

(2011) 07 DEL CK 0374
In the Delhi High Court
Case No : Writ Petition (C) 8709 of 2010

Indra Kumar Mehta

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 28-07-2011

Acts Referred:

Constitution of India, 1950 — Article 142

Citation : (2011) 07 DEL CK 0374

Hon'ble Judges : Sunil Gaur, J;Pradeep Nandrajog, J

Bench : Division Bench

Advocate : Rekha Palli, Amrita Prakash and Punam Singh, for the Appellant; L.K. Garg and Bhupinder Sharma, for the Respondent

Final Decision : Disposed Off

Judgement

Pradeep Nandrajog, J.—The factual backdrop resulting in the above captioned writ petition being filed is that the Respondents issued a circular dated 27.12.1995 notifying to the members of the Central Para-Military Forces that those who had rendered 10 years service would be entitled to pension if they either resign or sought voluntary retirement. Large number of BSF jawans, who had rendered 10 years" service sought voluntary retirement or offered to resign, which was accepted.

2. As regards the Petitioner, he joined service as an Assistant Commandant on 17.9.1984 and earned a promotion as a Deputy Commandant on 21.7.1989. By 17.9.1994 he had completed 10 years" service and thus when the circular dated 27.12.1995 was issued, having rendered service in excess of 11 years, he sought retirement which was accepted.

3. Pension was disbursed to the Petitioner and Ors. when a circular dated 15.1.1998 was issued informing that as per CCS (Pension) Rules 1972 minimum qualifying service to earn pension was 20 years and thus not only was pension stopped but recoveries were sought to be effected.

4. BSF officials who had either resigned or sought voluntary retirement upon rendering 10 years" service and who were misled by the circular dated 27.12.1995: that upon resigning or voluntarily retiring pension would be paid to them, litigated with respect to the circular dated 15.1.1998. They succeeded before the High Court but found defeat when, as per decision reported a Union of India and Others Vs. Rakesh Kumar etc., . the Supreme Court held that there could not be any estoppel against a statute and that the representation by the Government under the circular dated 27.12.1995 could not bind the Government in the teeth of the CCS (Pension) Rules 1972.

5. Another round of litigation commenced when the persons affected pleaded that since they acted contrary to their interest based on a representation which was held not binding the Government, they would be entitled to withdraw their resignation letters or letters seeking voluntary retirement. The second round of litigation terminated when the Supreme Court rendered its decision reported as Raj Kumar and Others Vs. Union of India (UOI) and Another,

6. The Supreme Court held that the person adversely affected had No. case in law but equities were held to be in their favour. Making it expressly clear in para 18 of the decision that the Supreme Court was issuing directions in exercise of its power to do complete justice under Article 142 of the Constitution of India, it was directed that all persons who had resigned or voluntarily retired on the belief that they would be paid pension could opt to rejoin but would have to refund the pension which they had received. The Supreme Court did not issue any directions as to in what manner the period post acceptance of the resignation/offer of voluntary retirement till the person was reinstated would be treated as. But qua those who did not seek reinstatement it directed that though not entitled to any pension, recoveries would not be made from them.

7. Petitioner sought re-induction in service and was taken back. The Petitioner now prays that his seniority with all consequential benefits including promotions be given to him.

8. It be noted that the Petitioner re-joined service, as pleaded by the Petitioner, on 1.6.2007.

9. The Petitioner had resigned as a Deputy Commandant and thus, had he continued to be in service he would have earned further promotions when the person immediately junior to him earned promotion as 2-IC on 3.1.1997 and further promotion, subject to the Petitioner being found fit for promotion.

10. With retrospective effect from 3.6.2008, vide order dated 21.7.2009, Petitioner has been promoted as 2-IC.

11. A similar issue arose before this Court when WP (C) No. 7410/2009 Sri Krishan v. UOI and Ors. and WP(C) No. 996/2010 Randev Singh and Ors. v. UOI and Anr. were decided vide order dated 2.2.2011, in para 11 to 19 of which decision it was observed as under:

11. 2 other problems have been projected by the Petitioners. The first is that persons junior to them, who continued to serve, have earned promotions. The Petitioners want a promotion with effect from the date persons junior to them were promoted. They also want their seniority to be protected. The second problem they highlight is of the period they did not serve being adjusted towards firstly earned leave, remainder towards half-pay leave and the balance as leave without pay i.e. EOL (Extra Ordinary Leave) and as a consequence as per FR-26 the date of increment being shifted to when they joined back.

12. Let us make it very clear that learned Counsel for the Petitioners have clearly stated that the Petitioners are not asking for salary for the said period, notwithstanding a claim being made to this effect in WP(C) 996/2010; a claim which even otherwise cannot succeed for the simple reason when the Supreme Court directed that even pension received for said period has to be refunded, it would run contrary to the direction issued by the Supreme Court if any Court would direct the salary to be released.

13. It has to be kept in mind by this Court that the persons similarly situate as Petitioners were held entitled to No. relief in law by the Supreme Court, but limited relief was granted by the Supreme Court in exercise of its power under Article 142 of the Constitution of India i.e. the power of doing complete justice.

14. With respect to the 2 problems faced by the Petitioners, we find that the Government of India has issued directions, which have been circulated to all the units by the DIG Establishment on 17.10.2008, as per which all persons who were re-inducted will retain previous seniority but would earn promotion to the next rank after undergoing mandatory courses.

15. Learned Counsel for the Respondents state that on the issue of seniority of the Petitioners and their entitlement for promotion, the Respondents may be bound down to the communication dated 17.10.2008, copy whereof we find has been annexed as Annexure R-2 to a Supplementary Affidavit filed by the Respondents under cover of its Index dated 13.4.2010.

16. We clarify that the Petitioners cannot claim benefit of promotion from a retrospective date or salary to the higher post from the retrospective date for the reason they must earn a promotion and upon promotion would be entitled to the salary of the promotion post only upon discharging the duties of the higher post.

17. But, on the issue of increments to be paid to the Petitioners, we are of the opinion that notwithstanding FR-26, which contemplates, normal situation, the instant case has a peculiar factual setting and thus the Government must reconsider the matter from at least one point of view.

18. The 2 decisions of the Supreme Court which we have noted, show that nearly 2000 jawans of BSF sought voluntary retirement or resigned on the express assurance that having putting 10 years service, but less than 20 years service, pension would be paid. These jawans were paid pension when in the year 1998 it

was detected by somebody that the assurance was contrary to the CCS (Pension) Rules 1972 resulting in the pension being stopped. Had these jawans been given No. assurance, they would not have acted to their detriment. These poor fellows lost the battle in law inasmuch as law does not recognize any estoppel against a Statute. Limited relief was given to these jawans by the Supreme Court when they were permitted to rejoin, but upon term of returning the pension which they have earned. Partial redressal has been accorded administratively to these persons in terms of the instructions dated 17.10.2008 requiring seniority to be protected but the consequences of promotion being prospective. In other words, an attempt has been made to harmonize the right of promotion with seniority retained with the liability of the Government to pay salary.

19. We can appreciate non-payment of salary on the promotional post till promotion is earned, but commensurate with the issue of seniority, would be the removal of the anomaly of a senior person not receiving a salary lower than what is received by the junior person. This anomaly is capable of being removed if an administrative decision is taken to waive FR-26 keeping in view the peculiar circumstances of the instant case and by giving notional increments for the years the Petitioners remained out of service i.e. not depriving the Petitioners the benefit of annual increments, with actual amount being paid when they rejoin and when they earn a promotion. This would mean that on the promotional posts, if promotion is earned, last pay drawn, on a notional basis, would be protected.

12. Direction issued in para 20 was as under:

20. Thus, we dispose of the writ petitions directing the concerned officer of BSF i.e. DIG Establishment to make a reference to the Ministry of Home Affairs seeking an opinion and preferably a concurrence to waive application of FR-26 qua the Petitioners and other similarly situated jawans of BSF and while so doing would draw up a note highlighting the origin of the problem in the context of the 2 decisions of the Supreme Court and would make a reference to our present decision; the opinion/concurrence to be sought would be to grant notional increments to all these persons so that the anomaly of their seniority being retained but they drawing less wages than their juniors would be removed. It would be highlighted that as per FR-26 a person granted Extra Ordinary Leave, other than on the grounds contemplated by FR-26, would result in the date of increment being shifted to the year succeeding when the person joins. A mandamus is issued to the Ministry of Home Affairs i.e. the Controlling Ministry, to process the reference made and take a reasoned decision.

13. The Petitioner would thus be entitled to the same relief as was granted to the writ Petitioners in the said 2 writ petitions, which decision we note has been accepted by the Respondents.

14. We note that as regards the issue of seniority, the establishment order dated 17.10.2008, referred to in para 14 of the decision dated 2.2.2011, takes care of

the same.

15. As regards the salary, No. direction can be issued to pay any salary from any retrospective date except the notional increments, in respect whereof necessary directions were issued as per para 20 of the decision dated 2.2.2011.

16. We hold that the Petitioner would be entitled to the same benefit which was directed to be issued vide para 20 of the decision dated 2.2.2011.

17. The other issue raised by the Petitioner during arguments was, that having been promoted as a 2-IC on 3.6.2008, the Petitioner would be deemed to have completed 2 years" service as 2-IC on 3.6.2010 and since 2 years" mandatory service as 2-IC has been rendered he would be entitled to further promotion.

18. We find that there are No. averments in the writ petition on the issue: Whether the applicable service rules mandate 2 years" regular service in the grade, for if the rule envisages 2 years" regular service in the grade, the Petitioner would not be entitled to the benefit of his promotion as 2-IC with retrospective date 3.6.2008. If the Service Rules do not contemplate regular service in the grade, the Petitioner may have a point.

19. In the absence of any pleadings in the writ petition, we do not issue any mandamus on the subject, except to declare that if the Service Rules do not contemplate 2 years" regular service in the grade, the Petitioner would be entitled to the benefit of his promotion as 2-IC being with a retrospective date and for which the Respondent would consider the language of the applicable service rule.

20. The writ petition stands disposed of issuing a mandamus in favour of the Petitioner by directing that the mandamus issued in para 20 of the decision dated 2.2.2011 disposing of WP(C) 7410/2009 would be read as a mandamus in favour of the Petitioner and on the issue of further promotion from the post of 2-IC to that of a Commandant, the Petitioner would be entitled to the declaration we have made as above.

21. No. costs.