

(2011) 01 DEL CK 0108

In the Delhi High Court

Case No : Writ Petition (C) 10668 of 2009

Sub Insp. S. Bhaskaran

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 25-01-2011

Acts Referred:

Citation : (2011) 177 DLT 166

Hon'ble Judges : Suresh Kait, J; Pradeep Nandrajog, J

Bench : Division Bench

Advocate : S.R. Kalkal, for the Appellant; Anuj Aggarwal and Bhupinder Sharma, Assistant Commandant (BSF), for the Respondent

Judgement

Pradeep Nandrajog, J.—Enrolled as a Constable (GD) with BSF on 11.9.1979, Petitioner was re-mustered as Clerk and earned promotion to the rank of ASI (Clerk) on 27.3.1986. He earned further promotion to the rank of Sub-Inspector (Clerk) on 14.2.1996.

2. On 27.12.1995, BSF issued an office memorandum informing that BSF personnel who have completed 10 years service may seek resignation; expressly informing that service pension under Rule 19 of the BSF Rules 1969 would be paid.

3. Petitioner resigned from service pursuant to the said office memorandum and was sanctioned service pension with effect from 1.4.1996, which was suddenly stopped in July 2001, on the stand taken by BSF that having not completed 20 years service no pension could be paid since Rule 49 of the CCS Pension Rules 192 stipulated 20 years as the minimum qualifying service.

4. Large number of BSF personnel who had resigned pursuant to the office memorandum dated 27.12.1995, on an express assurance that pension would be paid, litigated when pension was abruptly stopped after a few years. Matter was finally decided by the Supreme Court on 4.1.2006; decision being reported as Raj Kumar and Others Vs. Union of India (UOI) and Another, ; directing that all

those who had resigned pursuant to the office memorandum dated 27.12.1995 would be entitled to be reinstated with seniority protected. It was directed that the department would regularize the period of absence.

5. Realizing that in the interregnum, promotions had been effected, an office order was issued directing that wherever juniors have been promoted, those who have been re-inducted in service, may be detailed to undergo respective PP course and DP course, and if they qualify, they should be promoted with effect from the date of qualifying at the examination but their inter-se seniority in the promoted rank be reckoned with effect from the date of promotion of their juniors. In other words, effect was to grant pay from the date the officers assumed charge of the promotional post, but seniority to be reckoned with reference to the date persons junior were promoted.

6. Petitioner rejoined duty on 25.5.2006 after the Supreme Court pronounced the verdict and in respect of which rejoining, an office order dated 2.7.2007 was issued.

7. In between, persons junior to the Petitioner had been promoted to the rank of Inspector with effect from 11.5.2004. Therefore, Petitioner submitted a representation that he be promoted as Inspector and seniority assigned to him with effect from the date persons junior to him were promoted. It may be noted here that as averred by the Petitioner in para 14 of the writ petition, no mandatory course was prescribed for promotion to the rank of Inspector (Clerk) from the rank of Sub-Inspector (Clerk) when promotions were effected on 11th May 2004. As per the Petitioner it was only with effect from 9.10.2006, an office basic management course, to be undertaken was prescribed, before Sub-Inspector (Clerk) could earn promotion to the post of Inspector, which assertion of fact has not been denied by the Respondents while responding to the averments made in para 14 of the writ petition.

8. Petitioner's representation dated 28.12.2008 went unheeded.

9. But before that, certain events which are relevant took place and hence we note the same. Petitioner was sanctioned 60 days earned leave with effect from 20.3.2008 to 22.5.2008. While on leave, the Unit Medical Officer placed Petitioner in low medical category for a period of 12 weeks with effect from 4.5.2008. The Petitioner alleges that the Unit Medical Officer acted out of malice inasmuch as Petitioner had a verbal altercation with him. Petitioner asserts that the Unit Medical Officer could not have placed the Petitioner in low medical category, which plea of the Petitioner has been refuted by the Respondents who have made good their assertions with reference to the general medical condition of the Petitioner which shows that prior to, during the leave period and even subsequent thereto, Petitioner was under constant medication. The Respondents have further made good the plea of negation of mala-fide of the Unit Medical Officer, by drawing attention of this Court to the complaint made by the Petitioner against the Unit Medical Officer, pursuant where to a Court of Inquiry

was ordered and in which the allegations leveled by the Petitioner against the Unit Medical Officer were found to be false. The Respondents have also made good the plea that prior to proceeding on leave he was issued medicine for the leave period i.e. tablets of "Amblog - A" (anti-hypersensitive medicine). The Respondents have also made good the plea with reference to documents to show that before Petitioner took leave he remained hospitalized from 19.10.2007 till 23.10.2007 and for two further days on 1.11.2007 and 2.11.2007.

10. As per the Petitioner, at a Review Medical Board held on 1.8.2008 he was declared medically fit and based thereon he caused to be served a legal notice dated 23.9.2008 upon the Director General BSF requiring Petitioner to be promoted to the rank of Inspector (Ministerial Clerk) and seniority assigned from the date persons junior to him were promoted to which reply dated 7.11.2008 was received stating that he could not be promoted till he successfully cleared the mandatory course prescribed to earn promotion to the post of Inspector (Ministerial).

11. As noted hereinabove, Petitioner claims that since persons junior to him were promoted on 11th May 2004 and at that point of time there was no requirement to successfully undergo a mandatory course and that the requirement to successfully clear the mandatory course was introduced for the first time on 25.5.2006, the department could not insist on his successfully completing the mandatory course. Alternatively, the Petitioner claims that being declared medically fit on 1.8.2008, he should have been detailed for the mandatory course and for which necessary movement order should have been issued.

12. Refuting the said stand, it is pleaded in the counter affidavit filed that at a Review Medical Board held on 20.2.2009, the Petitioner was once again placed in low medical category for a period of 96 weeks.

13. The writ petition was filed when the department did not permit the Petitioner to proceed to undergo the stated mandatory course on the allegation that at the Review Medical Board held on 20.2.2009, for a period of 96 weeks, the Petitioner has been placed in low medical category.

14. Whereas the Petitioner places reliance upon certificates obtained by him from doctors at Civil Hospitals to assert that he is fully fit, the Respondent continues to rely upon the opinion given by the Medical Board and the Review Medical Board and thus to cut short the controversy, which essentially is a question of fact, vide order dated 9.12.2010 it was directed that a Board of Doctors at the Command Army Hospital (Research and Referral) Delhi Cantonment would examine the Petitioner and submit a report in Court.

15. The Petitioner appeared before a Board of Doctors at the Army Hospital (R&R). Col. R. Datta Senior Advisor (Medicine and Cardiology); Col. Sunil Sofat Senior Advisor (Medicine and Cardiology) and Lt. Col.G. Shanmughraj CL Specialist (Medicine) examined the Petitioner on 21.12.2010 and have submitted the report as per which Petitioner has been certified to be in "SHAPE-I" i.e. "FIT".

16. Mr. Anuj Aggarwal Advocate on instructions from Mr. Bhupender Sharma, Assistant Commandant (BSF) states that the report submitted by the Board of Doctors at the Army Hospital (R&R) is accepted by the Respondents and thus concedes that the Petitioner would be entitled to be treated as medically fit.

17. Two issues arise for consideration in the light of the aforementioned facts. Firstly, whether at all the Petitioner is liable to successfully clear the mandatory course, which requirement was introduced for the first time on 25.5.2006 in light of the fact that persons junior to the Petitioner were promoted on 11.5.2004 and at that point of time name of Petitioner was not included in the promotion list for the reason he had resigned pursuant to the office memorandum dated 27.12.1995 on an express assurance of pension being paid and since the assurance was withdrawn, matter was under litigation till it was settled by the Supreme Court on 4.1.2006 requiring all those who has resigned to be taken back in service. The second question would be contingent upon the answer to the first; if the answer to the first question is against the Petitioner, whether the Petitioner should be detailed and sent to undergo the mandatory promotion course and if he clears the same, what should be the seniority assigned to him.

18. A perusal of the decision of the Supreme Court in Raj Kumar's case (supra) would reveal that relief was granted by the Supreme Court, expressly stating in para 19 of the decision, that the directions were issued in exercise of the power vested in the Supreme Court under Article 142 of the Constitution in order to do complete justice to a Section of the Personnel who would otherwise be placed in an inequitable situation for which the authorities were to be blamed. The Supreme Court held that an executive instruction contrary to law could not be enforced hence the Supreme Court expressed inability to direct pension to be paid as per the promise held out under the office memorandum dated 27.12.1995 since that would have violated the CCS (Pension) Rules 1972.

19. It was under these circumstances that not only the Petitioner but a large number of other persons were required to be taken back in service.

20. In the interregnum, those who continued to serve earned promotions and needless to state the promotions were effected as per the then existing policy. In other words, the zone of consideration got restricted to such number of persons who were then in service and they moved up the ladder on a comparative assessment of their inter-se merit or otherwise, depending upon whether the post was a selection post or a non-selection post.

21. Since the Petitioner has regained employment under a decision of the Supreme Court which was rendered in very peculiar circumstances and the benefit extended was expressly in exercise of the power of the Supreme Court under Article 142 of the Constitution of India, no benefit other than what was granted by the Supreme Court can be directed to be given by this Court and thus it has to be held that the Petitioner would have to earn a promotion as per the promotion policy when he rejoined service and this answers the first question.

But, and this would be our answer to the second question, this would not be the end of the destination of the Petitioner for the reason the Respondents admit now that the Petitioner is in "SHAPE-I" i.e. is "FIT" for promotion and thus we see no reason why the Petitioner should not be detailed and given a movement order to attend the mandatory course which he must successfully clear for being promoted as Inspector (Ministerial Clerk). Needless to state, the Respondents themselves have taken a policy decision to grant seniority with effect from the date junior persons were promoted and thus it would be a just situation for the Petitioner, if he clears the mandatory course, to earn a promotion prospectively and get seniority from the retrospective date. This would be in conformity with the view taken in various judicial decisions that a person wrongly denied promotion would not be entitled to wages applicable to the promotional post on the principle of having not shouldered the responsibilities of the higher post the person is not entitled to higher wages, but would be entitled to seniority from a retrospective date.

22. Thus, we dispose of the writ petition issuing a mandamus to the Respondents to detail the Petitioner at the next available foundation course which would be conducted for Sub-Inspector (Ministerial Clerk) to acquire the eligibility for promotion as an Inspector. If the Petitioner successfully clears the foundation course, he would be promoted against the next available vacancy to the post of Inspector (Ministerial Clerk) and for purposes of seniority the same would be assigned to him notionally treating the promotion from the retrospective date when person immediately junior to the Petitioner was promoted from the post of Sub-Inspector (Ministerial Clerk) to that of Inspector (Ministerial Clerk).

23. No costs.