

GAHC010299972019



**THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

Case No. : WP(C)/9097/2019

SUKMAN GURUNG
S/O- LT. BALRAM GURUNG, VILL.- APOUN, P.O. AND DIST. GORKHA,
NEPAL. PRESENTLY SERVING AS NO. JC-3000244W SUBEDAR/ GD 30TH
ASSAM RIFLES, C/O- 99 APO.

VERSUS

UNION OF INDIA AND 3 ORS.
REP. BY THE SECY. TO THE GOVT. OF INDIA, MINISTRY OF HOME
AFFAIRS,
NEW DELHI- 110001.

2:THE DIRECTOR GENERAL
ASSAM RIFLES
HEAD QUARTER DIRECTORATE GENERAL ASSAM RIFLES
SHILLONG-11.

3:THE COMMANDANT
30TH ASSAM RIFLES
C/O 99 APO.

4:NO. JC- 3001063 SUBEDAR MAJOR GANGA SINGH
5TH ASSAM RIFLES
C/O- 99 APO

Advocate for the Petitioner : MS. S BORA

Advocate for the Respondent : ASSTT.S.G.I.

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA

ORDER

Date : 31-10-2022

Heard Ms. S. Bora, learned counsel appearing for the petitioner. Also heard Ms. A. Gayan, learned CGC appearing for the respondent Nos.1, 2 & 3. No one appears for respondent No.4 even though notice was issued to the respondent No.4.

2. The petitioner is aggrieved in not being promoted from the post of Subedar (GD) to Subedar Major/GD (General Duty) while his junior, respondent No.4 was promoted. The grievance of the petitioner is that the petitioner has not been promoted on account of the petitioner not securing the Benchmark in his un-communicated ACR for the period 2017-2018.

3. The petitioner's counsel submits that the non-communication of the petitioner's ACR for the period 2017-2018 and the subsequent denial of promotion due to uncommunicated ACR has prejudiced the petitioner. He submits that in terms of the judgment of the Apex Court in ***Dev Dutt Vs. Union of India and Others, reported in (2008) 8 SCC 725***, the petitioner should have been communicated with the gradings given in the 2017-2018 ACR, so as to enable the petitioner to make a representation against the entries/grading given to the petitioner.

4. Ms. A. Gayan, learned CGC, on the other hand, submits that the grading of "High Average" given in the petitioner's ACR for the year 2017-2018 is not an adverse grading and as such, there was no requirement for the respondents to communicate the said grading to the petitioner. Further, in terms of Para 41 of the Record Office Instruction No.4/97 pertaining to Annual Confidential Report : JCOs issued by the Directorate General, Assam Rifles, the non-recommendation for promotion is not required to be communicated to the JCO.

5. I have heard the learned counsels for the parties.

6. As per pleadings, it is seen that in terms of the latest guidelines applicable to the

Assam Rifles Personnel, for promotion from the post of Subedar/GD to Subedar Major/General Duty, the last 5(five) years' ACRs are to be considered.

7. In terms of the revised guidelines, the petitioner has to secure the Benchmark grading of not below "Very Good" (Above Average) in first 4 (four) ACRs including the ACR for the 2017-2018 and the grading of not below "Average" (Good) for the remaining 1(one) ACR. The equivalent gradings in respect of Outstanding, Very Good, Good etc. vis-à-vis the words used in the Assam Rifles, is reproduced in a chart hereinbelow, as follows:-

Points ACR	Grading	Equivalence in Assam Rifles
09 points	Outstanding	Outstanding
07 points	Very Good	Above Average
05 points	Good	High Average
04 points	Zero	Average
03 points	Zero	Low Average
01 point	Zero	Below Average

8. The petitioner's 5 ACRs for the year 2013-2014 to 2017-2018 were considered by the respondents. The petitioner secured the required Benchmark in all his ACRs, except for the year 2017-2018 where he secured "High Average" which was equivalent to "Good".

The fact that the petitioner was not communicated the gradings in his ACRs for the period 2017-2018 is not disputed by the parties.

9. In the case of **Dev Dutt** (supra), the Apex Court has held that every entry (and not merely a poor or adverse entry) must be communicated to an employee under the State or other service. It further held that even if there was no benchmark, non-communication of an entry may adversely affect the employee's chances of promotion or getting some other benefit. It also held that communication of an entry would enable the employee concerned to have an opportunity of making a representation against the entry, if he feels it justified and prays for its upgradation. It thus held that non-communication of an entry was arbitrary and was violative of Article 14 of the Constitution as held by the Constitution Bench of the Apex Court in **Maneka Gandhi vs. Union of India**, reported in **(1978) 1 SCC 248**. The Apex

Court further held that when an entry is communicated to a public servant, he 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. It also held that the representation must be decided by an authority higher than the one who gave the entry, otherwise there was a likelihood that the representation would be summarily rejected without adequate consideration, as it would be an appeal from Caesar to Caesar. It further held that when an entry is upgraded on the basis of a representation made by a Government servant, the departmental promotion committee should consider the same.

10. Paragraphs 13, 17, 37 & 41 of the judgment in **DevDutt** (supra) is reproduced below :

“13. In our opinion, every entry (and not merely a poor or adverse entry) relating to an employee under the State or an instrumentality of the State, whether in civil, judicial, police or other service (except the military) must be communicated to him, within a reasonable period, and it makes no difference whether there is a bench mark or not. Even if there is no benchmark, non-communication of an entry may adversely affect the employee’s chances of promotion (or getting some other benefit), because when comparative merit is being considered for promotion (or some other benefit) a person having a ‘good’ or ‘average’ or ‘fair’ entry certainly has less chances of being selected than a person having a ‘very good’ or ‘outstanding’ entry.

.....

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

.....

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 concerned authority, and the

concerned authority 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 noncommunication would be arbitrary, and as such violative of Article 14 of the Constitution.”*

11. Para 40 of the Record Office Instruction No.4/97 states that weak point/ adverse remarks in the ACR will be communicated in writing to the JCOs, which reads as follows,

“40. Weak point/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.”

12. Though Para No.41 of the Record Office Instruction No.4/97 provides that non-recommendation for promotion by the Reporting Officer will not be communicated to the concerned JCO, the weak points/adverse remarks have to be communicated in terms of Para 40 of Record Office Instruction No.4/97.

13. Keeping in view the judgment of the Apex court in **Dev Dutt** (supra) and Paragraph 40 of the Record Office Instruction No.4/97, this Court finds that the weak point and the grading given in the uncommunicated ACR for the period 2017-2018 should have been communicated to the petitioner.

14. The respondents are accordingly directed to communicate the entries and grading given to the petitioner, in his ACR for the year 2017-2018 and by giving him an opportunity to make a representation against the same within 1 (one) month from today. The petitioner’s

representation, if any, should thereafter be decided by an authority, higher than the Reporting authority who gave the entry in the ACR. If the Entries/Grading for the ACR for the year 2017-2018 are upgraded, a review DPC should be constituted, to consider the promotion of the petitioner to the post of Subedar Major/GD (General Duty) from the date when his junior was promoted.

15. The writ petition is accordingly disposed of in terms of the above observations and directions. The entire exercise should be concluded within a period of 3 (three) months from the date of receipt of a certified copy of this order.

JUDGE

Comparing Assistant