
(2015) 10 DEL CK 0318

In the Delhi High Court

Case No : W.P.(C) 1349/2013 and C.M. No. 2558/2013

Avinash Kumar

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 29-10-2015

Acts Referred:

Penal Code, 1860 (IPC) — Section 308, 34, 406, 498A, 498-A

Citation : (2015) 10 DEL CK 0318

Hon'ble Judges : S. Ravindra Bhat and Deepa Sharma, JJ.

Bench : Division Bench

Advocate : Sangeeta Singh and Jogendra Singh, Advocates, for the Appellant; Gaurav Sarin, Senior Panel Counsel and Ajitesh K. Kir, Advocate, for the Respondent

Final Decision : Allowed

Judgement

S. Ravindra Bhat, J.—The writ petitioner is aggrieved by the order issued by the Border Security Force (BSF) dated 23.11.2012 rejecting his request that he be treated as an appointee along with the candidates who joined in the 32nd Batch for training, as a direct recruit Assistant Commandant (DE).

2. The brief facts of the case are that the petitioner participated in the selection process i.e. Central Police Forces (Assistant Commandants) Examination, 2005 held on 16.10.2005 and was declared successful in the subsequent list published in that regard. He opted for BSF on 04.10.2006. Soon thereafter, on 10.11.2006 apparently a complaint was lodged against him alleging that he had committed offences punishable under Section 498A /406 /34 IPC. He had also earlier been implicated in a case which alleged that he committed an offence punishable under Section 308 /34 IPC. Information had already been disclosed to the BSF during the application process about the alleged criminal case involving the petitioner with respect to offence punishable under Section 308 IPC. Since the petitioner was implicated in the other criminal case subsequently, he intimated the UPSC - with regard to the alleged involvement in the complaint concerning

the offence punishable under Section 498A IPC on 16.11.2006. He was intimated on 13.04.2007 that he was selected to the post of Assistant Commandant. On 07.08.2007, the complaint lodged against him under Section 498A /406 /34 IPC was quashed by this Court. Due intimation was given to the BSF on 13.08.2007. While so, all other selected candidates were issued appointment letter and asked to report for training by joining Batch No. 32 on 12.11.2007 but the petitioner was not issued appointment letter.

3. As his requests to the respondents were of no avail, he therefore approached this Court on 06.11.2007 by filing W.P.(C) 8287/2007 seeking a direction that he should be appointed with immediate effect. The Court had during the pendency of that writ petition by order dated 04.02.2008 directed the BSF (after issuing notice to it) to keep one post vacant if they have already not filled it. The BSF in its defence in the writ proceedings relied upon its decision dated 25.01.2008 not to appoint the petitioner in view of his previous criminal record. The BSF was of the opinion that even though, the petitioner had been acquitted of the charges against him, his involvement in the complaint lodged under Section 498-A and the previous proceedings were of such nature that he ought not to be appointed. However, this Court rejected the BSF's contentions and on 19.02.2008, allowed W.P.(C) 8287/2007. Vide its judgment, the Court directed the BSF to appoint the petitioner "forthwith".

4. It is the common case of the parties that the petitioner was asked to report for training in December, 2008 when he was asked to join 33rd Batch. In the meanwhile, apparently, the Special Leave Petition preferred by the BSF was rejected on 29.09.2008. It is contended that the petitioner in the light of these developments represented to the BSF claiming that he ought to be treated as an appointee who joined with the 32nd Batch because he was kept away from it for entirely unjustified reasons. It was alleged by the petitioner that the rejection of his candidature, was set aside on 19.02.2008. Furthermore, he had been acquitted by the criminal court on 17.08.2007. The petitioner's request was however rejected by the impugned order.

5. Learned counsel urges that the rationale for denying seniority benefit to the petitioner on the ground that he actually joined the BSF in December, 2008 when he was sent for training along with 33rd Batch is arbitrary. It was urged in this context that the refusal of the BSF was held to be arbitrary and ultimately quashed on 19.02.2008. In fact, the Court was alive to the fact that the petitioner had already approached the Court prior to the commencement of the 32nd Batch's training and therefore directed that he should be appointed "forthwith". Nevertheless the petitioner was made to join the next batch of training. In these circumstances, contends the petitioner's counsel, he is entitled to be treated as having been appointed along with the others who were selected and sent for training in the 32nd Batch.

6. Mr. Sarin, learned counsel for the BSF submits that the petitioner's plea has to be rejected in view of proviso of Rule 7(3)(iv) which directs that in the case of

direct entrants, the date of appointment shall be the date of commencing of their training at BSF. Reliance is placed upon the decision of the Supreme Court in Rohitash Kumar and Others Vs. Om Prakash Sharma and Others, . It is pointed out that an identical provision was considered by the Supreme Court in the context of somewhat analogous if not similar facts. Counsel highlights that in that case, from amongst a composite batch of 154 selected direct recruit Assistant Commandants, 67 officers joined the training earlier and 87 officers joined the training subsequently seven months later. The deemed seniority that was assigned to the latter, on the basis that they were batch mates with the former was set aside by a single judge at the behest of a promotee who was appointed in the interregnum. The Supreme Court upheld the judgment of the High Court and remarked that the structure of the rule did not admit of two interpretations and that regardless of hardship in the individual cases, the plain meaning must be given to the provision.

7. It is submitted by the BSF consequently that the decision to not appoint the petitioner was principally based upon a bonafide concern about the previous cases he was implicated in. Although the Court set aside the decision and even directed his appointment "forthwith", the Division Bench on that occasion did not direct any consequential benefits. In these circumstances, the Court, it was submitted cannot ignore the mandate of the rule i.e. proviso of rule 7(3)(iv). The counsel therefore stated that the claim in these proceedings should not succeed. Rule 7(3)(iv) reads as follows:

"Seniority of officers, subject to the provisions of clauses (i), (ii) and (iii) shall be determined according to the date of their continuous appointment in that rank.

Provided that in case of direct entrants, the date of appointment shall be the date of commencement of their training course at the Border Security Force Academy;"

8. In the present case, it is evident from the factual narrative that the petitioner at all relevant times disclosed his involvement in the various criminal cases he was implicated in. He was acquitted of all charges honourably by the judgment of the competent criminal court on 07.08.2007. Even this was brought to the notice of BSF. The record further discloses that the rejection of the petitioner's candidature took place during the pendency of the writ petition preferred by him, i.e. W.P.(C) 8287/2007. In fact, the rejection took place on 25.01.2008. Keeping in mind the conspectus of these circumstances and also after considering the record including the two judgments of the competent court, it was held that the action of the respondent BSF in cancelling the petitioner's candidature and refusing to appointment was arbitrary. Consequential direction naturally was that he ought to be directed to be appointed "forthwith". It is not the BSF's case that there was suspension or stay of the Court judgment during the pendency of the Special Leave Petition preferred by it. Even that Special Leave Petition was rejected on 29.09.2008. Their contention now is that the literal and plain meaning is to be given to the rule i.e. Rule 7(3)(iv).

9. This Court is of the opinion that the BSF is hardly in a position to justify itself in this regard. The implication of the decision of the Court quashing the respondents' decision (taken belatedly given that the petitioner had already approached this Court on 06.11.2007 before the 32nd Batch was sent for training) was that full effect had to be given, to the declaration and the consequential direction of 19.02.2000 in W.P.(C) 8287/2007. Whilst the BSF may otherwise be correct in contending that the mandate of proviso of Rule 7(3)(iv) is unequivocal in its view that the date of appointment is defined or determined on the date the candidate is deployed or reports for training and that every candidate has to undergo training, nevertheless this Court cannot overlook three important considerations. First, the petitioner was diligent in reporting the disqualifying circumstances i.e. the pendency of the criminal case on 16.11.2006 and he did so again upon its quashing on 07.08.2007. Even then, the BSF chose not to take any action. Second, the petitioner's approaching this Court on 06.11.2007 could well have been the occasion for the BSF to decide the further course of action. They chose not to do so. It appears now to be pressed in a rather ill-considered manner to justify rejection of the petitioner's appointment along with his batch mates who were selected pursuant to the recruitment process of 2005. The third important circumstance is that in the light of the first two, the Court had directed full weight and effect to be given to its decision by requiring that the petitioner be appointed "forthwith". That direction was nowhere disturbed - it was never stayed and the Supreme Court rejected the respondent's Special Leave Petition.

10. The above circumstances, in our opinion are sufficient to draw a distinction between the facts of this case and that in Rohitash Kumar's case (supra) that was a case where administrative inconvenience and principles compelling necessity restrained the BSF from issuing appointment letters to 87 of the selected candidates. In the absence of police verification and other necessary records it could well be said that the selection itself was incomplete. It is in the light of such facts that the Supreme Court's interpretation (in Rohitash Kumar's case) that the plain, literal and full meaning has to be given to Rule 7(3)(iv) and has to be understood. Such clearly is not the case in the present instance. On 01.03.2013, upon an interim application by the petitioner this court had directed the respondents to keep one post unfilled in the next higher rank of Deputy Commandant during the pendency of this writ petition. Considering the totality of circumstances, the petitioner's entitlement to be treated as a member of the BSF joining in its 32nd Batch (for training as Assistant Commandant) stands established.

11. For the above reasons, we hereby direct that the petitioner should be treated as having been appointed along with those who joined in the AC(DE) Batch 32 and be given due seniority having regard to Rule 7(3)(iv) i.e. by taking into account his performance in the UPSC recruitment and the performance in the training undergone in the 33rd batch.

12. The writ petition is allowed and C.M. 2558/2013 is disposed of in the above terms.