
(2008) 05 DEL CK 0108

In the Delhi High Court

Case No : Writ Petition (C) No. 2178 of 1996

R.S. Sharad and Another

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 08-05-2008

Acts Referred:

Central Reserve Police Force Rules, 1955 — Rule 105

Citation : (2008) 104 DRJ 169

Hon'ble Judges : Sanjay Kishan Kaul, J; Mool Chand Garg, J

Bench : Division Bench

Advocate : Naveen R. Nath, for the Appellant; Sanjeev Sachdeva, for the Respondent

Judgement

Mool Chand Garg, J.—The petitioners who were directly recruited as Asstt. Company Commander in I.T.B.P. in 1974 were further promoted as Company Commanders and confirmed as such in the year 1980. On the other hand, respondents No. 3 to 18 (hereinafter referred to as private respondents) were recruited as Assistant Company Commander in the year 1980 and were promoted to the post of the Company Commanders/Dy SP in the year 1984.

2. The promotional post from the post of Company Commander/Dy. SP is that of Asstt. Commandant (Re-designated as Deputy Commandant). The second petitioner was promoted to the post of Asstt. Commandant (Deputy Commandant) on 06.5.1988 while the first petitioner was promoted to the said post on 06.7.1989.

3. Later a Writ Petition (CWP No. 885/89) was filed by R.S. Pathania i.e. the private respondents challenging the promotion of certain Subedar/Inspector (non gazetted) (their juniors other than the petitioners) to the post of Asstt. Commandant/equivalent post. In the said Writ Petition directions were given by this Court to respondents 1 and 2 on 26.7.1994 to consider the private respondents for promotion to the post of Asstt. Commandant (re-designated as Deputy Commandant) by making the following observation:

It may be recalled that the petitioners were directly recruited to the post of Assistant Company Commanders on June 12, 1980. Those were admittedly gazette posts and "in the Force" too. Thus, on May 6, 1988 when Respondents 3 to 15 were considered for promotion, they petitioners had already put in nearly 8 years of gazette service in the Force. Their claim for being considered for promotion to the post of Assistant Commandant could not thus be ignored.

What should then be done?

Since the petitioners (Respondents No. 3 to 18 herein) had rendered qualifying period of gazetted service in the Force, they ought to have been considered for promotion to the post of Assistant Commandant. As this was not done, Respondents 1 and 2 are directed to consider them for promotion on their record as on the date when they ought to have been considered and is selected. Their position will be adjusted in the seniority list.

4. The aforesaid judgment was delivered by taking into consideration Section 105 of CRPF (Second Amendment) Rule 1985 sub para 3-(A) (b) which provides that for the post of Asstt. Commandant five years gazetted service in Force from amongst Commanding Commanders or Quarter Masters or Asstt. Principals Central Training College of the Central Reserve Police Force was sufficient. On the strength of this judgment, the private respondents were promoted as Asstt. Commandants (Deputy Commandants) by the Review DPC held on 22.9.1995 w.e.f. February 1988. Subsequently, a revised seniority list dated 29.2.1996 was circulated by respondent No. 2 wherein the private respondents were shown senior to petitioners No. 1 and 2.

5. Petitioners aggrieved by the aforesaid action of respondents have filed the present Writ Petition. They have submitted that action of the respondents 1 and 2 showing the petitioners as juniors of the private respondents who were their juniors even on the strength of the orders passed by this Court in the aforesaid writ petition dated 26.7.1994 and not granting benefit of the said judgment to them is unsustainable being arbitrary and contrary to law. In this regard, the petitioners have made three folds submissions:

i) The promotional post of Company Commander/Dy.SP is Asstt. Commandant (now named as Deputy Commandant). To be eligible for that post, as per the revised eligibility conditions as circulated by the Government of India vide their office order bearing No. I-45026/5/82/Pers.II, dated 29.10.1987 the incumbent must have to his credit at least six years "gazetted service" in the Force at the time of his consideration whereas the judgment delivered by this Court in Pathania's case (supra) is based on Rule 105 CRPF which provide only five years service and was superseded.

ii) Once the petitioners had already been promoted on the strength of the rules applicable, the private respondents who were promoted subsequently could not have been shown senior to them.

iii) Even if the judgment in Pathania's case is to be taken as a correct judgment, though it is not, the petitioners should also have been given benefit thereof and should have been promoted as Deputy Commandant w.e.f. 21.11.1979 when they acquired five years gazette service in the Force.

6. Thus the petitioners sought issuance of a writ/directions in the nature of Certiorari for quashing the final revised seniority list in the grade of Deputy Commandant (GD) in ITBP as on 01.1.1993 circulated by the respondent No. 2 vide memo number 1-1093/4195/Estt/A-426, dated 29.2.1996 with further directions to prepare a fresh seniority list after assigning proper seniority to the petitioners in the said list. A further prayer is made for a direction to the respondents No. 1 and 2 to grant them also the benefit of the judgment delivered in the case of R.S. Pathania (supra) by considering them as qualified for the post of Asstt. Commandant/Deputy Commandant at the time of their initial considerations.

7. The respondents 1 and 2 have contested the matter. According to them, the writ petition filed by the petitioner is basically to seek promotion as Deputy Commandant w.e.f. 21.11.1979 and further grant of subsequent promotion despite the fact that the petitioners were not promoted in the year 1979 nor they objected to the same. Thus they are precluded to challenge their seniority after a period of 16 years. It is also stated by the respondents that the contentions of the petitioners seeking benefit of R.S. Pathania's case (supra) is blowing hot and cold in the same breath as on the one hand they alleged that the private respondents could not have been promoted to the post of Asstt. Commandant/Deputy Commandant having not completed six years of Group A Services in view of the Government of India letter No. 45026/2/85/Pers/II, dated 29th Oct. 1987, while, on the other hand, maintaining Rule 105 of the CRPF Rule as redundant despite directions given to the respondent 1 and 2 by the High Court on 26th July, 1994 to consider the private respondents for promotion to the post of Asstt. Commandant on the basis of Rule 105 of CRPF Rule in R.S. Pathania's case (supra) to which, they were not even a party. They have also not challenged the said judgment.

While replying to the merits of the case, it is also stated by the respondents, that the private respondents were considered for promotion by review DPC and promoted as Assistant Commandant (now re-designated as Deputy Commandant) w.e.f. 1988 notionally on the basis of the judgment delivered in Pathania's case and accordingly seniority was assigned to them. As regard the petitioners it is submitted that they were considered for the promotion to the post of Asstt. Commandant (now re-designated as Dy. Commandant) by the DPC held on 7.7.1987 and thereafter by DPC held on 25.2.1988, while the petitioner. 2 was promoted on the basis of recommendation of DPC held on 25.2.1988. Petitioner No. 1 was superseded by his juniors even in these two DPCs and was promoted on the basis of recommendation of DPC held on 22.9.1988. The review DPC was held in compliance of orders of this Court in R.S. Pathania's case

(supra). It is stated that the post of Asstt. Deputy Commandant is a selection post. Even few officers belonging to directly recruited batch of Asstt. Coy Commander of 1980 batch were also superseded by their junior in view of the grading given by the DPC. As such no harm was caused to the petitioners and if petitioners had any grudge then they should have challenged the above mentioned judgment. It is stated that by way of present writ petition, they cannot challenge the judgment of this court. It is also submitted that prior to enforcement of ITBPF Act, 1992 and Rules made thereunder, ITBPF was regulated under the provisions of CRPF Act, 1949 and CRPF rules 1955 made thereunder. In view of Transitory provisions laid down in Rule 187 of ITBP Rules 1994.

8. Learned Counsel appearing for respondents 1 and 2 has submitted, that revised instructions were brought to the notice to the court which decided in R.S. Pathania's case (supra). A specific reference to the averments in the counter affidavit in that case has been set out as under in the counter affidavit to the present writ petition:

The letter dated 29th Oct. 87 issued by MHA has been brought to the notice of Hon'ble High Court at the time of hearing of CWP No. 885/89 and the same had been annexed with the counter affidavit to the said writ petition as Annexure - R.XI. The promotion of respondents 3 to 18 to the post of Dy. Commandant has been made in the compliance of orders of 26.7.1994 of this Hon'ble High Court in CWP No. 885/89, as such same are legal and valid.

9. It is also stated that the final seniority list was prepared, circulated after inviting objections from the concerned persons and due compliance of principle of natural justice, service jurisprudence and rules, the final seniority list issued on 29.2.1996 is in order and as such no injustice has been done to the petitioner. The petitioners were considered by the original DPC held on 25.2.1988 but the petitioner No. 1 could not make grade.

10. As far as the private respondents are concerned they have neither caused appearance nor come to contest the writ petition.

11. We have considered the judgment delivered by this Court in R.S. Pathania's case (supra) of which copy has been annexed by the petitioners along with the writ petition. From the aforesaid Judgment, we find that while the court has not taken note of the revised circular dated 29.10.1987 despite contentions of respondents No. 1 and 2 and the circular having been placed before the Court, we find, that the court considered Rule 105 (3A) in extensio and held that the said Rule being statutory rule was applicable and was binding on the parties. The relevant discussions in this regard appears at internal page 17 of the judgment which is being reproduced for the sake of reference:

During arguments the promotion on May 6, 1988 of respondents 3 to 13 and 15 and non-consideration of the petitioners for promotion had been sought to be justified on the ground that at the relevant time the petitioners were not even

qualified to be considered for promotion to the post of Assistant Commandant and in support my attention was drawn to Sub-clause (6) in Sub-rule (3-A) in Clause (iii) of Sub rule 105 of the Central Reserve Police Force Rules, 1955 as substituted with effect from April 6, 1985 by Central Reserve Police Force (2nd Amendment) Rule, 1985 and which speaks of the requirement of 5 years of gazette service of certain categories of officers for being considered for promotion to the post of Assistant Commandant. The so substituted Sub-clause (6) runs as under:

(3-A) the posts of Assistant Commandants shall be filled

(i) ...

(ii) ...

(iii) by promotion:

(a) ...

(b) From amongst Company Commanders or Quarter Masters or Assistant Principals Central Training College of the Central Reserve Police Force who have completed 5 years gazette service in the Force.

...It was contended on behalf of the Respondents that since on May 6, 1988 when Respondents 3 to 13 and 15 were considered for and promoted to the post of Assistant Commandant the Petitioners had not completed 5 years of gazette service "as Company Commanders". Therefore, they were not eligible to be considered for promotion to the said post. It may be recalled that the petitioners were promoted as Company Commanders on February 20, 1984. Undoubtedly, as on May 6, 1988 they had not yet completed five years of services as "Company Commanders". Were they, Therefore, not eligible? This is the question and the answer lies hidden within the words "who have completed 5 years gazetted service in the Force".

The learned Counsel for Respondents 1 and 2 submitted that the words "who have completed 5 years gazetted service in the Force" are restricted to gazetted service put in conjointly in all the three posts referred to or either in one or two of those posts. In other words, the argument was that the period of gazetted service though rendered in the Force would not be counted if it was on a post other than the post of Company Commander, Quarter Masters or Assistant Principal, Central Training Colleges of the Central Reserve Police Force. I feel no hesitation in rejecting it. The rule does not say so either directly or by implication. It is wide enough and lays down only to restrictions. First, completion of 5 years gazetted service and secondly completion of such service "in the Force", which are wide enough to include all gazetted posts in the Indo-Tibetan Border Police, would have given place to some other words, like "on those or either of those posts".

It may be recalled that the petitioners were directly recruited to the post of

Assistant Company Commanders on June 12, 1980. Those were admittedly gazetted posts and "in the Force" too. Thus, on May 6, 1988 when Respondents 3 to 15 were considered for promotion, the petitioners had already put in nearly 8 years of gazetted service in the Force. Their claim for being considered for promotion to the post of Assistant Commandant could not thus be ignored. What should then be done?

Since the Petitioners had rendered qualifying period of gazetted service in the Force, they ought to have been considered for promotion to the post of Assistant Commandant. As this was not done, Respondents 1 and 2 are directed to consider them for promotion on their record as on the date when they ought to have been considered and is selected their position will be adjusted in the seniority list.

No order is made as to costs.

12. We may observe that when there was a rule in existence in the statute book i.e. Rule 105 (supra), the administrative instructions issued by the Government of India could not supersede the rule unless the instructions were incorporated in the Rules. Nothing has been pointed out that there was any vacuum which was sought to be filled up by administrative instructions. In this regard, we may also refer to another judgment of the Hon'ble Supreme Court in the case of T.N. Housing Board Vs. N. Balasubramaniam and Others, wherein it has been held:

Once the eligibility criteria are considered to be a prerequisite for giving effect to the statutory Regulations, the purported executive instructions would not be applicable. Once it is held that relying on the basis of the executive instructions in terms of Regulation 28 (a), the Draftsmen who have been getting higher salary are given preference over the diploma-holder Junior Engineers, the eligibility criteria contained in the statutory Regulations would become otiose. Such a consequence would lead to an absurdity. Therefore, it is held that the executive instructions cannot be given effect to.

13. Now coming to the second point i.e. benefit of Rule 105 not being granted to the petitioners by promoting them w.e.f. 21.11.1979 it would suffice to observe that the petitioners having not come to the court earlier against the report of the DPC at the relevant time despite existence of Rule of 105, now cannot take benefit thereof merely because of a judgment delivered in the case of R.S. Pathania's case (supra). If the petitioners were aggrieved that they ought to have been considered by Rule 105 they should have approached the court at proper time without delayed laches.

14. However, we find force in the contention that the petitioners could not have been shown junior to private respondents who were considered for promotion on the strength of order passed in R.S. Pathania's case (supra) which writ petition itself was filed in 1989 by which time both the petitioners had already been promoted as Asstt. Commandant (re-designated as Deputy Commandant). They were neither a party to the writ petition filed by the Pathania & Ors. nor were

juniors of the petitioners who ought to have been affected by the review DPC which was held for granting promotion to the private respondent on the strength of the judgment delivered in the R.S.Pathania's case (supra). We also do not find any direction in the order passed by this Court in R.S. Pathania's case (supra) whereby the respondents No. 1 and 2 were authorized to make the petitioners who were not even a party to the writ petition junior to the private respondents.

15. Thus, to that extent, the petitioners succeed and accordingly Writ of Certiorari is issued thereby quashing the seniority list circulated by the respondents 1 and 2 dated 29.2.1986 with a further direction to prepare a fresh seniority list by showing the position of Petitioners No. 1 and 2 over and above private respondents. It is trite to say that the petitioners would become entitled to all consequential benefits qua private respondents. With these observations, Writ Petition is disposed of by leaving the parties to bear their own cost and accordingly, all the interim application have become infructuous and are disposed of.