

(1995) 08 DEL CK 0084

In the Delhi High Court

Case No : Civil Writ Appeal No. 42 of 1990

Bishamber Nath

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 31-08-1995

Acts Referred:

Constitution of India, 1950 — Article 14

Released Emergency Commissioned Officers and Short Service Commissioned Officers
(Reservation on Vacancies) Rules, 1971 — Rule 6

Citation : (1996) ILR Delhi 790

Hon'ble Judges : Mohd. Shamim, J

Bench : Single Bench

Advocate : G.D. Gupta, Monica Banerjee, Pramod Gupta and S.S. Sabharwal, for the Appellant;

Judgement

Mohd. Shamim, J.

(1) The petitioner through the present writ petition wants that the services rendered by him as an Emergency Commissioned Officer, Territorial Army Officer be taken into consideration" for deciding his seniority and for his promotion and for the purposes of pay and allowances

(2) The facts in brief which are necessary for deciding the points raised in the present writ petition are as under : that the petitioner was initially granted a commission in the Territorial Army on May 13, 1960. During the period from May 13, 1960 to March 9, 1964 he served over there and rendered full embodied service. While the petitioner was working as a Commissioned Officer in the Territorial Army he was selected as an Emergency Commissioned Officer on March 10, 1964. He served the Army in the said capacity during the period from March 10, 1964 to July 16, 1969. Subsequently during his tenure of service as Emergency Commissioned Officer (ECO for short) he was promoted to the rank of Captain. Since there was a scheme to release the ECOs in a phased manner as their services were no more required, he was released from the Army on the

aforesaid date i.e. July 16, 1969. However, the petitioner was selected for the period of Company Commander Deputy S P. in the C.R.F.F. and he joined the said post on the above said date without any break in his service. The appointment of the petitioner as a Company Commander Deputy S .P. was approved by the Ministry of Home Affairs vide their letter dated June 19, 1969 and the same was conveyed to the petitioner vide offer of appointment dated July I, 1969. The appointment of the petitioner in the CRPF was subsequently regularised vide office order dated May 2, 1974. The promotion from the post of Company Commander to the post of Assistant Commandant in CRPF is governed by the provisions of Rule 105(3A)(-ii)(b) of the CRPF Rules which read as under :-

"105.Appointment and promotion of Superior Officer : (3A) The posts of Assistant Commandant (Second-in-Command or Adjutant or Junior Staff Officer.. Vice Principal, Central Training College in Battalion other than Signals Battalions shall be filled: (iii) from amongst Deputy Superintendents of Police from State and Company Commanders or Quarter Masters or Assistant Principal, Central Training College from the Central Reserve Police Force (other than Indian Police Service Officers) who have completed five years of Gazetted or Commissioned Service and have served in the Force for a minimum period of two years."

(3) A perusal of the same reveals that the Deputy Superintendents of Police who have completed five years of Gazetted or Commissioned service and have been in CRPF for a minimum period of two year? are eligible for promotion to the post of Assistant Commandant. The petitioner was informed, however vide memo dated July 31, 1972 that he was not considered for promotion to the post of Assistant Commandant along with other Company Commanders by the Departmental Promotion Committee (hereinafter referred to as the Dpc held on November 3, 1971 as by that time he had not computed two years service as Deputy S.P. in the CRPF.

(4) The Inspector General of Police, CRPF. Calcutta while recording the Annual Confidential Report of the petitioner for the year ending March 31, 1971 commented adversely on his work and conduct inasmuch as though he was described as a hard worker, sincere, loyal officer with sober habits but had been advised to go in depth of the problems and exercise proper supervision over his subordinate. The said adverse remarks were communicated o him vide D.O. letter dated August 13, 1971 by Shri C. M. Pandey, Senior Staff Officer. Inspector General of Police, CRPF. Calcutta. The petitioner made a representation against the same to the inspector General of Police, CRPF, Calcutta on September 7, 1971. The said representation was rejected and the petitioner was informed to that effect vide memo dated November 29, 1973. .Meanwhile, a Dpc was held on January 25, 1973 wherein the name of the petitioner was considered for promotion to the post of Assistant Commandant. However, he was not selected on the ground that he did not make the grade. It appears that the adverse remarks recorded in the confidential report alluded to above were taken into consideration against the petitioner and he was not as such found fit. The said

adverse remarks could not have been taken into consideration as the representation of the petitioner against the same was still pending disposal. Had the said remarks not been taken into consideration the petitioner would have been selected to the above said post.

(5) A provisional gradation list of all the officers of the CRPF was circulated vide memo dated July 2, 1974. The petitioner as per the said list was placed wrongly at Serial No. 254 of the said list and not in accordance with the seniority which he had attained by that time. The petitioner made a representation against the same to the Director General, CRPF on July 27, 1974. The petitioner was informed in March 1976 that since his first representation dated July 27, 1974 regarding his seniority had already been forwarded to the Directorate his second representation on the same subject was not being forwarded. He was further apprised of the fact that the provisional gradation list of the gazetted officers was still under consideration and as such he should wait till the final decision. Since the petitioner did not receive a reply he submitted a detailed representation to the Secretary, Ministry of Home Affairs on August 28, 1978 along with representation to the Director General, CRPF dated November 27, 1978 with regard to the consideration of his case for promotion in January 1973 without taking into account the above remarks. The petitioner was informed through letter dated January 30, 1979 that due weightage was given with regard to the services rendered by him as Territorial Army Officer for the purposes of promotion to the rank of Assistant Commandant by the Dpc held in January 1973 and April 1975 but he was not found fit. However, he was found fit for promotion by the subsequent Dpc which met in November 1976 and accordingly he was promoted to the rank of Assistant Commandant w.e.f. December 13, 1976. The petitioner also made representation for his fixation of pay and emoluments after taking into consideration services rendered by him as Eco vide his letter dated February 4, 1974 and the subsequent letter dated August 29, 1974 where through he informed the authorities with regard to his regularisation by the Selection board vide office order dated May 2, 1974 and requested for re-fixation at an early date in view of the provisions of the circular issued by the Ministry of Home Affairs dated September 23, 1970. The petitioner was, however, informed vide office memo dated October 5, 1974 that the circular dated September 23, 1970 was applicable to the ex. ECOs and Short Service Commissioned Officers appointed as Deputy Superintendent or Police in the CRPF and as such the instructions contained therein were not applicable to the case of the petitioner who was an ex. Territorial Army Officer.

(6) It is manifest from above that the authorities..? did not take into consideration, the fact that the petitioner was an ex Bco at the time of his appointment as Deputy S.P. in the CRPF. The petitioner later on was advised vide letter dated February 7, 1976 to take up the matter with the Administrative Authority in the CRPF. The petitioner submitted a detailed representation to the Director General, CRPF in January, 1976. The said representation was rejected vide letter dated September 9, 1976. The petitioner was informed through the

aforesaid letter that he was not selected to the post of Deputy S.P. as an ex. Eco and in fact he was inducted in the service as Deputy S.P. as an ex. Territorial Army Officer. It is thus abundantly clear from above that the authorities lost sight of the fact that at the time of the appointment of the petitioner as Deputy S.P. in the CRPF he was serving in the Army as an Eco and he Therefore, could not be deprived of his past services rendered by him .is Eco for the fixation of his seniority and his pay and allowances, particularly in view of the fact that other ECOs have been given due weightage of their past services by taking into consideration the services rendered by them in the Army as ECOs for fixation of their seniority, " pay and allowances while fixing their seniority, pay and emoluments. The petitioner has, as such, clearly been denied equality of opportunity as enshrined in Art. 16 of the Constitution of India. The petitioner again made a representation dated December 27, 1976. However, it again met the same fate vide reply letter dated February 16, 1977. Yet another representation was made on March 4, 1977. However, the request of the petitioner was again turned down vide memo dated February 13. 1979. In the above stated circumstances the petitioner has been left with no alternative but to approach this Court under Art. 226 of the Constitution of India.

(7) The respondent put in contest, inter alia, on the following grounds : that the petitioner prior to his appointment w.e.f. July 16, 1969 as Deputy S. P. had applied for the said post along- with other ECOs but could not make the grade. Rule 105 of the CRPF Rules, 1955 provides for the appointment to the post of Deputy S.P. Company Commander through direct recruitment. The petitioner was appointed under the said rules to the post adverted to above by giving him the benefit of his services rendered as Territorial Army Commissioned Officer as envisaged under the Note to the aforementioned rule. It was made clear to the petitioner in his appointment letter that his appointment was not on regular basis and for being regularised he was required to appear before a Selection Board. The petitioner in fact appeared before the Selection Board for regular appointment in November, 1972 but he was not found fit for the said post. The petitioner again appeared before the Selection Board whereby he was cleared for regular appointment in the CRPF on May 2, 1974.

(8) A Dpc for promotion to the next higher rank of Assistant Commandant from the post of Company Commander was held on November 3, 1971. The petitioner by that time had not completed two years of service in the CRPF. Hence he was not found eligible for consideration to the post of Assistant Commandant. The representation made by the petitioner to the Inspector General of Police was rightly rejected after a careful consideration of the same. Since the representation made by the petitioner against the adverse remarks in his Annual Confidential Report was rejected it was not at all required to hold another DPC. The adverse remarks against the petitioner were rightly taken into consideration by the Dpc as his representation against the said remarks was rejected It is wrong and false that the petitioner had un-blemished excellent record of service. The fact is that he was earlier found unfit for promotion to the CRPF as an Ex.

Eco and subsequently he was further also not found fit for appointment on regular basis as Ex. Territorial Army Commissioned Officer. The gradation list of the Gazetted Officers in the CRPF could not be finalised because of the pendency of the litigation in the High Court and the Supreme Court. The petitioner was given due weightage for the services rendered as Territorial Army Officer at the time of consideration of his case for promotion in January 1973, April 1975 and November 1976. The DPCs held in January 1973 and April 1975 did not find him fit for promotion. Since the petitioner was appointed through direct recruitment on the basis of service rendered as Territorial Army Commissioned Officer, he was not entitled to count his past service towards the seniority in view of the judgment of this court in *Civil Writ Petition No. 1053/70 Gurmohan Singh v. Union of India & Ors*(1) petition is thus false and frivolous. It is liable to be dismissed. and joined the Army in order to defend the borders of the country and to lay-down and sacrifice their lives for the sake of the Nation. In the words of a poet they were infused with the spirit of courage and patriotism.

" AND. they who for their country die shall fill an honoured grave, For glory lights the soldiers tomb, And beauty weeps the brave"

(J. R. Drake- (To the Defenders of New Orleans)

(9) It was in the above circumstances that it was thought fit and proper to grant and confer certain benefits on such officers as and when they were released from the Army. Hence it was thought proper to safeguard the interests of such ECOs who were released from the army (.vide Notification No. 31/1./67-Estt.-(C). Government of India Ministry of Home Affairs, .dated 4th October 1967). Only the relevant. Aras of the said Notification are being reproduced below:-

1.Short title, commencement and duration.-(1) These rules may be called the Released Emergency Commissioned Officers and Short Service Commissioned Officers (Reservation of Vacancies) Rules, 1967. (2) They shall be deemed to have come into force with effect from the 19th January, 1966. (3) They shall cease to be in force on .and from the 29th January, 1971. Application.-These Rules shall apply to. all the Central Civil Services and posts, Class I and Class II, other than Engineering and Medical Services and posts. 3. Definitions..... (a) (b)the expression "release" (with its grammatical variations) means actual release, after , spell of service, .from the Armed. Forces of the Union. and does not mean release during or at the end of training or or during or at the end of Short Service. Commission granted to cover periods .of such training prior to being taken in 800 actual service, nor does it cover-cases" Of offence released on account of misconduct of inefficiency or at their own request. 4. Reservation of vacancies.--(1) For a period of five years commencing from 29th January, 1966, 20 per cent of the permanent vacancies in the Indian Foreign Service, 25 per cent of the permanent vacancies in all the other Central Civil Services and posts, Class I (Non-technical) and 30 per cent of the permanent vacancies in. all the Central Civil Services and posts, Class II (non-technical) to be filled by direct requirement in my year shall be reserved for being filled by the Emergency

Commissioned Officers and Short Service Commissioned Officers of the Armed Forces of the Union who were commissioned after the 1st November, 1962. 6. Seniority and pay.-(1) Seniority and pay of those candidates who are appointed against the vacancies reserved under Rule shall be determined on the assumption that they entered the Service or the post, as the case may be at the first opportunity they had after Joining the training prior to their commission or the date of their Commission where there was only post Commission training, that is- (a) in case of Service or posts recruitment to which is made on the results of a competitive examination conducted by the Commission, the released Emergency Commissioned Officer or Short Service Commissioned Officer who competes successfully at the first or second occasion he could have appeared at the relevant examination had not joined military service and shall be assigned the year of allotment correspondingly; and (b) in the case of Services or posts recruitment to which is made otherwise than through a competitive examination conducted by the Commission, seniority shall be fixed on the assumption that the Emergency Commissioned Officers and Short Service Commissioned Officers would have been appointed on the date arrived at after giving credit for the approved military service as commissioned officers, as the case may be including, the period of training, if any, and shall be deemed to have been allotted the corresponding year for the purpose of fixation of seniority.

(10) It is crystal clear from the Notification adverted to above that the said Notification though issued on October 4, 1967 it was given a retrospective effect and as such it came into operation w.e.f. January 9, 1966 and it was to remain in operation till January 29, 1971. It is also abundantly clear from para 4 of the said Notification that it was to be made applicable to candidates who were commissioned after November 1, 1962.

(11) The petitioner in the instant case admittedly joined the Army as an Eco on March 10, 1964. He served over there till July 16, 1969 i.e. the date when he was released from the Army and where after he joined the CRPF on the same day i.e. July 16, 1969. Thus the case of the petitioner falls well within the domain of the instructions issued, through the afore-mentioned Notification by the Govt. of India. Hence he is entitled to the benefit to the services rendered by him as an ECO.

(12) The only possible argument which could have been made from the side of the respondents however, which was never made, is that the appointment of the petitioner was not made within the percentage which was fixed for the released ECOs. Hence it could have been argued that the petitioner was not entitled to the benefit of the services rendered by him in the past. To countervail the above contention Mr. Gupta, counsel for the petitioner, has led me through Rule 105(4) (iv-A) which is in the following words:-

"BY appointment of Emergency Commissioned Officers and Short-Service Commissioned Officers of the Armed Forces of the Union who were commissioned on or after the 1st November, 1962 and were released at any time there- after;"

(13) Learned counsel for the petitioner has contended on the basis of the above Rule whereunder the petitioner was appointed as a Company Commander in the CRPF that there was no fixed number of vacancy's to be filled in by the ECOs. The provision is for filling up the vacancies by appointment of ECOs. They were to be appointed as a class. It was a separate source of recruitment and there was no fixed percentage. Hence the case of the petitioner is not hit by Rule 4 of the Notification dated October 4, 1967. In any case no such argument, as observed by this Court above was made for and on behalf of the learned counsel for the respondents.

(14) Learned counsel for the petitioner has then. sought help from the Circular No. 15/22/71-Pers-I. Government of India Ministry of Home Affairs dated July 5, 1972 addressed to the Dg, CRPF, New Delhi, (Annexure XXIX), which deals with the fixation of seniority of Ex. ECOs appointed in Para Military Forces. He has in this connection led me through the said letter. The relevant contents of the same can be adverted to with profit in order to find out as to how far does the said letter help the petitioner. It provides "I am directed to say that the question of fixation of seniority of Ex. ECOs appointed as Deputy S. P. Coy. Commanders in the B.S.F. the (RP Forces, the Itbp and the Assam Rifles has been engaging the attention of the Government of India for some time past. It has now been decided that for the purpose of fixation of seniority Ex. ECOs appointed in the abovementioned forces will be divided into the following categories :-

(I) ECOs who were considered suitable at the first opportunity, i.e.. in the year of release from the Army, viz., for Ec I and Ec II courses in 1967, Ec III to Ec V courses in 1968, Ec VII to Ec IX courses" in 1969 and Ec X to Ec XII courses in 1970. (ii) ECOs who were not considered suitable at the first opportunity even though they offered their services. They were, however, subsequently selected by the Special Selection Board. (iii) ECOs who did not apply Along with Officers for appointment to the force in the year of their release from the Army but did so later and were selected.....

(A) In the case of officers belonging to category (i) above, the inter se seniority will be the same as determined by the Army authorities" vide Army List, i.e. the date of commissioning in the Army (and not from the date of joining the pre-commission training courses)..... (b) In the case of officers belonging to category (ii) above, the seniority will be reckoned from the date of their appointment in the force. No benefit of Eco service will be given to them for the purpose of seniority. (c) As for the officers belonging to category (iii) above, their seniority will be fixed by giving due weightage of Ec service in the Army. For example if an officer of this category with 4 years Ec service was appointed in the Force on 1-1-1971 his seniority would be fixed from 1-1-1967....."

(15) It is thus abundantly clear from above that the services rendered by an Eco are to be counted for the purposes of seniority and consequently for the determination of fixing of his pay and emoluments. The only exception has been made only in the case of those officers who were not selected at the first

opportunity.

(16) A faint argument was made by the learned counsel for the respondents that the petitioner in the instant case could not qualify at the first instance, hence he is not entitled to the advantage of his past services in the Army. Surprisingly enough the said argument is simply an argument made in the air. Had there been any such thing on record the respondents would have placed the same in order to substantiate their contention. Curiously enough even on repeated directions the respondents did not place any such thing on record.

(17) Assuming argue do that the contention as put forward by the learned counsel for the petitioner is correct even then the petitioner who is a released Army Officer cannot be treated differently from his other colleagues who also joined the CRPF or other departments after their release from the Army. Had they continued in the Army their seniority would have been the same as it was earlier. Thus all those persons who were recruited from the same source are entitled to the same type of treatment inasmuch as all of them are equals and hence they cannot be treated unequally. There must be some reasonable classification and it must be based on intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and the differential must have a rational nexus to the object sought to be achieved. Thus the portion of the Notification which authorised the authorities to treat differently the person mentioned at Item No. (b) by not allowing them benefit of the past service would be bad in law as the same would be hit by Arts. 14 & 16 of the Constitution of India.

(18) The above view was also given vent to by their Lordships of the Supreme Court as reported in *Raj Pal Sharma and Others Vs. State of Haryana and Others, ,.....*" (2) All those persons released from Military Service constitute one class and it is not possible to single out certain persons of the same class for differential treatment. There appears to be no reasonable classification between the persons who were released on compassionate grounds and those who were released on other grounds and in this respect the petitioners have been deprived of the equal opportunity. The amendment, Therefore, is violative of Arts. 14 and 16 of the Constitution and Therefore, bad".

(19) A matter very much akin to the matter in hand came up for consideration before Hon''ble Supreme Court as reported in *Ravi Paul and Others Vs. Union of India (UOI) and Others*, wherein their Lordships opined that Rule 8 (b) of CRPF rules does not govern officers appointed to Bsf and as such Bsf officers are not entitled to count their service in the Army for seniority in BSF. I am tempted here to cite in extenso certain observations of their Lordships of the Supreme Court in order to substantiate the view which I am taking in the instant case....." The ECOs who were absorbed/appointed to the Bs, during the period 1967-71 have joined Army duping emergency in the wake of the Chinese''e aggression. By joining the Army when. the Country needed their services they had made a sacrifice. Keeping in view the sacrifice made by them, the Government of India

evolved a policy whereunder they were given certain benefit of their Army Service for counting their seniority on re-employment in public services after their release from the Army. Moreover, they were absorbed in the Bsf at a time when there was need for competent officers in the Bsf and in order to attract such officers" in the Bsf it was considered necessary to give the benefit of the service of the Army for the purpose of seniority in the Bsf to the officers who were absorbed/appointed in the Bsf during the period 1967-71. The SSCOs have joined the Army as a career after the emergency resulting from the Chinese Aggression was over. When they were absorbed/appointed to the Bsf during the period 1974-78 there was a change in the policy of the Government of India and the benefit of the service in the Army was not to be given to the SSCOs who were absorbed/appointed in the Bsf after release from the Army. This condition was expressly mentioned in their letters of appointment and they opted to join the Bsf knowing fully well that their Army service would not be counted for seniority in the Bsf. The SSCOs who were absorbed/appointed in the Bsf during the period 1974-78 are officers belonging to two different categories and they cannot be regarded as persons similarly situated".

(20) There is yet another aspect of the matter. The petitioner was appointed admittedly vide appointment letter dated July 1, 1969. He joined the CRPF on July 16, 1969. His services were regularised vide Office Order No. F. 4/24/74-Ests. (CRPF) dated 2-5-1974 with a copy to the petitioner vide endorsement dated 20-5-1974 (Annexure-IV). This fact has been admitted in the counter affidavit (paras 23 to 28). Thus, now in view of the above the petitioner would be deemed to be a regular appointee w.e.f. July 16, 1969 and the services rendered by him earlier thereto are to be counted towards his seniority. The same view finds support from the view given by the Hon'ble Supreme Court as reported in *The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others*, ... (4)." But if the appointment is made after considering the claims of all eligible candidates and the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules made for regular substantive appointments, there is no reason to exclude the officiating service for purpose of seniority".

(21) The defense set up by the respondents in their counter affidavit placed on record is simply this much that the petitioner was appointed on the basis of his services rendered as Territorial Army Officer, hence he is not entitled to the benefit of the past services. Surprisingly enough there is no such mention in his appointment letter. Admittedly the petitioner was appointed at the time when he was serving in the Army and was released there from. The contention of the respondents that the petitioner failed initially to qualify for the post of the Deputy S. P., hence the authorities took pity on him and he was appointed as a direct recruit on the basis of his past services as Territorial Army Officer is without any merit inasmuch as there is absolutely nothing on record to fortify the said contention. Had the petitioner failed initially to qualify there would have been a record relevant to that effect in possession and power of the CRPF authorities.

However, for the best reasons known to them nothing was produced and placed on record, despite the fact that the respondents were asked many a times to show and place the same on the file of the Court. Hence an adverse inference is liable to be drawn against the respondent in. favor of the petitioner.

(22) The upshot of the above discussion is that the petitioner was entitled to have the service rendered by him considered for the purposes of his seniority and consequential benefits" inasmuch as the seniority and pay were to be fixed as per rule 6(b) of the Notification dated October 4, 1967 and in the light of letter dated October 5, 1972. The petitioner was given the benefit of his past service by a legal fiction inasmuch as it was presumed in his favor that he would be deemed to have joined the CRPF on the date he joined the military service.

(23) To illustrate the above it would be profitable to refer over again to Rule 6(b). It is in the following words :-

"(B)in the case of Services or posts recruitment to which is made otherwise than through a competitive examination conducted by the Commission, seniority shall be fixed on the assumption that the Emergency Commissioned officers and Short Service Commissioned Officers would have been appointed on the date arrived at after giving credit for the approved military service as commissioned officers, as the case may be including the period of training, if any, and shall be deemed to have been allotted the corresponding year for the purpose of fixation of seniority."

(24) Thus it was to be presumed that they joined the service after the release from the Army on the date on which they had joined the military service since they would be deemed to have been allotted the corresponding year for the purposes of fixation of seniority. The petitioner is to be granted this benefit by a legal fiction which was created in the instant case to give him the benefit of his past service. "Legal Fiction" is a rule of law which assumes something as true which in fact is not correct. It assumes to be true a certain state of affairs which in fact docs not exist and which the law does not allow to be disproved. According to Jowitt's Dictionary of English Law it menus "a rule of law which assumes as true, and will not allow to be disproved, something which is false". It has been described in the following words :-

"A legal assumption that a thing is true which is either not true, or which is as probably false as true ; an assumption or supposition of law that something which is or may be false is true, or that a state of facts exists, which has never really taken place : an allegation in legal proceedings that does not accord with the actual facts of the case, and which may be contradicted for every purpose, except to defeat the beneficial and for which the fiction is invented and allowed. The rule on this subject is that the court will not endure that a mere form or fiction of law, introduced for the sake of justice, should work wrong, contrary to the real truth and substance of the thing."

(25) It has already been observed above that the petitioner joined the Army on March 10, 1964 as ECO. He left the Army on being released on July 16, 1969 and

joined the CRPF on the same date. Hence by a legal fiction he will be deemed to have joined the CRPF on the date he joined the army i.e. March 10, 1964 and his seniority will relate back to the said date. The petitioner is alleged to have not been considered for the post of Assistant Commandant by the Dpc which was held on November 3, 1971 on the ground that by that time he has not completed two years of service which was mandatory as per the provisions of Rule 105 of the CRPF Rules. To my mind this could not have been done in view of the above view which this Court has taken. By a legal fiction we assume some thing as true which in fact is false and would not allow to be disproved. A fiction is created in order to confer certain benefits. In fact it is introduced for the sake of justice. It is an assumption that a certain state of fact exists whereas in fact it is not there.

(26) To the same effect are the observations of Lord Asquith as reported in *East End Dwelling Co. Ltd. v. Finsbury Borough Council* (1951) 2 All Er 587 ". If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequence and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs".

(27) The same view was taken by a Single Judge of this Court in the case of *O. N. Tandon & Ors. v. Food Corporation of India* (6), C.W. No. 36175, decided on February 17, 83.

(28) Admittedly, the said fiction was created with a view to confer certain benefits and advantages on the petitioner & others who served in the Army. With the said and in view the circulars and the Notifications were issued that they be given the benefit of their past services for the purpose of their seniority and pay and emoluments. Promotion admittedly is an incidence of seniority. Thus it is inconceivable and beyond all reasonable comprehensions if we come to the conclusion that the services rendered by a person in the past be considered for his seniority and not for his promotion. In the above circumstances I feel that the petitioner should have been considered for promotion in the Dpc which was held on November 3, 1971.

(29) The second Dpc was held on January 25, 1973. The petitioner was not selected by the said Dpc on the ground that he did not make the grade. This obviously was done on the basis of the adverse remarks which were communicated to the petitioner vide letter dated July 18, 1971.

(30) Now the question which comes to the tip of the tongue is as to whether the said adverse remarks could have been considered by the said Dpc ? My answer to the above question is an emphatic no. Every adverse remark, it is an established principle of law, is to be communicated to an officer against whom the same is made in order to aboard him an opportunity to make a

representation against the same. The petitioner also represented against the same on September 7, 1971. The said representation was rejected vide letter dated November 29, 1973. Thus by the time the said adverse remark was taken into consideration the representation of the petitioner against the same was pending. Hence, I feel, the said adverse remark could not have been taken into consideration by the DPC. I am inclined here to cite (para v.) from the- Govt. of India, Ministry of Home Affairs" O.M. No. 21011/1/77-Estt. dated 30-1-78 forwarded by Ad (ADM) vide hts Endst. No. E. IX. 12/ 62-78 dated July 24, 1978 (Annexure-IX)" All representations against adverse remarks should be decided expeditiously by the competent authority and in any case, within three months from the date of submission of the representation. Adverse remarks should not be deemed as operative, if any representation filed within the prescribed limit is pending.....".

(31) Furthermore, it was opined in *Gurdial Singh Fijji v. The State of Punjab and others* 1979(1) Slr 804...." The principle is well settled that in accordance with the rules of natural justice, an adverse report in a confidential roll cannot be acted upon to deny promotional opportunities unless it is communicated to the person concerned so that he has an opportunity to improve his work and conduct or to explain the circumstance leading to the report. Such an opportunity is not an empty formality, its object, partially, being to enable the superior authorities to decide on a consideration of the Explanation offered by the person concerned ,whether the adverse report is justified. Unfortunately, for one reason or another, not arising out of any fault on the part of the appellant, though the adverse report was communicated to him, the Government has not been able to consider his Explanation and decide whether the report was justified. In these circumstances is difficult to support the non-issuance of the integrity certificate to the appellant. The chain of reaction began with the adverse report and the infirmity in the link of causation is that no one has yet decided whether that report v/as justified.." Thus the case of the petitioner should have been considered in the Dpc held on January 25, 1973 without taking into consideration the adverse remark.

(32) The petitioner in his relief at Sr. No. 2 has claimed that his case for promotion to the post of Assistant Commandant should have been considered by the Dpc held on January, 25, 1973. However, the view which this Court is taking is this that the petitioner was entitled to be considered for promotion to the post of Assistant Commandant even on November 3,1971 though the petitioner has not claimed the said relief. However, it is well known that a Court while exercising its Extraordinary Jurisdiction under Art. 226 of the Constitution of India has the power to mould, the relief it thinks just and fair in the circumstances of a case.

(33) To the same effect are the observations of their Lordships of the Supreme Court as reported in *Chiranjit Lal Chowdhuri Vs. The Union of India (UOI) and Others,(8)*" Anyway Art. 32 of the Constitution gives us very wide discretion in the matter of framing our writs to suit the exigencies of particular cases, and

the application, of the petitioner cannot be thrown out simply on the ground that the proper writ or direction has not been prayed for".

(34) In the circumstances stated above the petitioner is entitled to succeed. The petition is allowed. The letters dated January 30, 1979, July 17, 1979, September 9, 1976 and February 13, 1979 are hereby quashed. The services rendered by the petitioner as Emergency Commissioned Officer for the period from March 10, 1964 to July 16, 1969 will be taken into consideration for the purposes of seniority and fixation of pay and emoluments and all other consequential benefits. The case of the petitioner will be considered for promotion to the post of Assistant Commandant as on January 31, 1971 and if selected, will be promoted from the said date.