person who had actually held the place and made the entry.. That is the difficulty nearing an impossibility, felt while exercising the power of judicial review in the matter touching entries in the confidential records. Mostly the matter as to annual entries in confidential records is governed by the Instructions issued from time to time by the departmental heads laying down sufficient guidelines from which the officers entrusted with the task of making entries have to take light. Such instructions contained in circulars, leaflets or booklets, do not have the binding efficacy of law. Nevertheless the breach of the instructions by the superior officers may provide cause of action to the officer assessed for challenging the adverse entry as vitiated by arbitrariness.

In [R.L. Butah Vs. Union of India \(UOI\) and Others](#), the Instructions issued in the matter of preparation and maintenance of confidential records by the Central Water and Power Commission (Water Wing) came up for consideration of their Lordships. Their Lordships" observations in reference thereto made in para 13 do have general applicability, and are extracted hereunder:-

"....a confidential report is intended" to be a general assessment of work performed by a Government servant subordinate to the reporting authority, that such reports are maintained for the purpose of serving as data of comparative merit when questions of promotion, confirmation, etc. arise. They also show that such reports are not ordinarily to contain specific incidents upon which assessments are made except in cases where as a result of any specific "incident a censure or a warning is issued and when such warning is by an order to be kept in the personal file of the Government servant."

Their Lordships overruled the contention that before any adverse entry is made an opportunity of hearing is required, holding that it was a misapprehension to assume that an adverse entry in confidential report amounts to penalty of censure. Their Lordships observed :-

"Making of an adverse entry is thus not equivalent to imposition of a penalty which would necessitate an enquiry or the giving of a reasonable opportunity of being heard to the concerned Government servant."

In [Shri Parvez Qadir Vs. Union of India \(UOI\)](#), their Lordships approved the criteria of adjudging the suitability of the officers by looking into the past performance as can be gleaned from the confidential records. Vide para 17 their Lordships observed :-

"The past performance of an officer being one of the criteria for making selection, the only way to adjudge their suitability is by perusal of confidential records. It is true that confidential records do not sometimes give a true picture due to vagaries of the recording officer. The human fallibility and want of objectivity, in the superior officer are factors which cannot be eliminated altogether. For that matter one can ask what method is perfect? For this reason, certain safeguards have been provided in order to make them as objective as possible. If there is an adverse entry against any officer that officer is given an opportunity to explain. After the explanation is given, the superior officer as well as the Government ultimately decide whether that remark by the recording officer was justified or not, and if it is not justified the Government can always order its deletion. Sometimes vagary may enter into the service confidentials, and it cannot be postulated that all superior officers who have been empowered to finalise such entries will suffer from any of those traits because the actions of the officer concerned may not have any immediate impact upon him and consequently his sense of objectivity will not be dimmed or strained. In our view, often enough, the entries in confidential records are themselves an insignia of the capacity and capability of the maker as a superior officer as well as a commentary on the quality of the officer against whom that confidential remark is being noted. But those who are charged with the duty to oversee that these entries are fair, just and objective quite often do intervene and rectify any entry on representation being made against it at the proper time."

In O. and N. Gas Commission v. S. Iskander Ali 1980 (2) SLR 792, their Lordships repelled the contention that acting on the remarks made in the assessment roll was to proceed by way of punishment. Their Lordships further held that these remarks are not intended to cast any stigma.

A Division Bench of the High Court of Bombay in Vithalrao v. State of Maharashtra 1983 (1) SLR 255, repelled the contention forcefully advanced against the system of maintaining the confidential records and refused to accept the argument that tenure of any Government servant would not be safe and secure if decisions were founded on one sided subjective remarks, correctness of which was never put to

test. The Division Bench availed the opportunity for examining the utility and the vice inherent in the method still observing that the same was required to be maintained for its sheer necessity in public interest in any system where master and servant relationship exists. To quote from para 15 :-

"Any master in the ordinary course of the employment has to make some estimate of his servant's calibre and he is guided by this estimate while exploiting servant's talents for his own end. Such estimate is inevitably subjective and is bound to operate effectively in his dealing with his servants, excepting in fields where the servant is statutorily protected against its adverse effects. Where a master is an individual or a small group of individuals, even a mental note of the calibre, capacity, aptitude, abilities, "alents, habits and the character, etc. of the servant can meet such requirement. Where, however,, the master happens to be a vast institution like the Government and a servant has to work under a floating army of several superiors, such "estimate, so essential for the functioning of the administrative machinery and putting the talents of the servant to maximum possible use, cannot be made available unless written record is maintained by the superiors under whom he has occasion to work. Maintenance of such records ordinarily is regulated by administrative rules or instructions. Such record is maintained regularly and in the ordinary course of duties by the superiors in the

(v) Action is taken on the basis of remarks in character roll in the matter of allowing crossing of efficiency bar, promotion, supersession or reversion etc. Adverse entries affect the service prospects of an employee and have civil consequences.

(vi) At the time of record of confidential records, the employee is not entitled to any hearing.

(vii) It is only after the record of the confidential reports and the communication thereof, he is given an opportunity to make a representation against the adverse entry.

(viii) 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.

(ix) If the employee does not make a representation against the adverse entry after communication, it becomes final.

x x x

(xiii) If the adverse entry is not communicated at all for an unusually long period and action is taken on the basis of the adverse entry, a Government servant can ask for an appropriate writ directing the Government to communicate the adverse entry and to dispose of the representation, if any. In appropriate cases depending on facts and circumstances, adverse action taken against the Government servant is liable to be quashed."

We find ourselves in entire agreement with the views expressed by the Full Bench as noticed hereinabove.

The above noted authorities make it clear that though the entries in character rolls are reflections of the subjective impressions formulated by an officer nevertheless he has to be objective in his approach. An entry in the character roll need not satisfy the requirement of natural justice at the time of its making.

It is now well settled that even the Administrative actions of the State and statutory authorities are not immune from judicial review and arbitrariness in the State action would lead Article 14 of the Constitution spring in action, striking out State action, if vulnerable. Every State action has to stand by reason and be subject to rule of law. Still the scope of judicial review is limited. This Court would not substitute its opinion for the decision reached by the competent authority by a fair procedure. Judicial review is not concerned with the decision, but with the decision making process. Unless this restriction on the power of the Court is observed, the Court would under the guise of preventing the abuse of power, be itself guilty of usurping power which does not belong to it. (See the observations of their [Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay](#), para 31)

The facts of the case as brought on record demonstrate without any manner of doubt the violation of the provisions contained in paras 53(b), 57 and 63 of Procedure and Instructions. The petitioner was communicated prescribed form. Copies are required to be sent to the Head of the Department who is also required to verify such remarks and require the author of the remarks to reconsider the same if the Head of the Department thinks it so necessary. This itself tends to ensure the truthfulness of the remarks. It is true that such estimate is subjective and one-sided and is open to the infirmities implicit in such procedure. It is also true that possibility of some dishonest superior abusing his position and damaging the record of such servant maliciously cannot be totally ruled out. But further guarantee of the genuineness is afforded by the record being maintained by successive superiors from time to time. It is inconceivable that all the successive "superiors of the same servant would commit error or continue to bear malice against him and make unfavourable remarks without any rhyme or reason."

xxx

"It is this record which enables the Government, like any other master, to make up its mind while allotting work, places and promotions and in various other administrative fields. It is difficult to conceive of any administration functioning without such record. Maintenance of such record is not contrary to any provision of law. On the other hand, it is required to be maintained out of sheer need in public interest. It is also an ordinary incident of the relationship of master and servant. Whatever unfairness is involved in allowing the remarks to be made behind the back of such servant, is outweighed by the mode in which it is maintained and the public

interest as a whole, which can ill-afford to dispense with such record. This is the only way to strike a balance between the rights of the citizen and the public interest."

It will be useful to notice the law as to maintenance of confidential rolls as summed up by a Full Bench of Orissa High Court in its decision in S. S. S. Venkataraao v. State of Orissa 1974 (2) SLR 899, as under :-

"(1) Maintenance of character rolls is not enjoined by any statute or rules framed under Article 309 of the Constitution. Principles regarding record of confidential reports and communication of administrative instructions issued from time to time. The circular which holds the field at a particular point of time is to be followed in its entirety.

(ii) Character rolls are maintained primarily for the benefit of the Government. Government as the master is to make its own estimate of the calibre of its servants and to exploit the talents of its servants for its own end.

(iii) The instructions prescribe guidelines for subordinate officers in making assessment of the worth and calibre of their subordinates.

(iv) These circulars bind the departments under the administrative control of the Government. with the substance of only that part of the entry which ran adverse to him, but not with the substance of the entry report including what may have been said in his praise. (This fact is being recorded on perusing the entire filled up proforma, containing stagewise information touching the petitioner, leading to the annual entry in confidential roll, a document not placed on record with the return, but made available in a sealed cover for perusal of the Court). It is only the communication of the substance of the entire report and not the adverse part alone which would have enabled the petitioner to make an effective representation. We are, therefore, of the opinion that the petitioner was denied an effective opportunity of making a representation under para 57 of the Procedure and Instructions.

The petitioner was also denied the opportunity of making a subsequent representation to the superior authority under para 63. The petitioner's subsequent representation, aggrieved by the rejection of his first representation by the competent authority, was rightly made through proper channel as the discipline of the force or of any other Government Department would demand. The competent authority should not have withheld the representation and disposed it of by itself saying that a reconsideration was not permissible. The competent authority should have forwarded the representation to the superior authority, empowered to deal with subsequent representation under para 63 of Procedure and Instructions. Yet another one was withheld on the ground of its being time barred which too was an arbitrary and unreasonable act inasmuch as the first "subsequent representation" having not reached the superior authority, the second "subsequent representation" should have been read in continuation of the first one having the effect of inviting attention of the competent authority to the necessity of the subsequent

representation being forwarded and placed before the superior authority for disposal. The fault with the decision making process is clearly demonstrated which having caused prejudice to the petitioner, is vulnerable to judicial review in the facts of the case.

Consequently, the petition is partly allowed. The communication of A.C.R. for the year ending 31st December 1986 as contained in Annexure P/8, the rejection by the Director Personnel, of the representation against it, (Annexure R-4) and the rejection of the subsequent representations vide Annexures P/12 and P/14 are all quashed. It is directed that the substance of the entire report and not the adverse part alone, for the period ending 31st December 1986, shall be communicated to the petitioner consistently with para 53 of the Procedure and Instructions. Till then the A. C. R. for the period ending 31st December 1986 shall not be acted upon. On such communication being, made the petitioner shall have the right and liberty of making a representation and a subsequent representation, if need be, as contemplated by the Procedure and Instructions. There shall be no order as to costs.