

Serial No. 01
Regular List

HIGH COURT OF MEGHALAYA
AT SHILLONG

WP(C) No. 23 of 2017

Date of Decision: 06.05.2021

Shri. Joseph K.S. Vs. Union of India & Ors.

Coram:

Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Petitioner/Appellant(s) : Mr. M. Chanda, Adv.
For the Respondent(s) : Dr. N. Mozika, ASG. with
Ms. L. Jana, Adv.

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| i) | Whether approved for reporting in Law journals etc.: | Yes/No |
| ii) | Whether approved for publication in press: | Yes/No |

1. In brief, the case of the Petitioner is that he was appointed as Nb/Sub Clerk on 25.06.1987 in Assam Rifles and is working under the administrative control of the Commandant, 15 Assam Rifles, Nagaland.

2. The Petitioner has referred to his ACR for the year 2011-12, 2012-13, 2013-14 and 2015-16 where he was awarded grading of Good/Very Good. However, in his ACR for the period 01.04.2014 to 31.03.2015, he was awarded grading of '4' with some adverse remarks without specifying any particular instance of lapse or unsatisfactory service on his part.

3. The Respondent No. 2 vide letter No. I.31019/AR/Rev/2016/Adm-III/287, dated 02.09.2016 (Annexure-6 of the writ petition) has published a list of Assam Rifles JCOs group 'C' Non-gazetted employees (Ministerial) i.e. Nb Sub/Clk for extension/non extension of service beyond 30 years of

qualifying service or on attaining 55 years of age whichever is earlier, the list being issued with reference to Fundamental Rule 56 (j) and Appx 10 to Rule 48 of CCS (Pension) Rules 1972. The name of the Petitioner appears at Sl. No. 1 of Appx 'B' of the said letter dated 02.09.2016.

4. In the said letter dated 02.09.2016 at paragraph 3, it is stated that the JCOs mentioned in Appx 'B' have not been granted further retention being not eligible and they will retire from service on due date after issuance of necessary orders as per Rule 48 (1)(b) of CCS (Pension) Rules, 1972. The reason for the Petitioner not being eligible for further retention is due to the fact that he did not meet the ACR criteria.

5. The Petitioner has also received a show cause notice No. Rec (Adm-III)/Review/2017/031, dated 25.01.2017 (Annexure-8 of the writ petition) which according to him is a reference to a communication to the effect that a review board was constituted in August 2016 to ascertain physical fitness, effectiveness and competency to perform duties and has found that the Petitioner has not met the ACR criteria for the year 2014-15 in favour of retention in service beyond 30 years. The Petitioner was accordingly directed to show cause as to why action under Rule 48(1) (b) of CCS (Pension) Rules, 1972 should not be initiated to retire him from service w.e.f. 01.07.2017. A reply to this show cause notice was send by the Petitioner vide letter dated 09.02.2017, however, vide Order No. Rec (Adm-III)/Review/2017/047, dated 10.02.2017 (Annexure-10 of the writ petition) the Petitioner was directed to retire from service on the forenoon of 01.07.2017.

6. Therefore, being aggrieved by the said impugned letter dated 02.09.2016 (Annexure-6), the Show Cause Notice dated 25.01.2017 (Annexure-8) and the Order dated 10.02.2017 (Annexure-10), the Petitioner has approached this Court with this instant writ petition with a prayer to set aside and quash the same.

7. Heard Mr. M. Chanda, learned counsel for the Petitioner who has

submitted that the Petitioner has been working with the Assam Rifles for a number of years and there is nothing adverse recorded against his character or integrity. In fact, from his ACR for the year 2011-12 up to the year 2015-16 they are either above average, high average with average being only for the year 2014-15. The Service Review Board which has been convened in the office of the Commandant 15th Assam Rifles have found the Petitioner to be medically fit as he was assessed SHAPE I.

8. It is also the submission of the learned counsel for the Petitioner that on coming to know that he was recommended not to be extended for service for not meeting the ACR criteria, the ACR of the Petitioner for the year 2014-15 not being communicated to him, he had submitted a representation on 27.11.2016 to the Medical Superintendent, ARCH, Sukhovi and officer Commanding Tac HQ 15 AR to supply him with a copy of the adverse ACR, but the same was not supplied to him, he was therefore deprived of the opportunity to make a representation against the same which is against the settled principle of law.

9. It is also the submission of the learned counsel for the Petitioner that the 'Record Office Instruction' (ROI) No. 4/97 clearly provides that:

“Communication of Weak Points/Adverse Remarks:

40. Weak points/adverse remarks of reporting officer in the CR will be communicated to the JCO in writing. Remarks of reviewing/senior reviewing officer where applicable, will be communicated in writing through the initiating officer”

“Representation against Confidential Report:

43. Representation and complaint against the weak points and adverse remarks communicated to a JCO will be submitted within 60 days after the date of initiation of the remarks to the JCO concerned. The representation/complaint will be routed through the concerned DGAR.”

The Respondents have not complied with the above quoted instruction in ROI No. 4/97 and as such, it is reiterated that the uncommunicated adverse

remarks should not have been taken into consideration while resorting to the exercise of power under clause 56 (j) of the Fundamental Rules and Rule 48 (1) (b) of the CCS (Pension) Rules, 1972. In this regard, the Petitioner has relied upon the case of:

- i) ***Dev Dutt v. Union of India & Ors: (2008) 8 SCC 725, paragraphs 12, 15, 16 & 17;***
- ii) ***Abhijit Ghosh Dastidar v. Union of India & Ors: (2009) 16 SCC 146, paragraphs 5, 8 & 10;***
- iii) ***State of Gujarat and Anr v. Suryakant Chunilal Shah: (1999) 1 SCC 529, paragraphs 25 and 28.***
- iv) ***Sukhdev Singh v. Union of India & Ors: (2013) 9 SCC 566, paragraphs 4, 5, 6, 7 & 8.***

10. The learned counsel for the Petitioner has also submitted that the impugned order dated 10.02.2017 was passed purportedly in exercise of the powers conferred by Clause 56 (j) of the Fundamental Rules and Rule 48 (1) (b) of the Central Civil Services (Pension) Rules, 1972 in public interest, however there is no opinion formed in this respect and as such, the same was passed arbitrarily without proper application of mind and is liable to be set aside and quashed.

11. It is also the contention of the Petitioner that the decision of the Service Review Board to retire him on completion of qualifying service of 30 years or on attaining the age of 55 years has already been taken by the impugned letter dated 02.09.2016 whereas show cause notice was issued to the Petitioner on 25.01.2017 which clearly indicates that the issuance of the show cause notice was done as a mere formality and as such, the impugned order dated 10.02.2017 is liable to be set aside and quashed. Reference is made to the order dated 15.06.2016 passed by the Hon'ble Gauhati High Court in WP(C) No. 1250/2015 (***Sunil Kumar Shahi v. Union of India & 3 Ors.***) and other related and connected cases.

12. Referring to the summary of Review Board Proceedings at Annexure-

1 of the affidavit-in-opposition of the Respondents, the learned counsel for the Petitioner has pointed out that the recommendation of the Review Board as far as the Petitioner is concerned is that he was not recommended for retention in service simply on the ground that he did not meet the ACR criteria, whereas in the case of Nb/Sub(Clk) Munib Singh Yadav who was listed below the name of the Petitioner in the said Review Board Proceedings, although it was remarked that he was graded average by IO and NR for the year 2015 and also that a disciplinary proceeding against him is pending, yet he was still recommended for retention in service beyond 30 years of qualifying service. This, according to the learned counsel is a violation of Article 14 of the Constitution of India as far as the Petitioner is concerned. The case of ***Uttar Pradesh Power Corporation Ltd. v. Ayodhya Prasad Mishra & Anr: (2008) 10 SCC 139***, paragraph 36 was cited in support of this contention.

13. Again, the learned counsel for the Petitioner has submitted that according to the advisory letter dated 21.08.2015 (Annexure-3 of the affidavit-in-opposition), the Petitioner has fulfilled all the conditions and out of the five ACRs taken into account by the Service Review Board, he has not been awarded 'Below Average' grading for the period 2011-12 to 2015-16, the question of recommendation for compulsory retirement therefore does not arise. The recommendation of the Service Review Board as far as the case of the Petitioner is concerned is in total violation of the above mentioned advisory. Even the total service record of the Petitioner was also not considered by the Service Review Board. The case of ***Nand Kumar Verma v. State of Jharkhand and Ors: (2012) 3 SCC 580***, paragraphs 34 and 41 was cited in support of this contention.

14. In response to the argument advanced by the learned counsel for the Petitioner, the Respondents appearing through Dr. N. Mozika, learned ASG has submitted that the main issue to be considered here is the fact that the Petitioner was found fit to stop his further retention in service beyond the 30

years of service put up by him or on attaining the age of 55 years whichever is earlier. In this regard, it is submitted that the case of the Petitioner came up for service review in the month of July, 2016 and the entire service record was placed before the Service Review Board where it was concluded that he is not entitled to be retained in service beyond 30 years as he was found lacking in ACR criteria.

15. It is also submitted that as per the Record Office Instructions (ROI) dated 21.08.2015, an Assam Rifles personnel must have the following ACR for retention in service beyond 30 years.

- (i) Out of last 05 ACRs, minimum 03 reports should be “High Average”
- (ii) Rest 02 reports should not be below “Average”
- (iii) Should be recommended for promotion in all 05 reports.

16. As far as the Petitioner is concerned, the Service Review Board found that his service record for the preceding 5 years were as follows:

Sl. No.	Year	Grading and Recommendation obtained by the petitioner in last five ACRs	
		Grading	Recommendation for Promotion
(a)	2011-12	7 (Above Average)	‘Recommended’
(b)	2012-13	7 (Above Average)	‘Recommended’
(c)	2013-14	5 (High Average)	‘Recommended’
(d)	2014-15	4 (Average)	‘Not Recommended’
(e)	2015-16	5 (High Average)	‘Recommended’

17. The learned ASG has further submitted that the Petitioner having failed to achieve the third criteria that is, “Should be recommended for promotion in all 05 reports”, he is therefore found to be ineligible to be retained in service beyond 30 years of service.

18. As to the contention of the Petitioner that the impugned order directing his retirement from service was based on the uncommunicated ACR for the year 2014-15, the learned ASG has submitted that the recommendation of the Service Review Board in this regard was not in violation of ROI No. 4/97 which deals with promotions, but was based on ROI No. 1/2004 which deals with compulsory retirement and nowhere was it mentioned that uncommunicated ACRs cannot be taken into account in service review of Assam Rifles Personnel under Rule 48(1) (b) of CCS (Pension) Rules, 1972 as well as FR 56 (j). It was further submitted that the principle that uncommunicated adverse remarks can be considered while passing an order of compulsory retirement has been found in a number of decisions rendered by the Hon'ble Supreme Court of India, some of which are referred herein below being the case of:

- i) ***Baikunth Nath Das v. Chief District Medical Officer, Baripada: (1992) 2 SCC 299***, paragraph 34,
- ii) ***Union of India v. V.P. Seth: AIR 1994 SC 1261***,
- iii) ***Rajasthan State Road Transport Corporation & Ors v. Babu Lal Jangir: (2013)10 SCC 551*** and
- iv) ***Judgment dated 22.07.2015 in the case of Tikendra Singh v. Union of India: (W.A. No 12 of 2014) paragraph 12.***

19. On the contention of the Petitioner that in the case of a similarly situated personnel, Munib Singh Yadav who has also got 'Average' grading for one year and that there is also a disciplinary proceedings against him, yet he was still recommended for retention of service, unlike the case of the Petitioner, the learned ASG has submitted that the factual situation is not correct as in the case of the said Munib Singh Yadav, he was graded Average by the IO, whereas the RO has graded him High Average and this was technically incorrect. Therefore, considering his service profile, he was considered for retention beyond 30 years, as such his case and that of the Petitioner are not on the same footing.

20. Finally, it is submitted that this Court in a proceeding under Article 226 of the Constitution is not an appellate court and is not supposed to conduct a roving enquiry into the circumstances, but is only to ensure that the decision making process does not suffer from arbitrariness or perversity.

21. This Court has given a careful and considerable thought to the submission and contention of the parties and on shifting of the irrelevant and relevant issues, what has emerged for consideration is whether the fact that the Petitioner was found lacking in ACR criteria would render him to be ineligible for further extension of service and whether the said impugned decision of the Respondents was taken on due observation of the proper procedure and law. The Respondents Authorities have placed reliance on the Record of Instructions (ROI) 01/2004 read with the “*Advisory*” (Service Review Assam Rifles JCOS/NCOS on completing 30 years of service or 55 years of age, whichever is earlier) dated 21.08.2015 to conclude that since the Petitioner have failed to achieve the third criteria “*Should be recommended for promotion in all 05 reports*”, the impugned order dated 10.02.2017 was finally passed.

22. What is seen here is that the Respondents has referred to the Service Review Board which has found that in the summary of the service record of the Petitioner for the preceding 5 years, that is, for the year 2011 to 2016, he was graded above average and high average, except for the year 2014-15 where he was graded average. Under the column “*Recommended for Promotion*”, he was recommended for promotion for four years, except for the year 2014-15 where he was not recommended for promotion.

23. What can be understood from the said summary is that for every grading given to the Petitioner, against that, he was either recommended for promotion or not recommended for promotion. Therefore, the consideration at the first instance would be as to whether the Petitioner or any other Assam Rifles personnel for that matter is fit for promotion or not at the end of a particular year. For the purpose of promotion, it is well settled that it is

incumbent upon the authorities to afford adequate opportunity to make representation for reconsideration of the decision, if the said personnel is not recommended for promotion. For this, the details of the ACR for that particular year has to be communicated to the said personnel. Non-communication would be a violation of the principle of natural justice which will render the said recommendation illegal.

24. From the pleadings of the parties, it can be understood that the details of the said ACR of the Petitioner for the year 2014-15 has not been communicated to him, inspite of his asking for the same, which if communicated, would enable him to make a proper representation, the result of which may end in his case to be considered or to be rejected and the final grading to be given eventually. However, the fact that the said ACR of the Petitioner for the year 2014-15 was never communicated to him in accordance with proper procedure, his prospect of promotion has been kept in the dark. The case of **Dev Dutt (supra)** cited in this regard has relevance in this context particularly at paragraphs 17, 37 & 41 which are reproduced herein below:

“17. In our opinion, every entry in the ACR 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 v. Union of India, (1978) 1 SCC 248 that arbitrariness violates Article 14 of the Constitution.

37. We further hold that when the entry is communicated to him the public servant should have a right to make a representation against the entry to the authority concerned, and the authority concerned must decide the representation in a fair manner and within a reasonable period. We also hold that the representation must be decided by an authority higher than the one who gave

the entry, otherwise the likelihood is that the representation will be summarily rejected without adequate consideration as it would be an appeal from Caesar to Caesar. All this would be conducive to fairness and transparency in public administration, and would result in fairness to public servants. The State must be a model employer, and must act fairly towards its employees. Only then would good governance be possible.

41. In our opinion, non-communication of entries in the Annual Confidential Report of a public servant, whether he is in civil, judicial, police or any other service (other than the military), certainly has civil consequences because it may affect his chances for promotion or get other benefits (as already discussed above). Hence, such non-communication would be arbitrary, and as such violative of Article 14 of the Constitution.”

The same view as was held in the case of **Dev Dutt (supra)** was found present in the case of **Abhijit Ghosh Dastidar (supra)**, as well as in the case of **Sukhdev Singh (supra)** which may not be necessary to discuss here.

25. In the context of this case, the proper procedure in the case of the Petitioner herein would have been for the Respondent Authorities to communicate the said ACR for the year 2014-15 to the Petitioner, give him the opportunity to make representation and then after deciding on the said representation, if retained, the same will stand in the records. Thereafter, if it is found that the Petitioner has not been recommended for promotion in all the 5 reports, his extension of service beyond 30 years may not be allowed taking recourse to the provision of the Advisory dated 21.08.2015 or the related rules.

26. Consequently, the fact that the said uncommunicated ACR of the Petitioner was taken on record and the same was made the basis for passing of the final order for refusal to extend his service beyond 30 years or 55 years whichever is earlier, the same smacks of arbitrariness and deprivation of justice to the Petitioner by the Respondents Authorities.

27. Reiterated herein, the stand of the Respondents is that Petitioner was required to be compulsorily retired on completion of 30 years of service or 55 years or whichever is earlier, mainly on the ground that he could not meet the

ACR Criteria particularly for the year 2014-15 where he was not recommended for promotion and this in turn had rendered him to be found lacking as far as compliance of one of the criteria i.e “(iii) *should be recommended for promotion in all five reports*” is concerned. The decisions referred to by the learned ASG, in the case of *Baikunth Nath Das (supra)*, *V.P. Seth (supra)* and *Tikendra Singh (supra)*, all speaks of the same proposition of law that an order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it, uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference.

28. However, as observed above, this Court while not disputing the ratio of the decisions cited by the Respondents, in the case of the Petitioner herein the situation would not have come to a pass where he is required to be compulsorily retired from service had he been given the opportunity to contest the remarks of non-recommendation in his ACR for the year 2014-15, which ACR was not communicated to him, therefore, it is not only a case of uncommunicated adverse remarks but also a case of non-recommendation for promotion at the relevant period.

29. On this ground alone, this Court is of the considered opinion that the Petitioner has made out a strong case for interference with the impugned recommendation dated 02.09.2016, Show Cause Notice dated 25.01.2017 and the Order dated 10.02.2017 which is hereby done so to the extent that the abovementioned communications are hereby set aside and quashed.

30. As the observation of this Court made above has decided the case of the Petitioner, the many decisions cited by the parties herein need not be discussed save those already acknowledged in the context of the issues discussed.

31. In the final analysis, this Court finds that the Petitioner has been able to make out a case for himself and accordingly, the impugned Order dated 10.02.2017 is hereby set aside and quashed. The Respondents Authorities are

to immediately reinstate the Petitioner to serve the remaining period of his tenure with all consequential service benefits, if so entitled.

32. After reinstatement, it is however open to the Respondent Authorities to respond to the representation of the Petitioner for communication of his ACR for the year 2014-15 and thereafter, to follow any suitable procedure as deemed necessary.

33. With the above, this writ petition is hereby disposed of. No cost.

Judge

Meghalaya
06.05.2021
"D. Nary, PS"

