

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on: 20<sup>th</sup> October, 2009*  
*Judgment Delivered on: 27<sup>th</sup> October, 2009*

+ **WP(C) No.21900/2005**

ASHOK KUMAR .....Petitioner  
Through: Ms.Rekha Palli, Ms.Poonam Singh,  
& Ms.Amrita Prakash, Advocates.

Versus

UNION OF INDIA & ORS. ....Respondents  
Through: Mr.A.K.Bhardwaj, Advocate for  
R-1 to 4.

**WP(C) No.21902/2005**

RAJESH KUMAR .....Petitioner  
Through: Ms.Rekha Palli, Ms.Poonam Singh,  
& Ms.Amrita Prakash, Advocates.

Versus

UNION OF INDIA & ORS. ....Respondents  
Through: Mr.A.K.Bhardwaj, Advocate for  
R-1 to 4.

**WP(C) No.21904/2005**

VIRENDER SINGH GEHLOT .....Petitioner  
Through: Ms.Rekha Palli, Ms.Poonam Singh,  
& Ms.Amrita Prakash, Advocates.

Versus

UNION OF INDIA & ORS. ....Respondents  
Through: Mr.A.K.Bhardwaj, Advocate for  
R-1 to 4.

**WP(C) No.22026/2005**

ASHOK KUMAR .....Petitioner  
Through: Ms.Rekha Palli, Ms.Poonam Singh,  
& Ms.Amrita Prakash, Advocates.

Versus

UNION OF INDIA & ORS. ....Respondents  
Through: Mr.A.K.Bhardwaj, Advocate for  
R-1 to 4.

**WP(C) No.9568/2006**

MAHABIR PRASAD .....Petitioner  
Through: Ms.Rekha Palli, Ms.Poonam Singh,  
& Ms.Amrita Prakash, Advocates.

Versus

UNION OF INDIA & ORS. ....Respondents  
Through: Mr.A.K.Bhardwaj, Advocate for  
R-1 to 4.

**WP(C) No.15083/2006**

KULDEEP SINGH .....Petitioner  
Through: Ms.Rekha Palli, Ms.Poonam Singh,  
& Ms.Amrita Prakash, Advocates.

Versus

UNION OF INDIA & ORS. ....Respondents  
Through: Mr.A.K.Bhardwaj, Advocate for  
R-1 to 4.

**WP(C) No.1761/2007**

RAM MEHAR SINGH DHAKA .....Petitioner  
Through: Ms.Rekha Palli, Ms.Poonam Singh,  
& Ms.Amrita Prakash, Advocates.

Versus

UNION OF INDIA & ORS. ....Respondents  
Through: Mr.A.K.Bhardwaj, Advocate for R-1.

**WP(C) No.6978/2007**

SI/GD. SHYAM BIHARI .....Petitioner  
Through: Ms.Jyoti Singh, Advocate.

Versus

UNION OF INDIA & ORS. ....Respondents  
Through: Dr.Ashwani Bhardwaj, Advocate.

**WP(C) No.7893/2007**

M.J.ANSARI .....Petitioner  
Through: Ms.Jyoti Singh, Advocate.  
Versus

UNION OF INDIA & ORS. ....Respondents  
Through: Dr.Ashwani Bhardwaj, Advocate.

**CORAM:**  
**HON'BLE MR. JUSTICE PRADEEP NANDRAJOG**  
**HON'BLE MR. JUSTICE SURESH KAIT**

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes.
3. Whether the judgment should be reported in the Digest? Yes.

**PRADEEP NANDRAJOG, J.**

1. Petitioners Ashok Kumar, Rajesh Kumar, Virender Singh Gehlot, Ashok Kumar, Mahabir Prasad and Kuldeep Singh have

filed writ petitions; being WP(C) Nos.21900/2005, 21902/2005, 21904/2005, 22026/2005, 9568/2006 and 15083/2006 respectively, praying for the issue of a writ of Mandamus against the respondents directing them to promote the petitioners from the rank of Deputy Commandant to the rank of Second-in-Command (2 IC) in Border Security Force (BSF) with retrospective effect from the date on which the immediate juniors of the petitioners were promoted to the rank of Second-in-Command.

2. Petitioner Ram Mehar Singh has filed WP(C) No.1761/2007 praying for the issue of a writ of mandamus directing the respondents to promote the petitioner from the rank of Sub-Inspector to the rank of Inspector in BSF with effect from the date on which the immediate junior of the petitioner was promoted to the rank of Inspector.

3. Petitioners SI/GD Shyam Bihari and SI M.J.Ansari have filed WP(C) Nos.6978/2007 and 7893/2007 respectively, praying for the issue of a writ of mandamus directing the respondents to promote the petitioners from the rank of Sub Inspector to the rank of Inspector in CRPF with effect from the

date on which the immediate juniors of the petitioners were promoted to the rank of Inspector.

4. A brief resume of the service profile of the petitioners may be noted before delving into the legal issues which were projected at the hearing of the writ petitions by the learned counsel for the parties.

5. Ashok Kumar, the Writ petitioner of WP(C) No.21900/2005, was appointed as an Assistant Commandant in the Border Security Force (BSF) on 4.2.1991. In October 1997 he was promoted to the rank of Deputy Commandant and in view of the fact that he had a very high educational qualification i.e. M.Sc. (Physics) with specialization in electronics, was posted as Deputy Commandant (Communications) at FTR HQ TC&M Agartala from 27.10.1997 to 11.7.1999. With effect from 12.7.1999 to 22.7.2003 he was posted as an Instructor at Signal Training School, New Delhi. He was posted to the 199 Bn. BSF on 23.7.2003 where he remained till 12.7.2005. On 6.8.2005 he was deputed to the 46<sup>th</sup> Bn. BSF. His grievance is of not being promoted to the rank of Second-in-Command (2 IC) when persons junior to him were promoted on 25<sup>th</sup> and 26<sup>th</sup> August 2004. The reason

being his rendering service in a duty battalion for only five months. As per the respondents, the service rule applicable requires at least two years service as a Deputy Commandant in a duty battalion as an essential condition for being considered for promotion to the rank of 2 IC.

6. Rajesh Kumar was appointed as an Assistant Commandant under BSF on 26.12.1990 and was promoted to the rank of Deputy Commandant in October 1997. From 17.10.1997 to 28.6.1999 he was posted as Deputy Commandant (Arms Inspection Authority) and in-charge of Arms Workshop in Frontier Headquarter at Srinagar. From 1.7.1999 to 15.6.2003 he was posted at the Arms Workshop at CSWT BSF Indore. In July 2003 he was transferred to the 15<sup>th</sup> Bn. BSF where he served till January 2004 when he was posted at UN Mission Duty. His grievance also is the same as that of Ashok Kumar. The reason being his rendering service in a duty battalion for only six months and fifteen days.

7. Virender Singh Gehlot was appointed as an Assistant Commandant under BSF on 26.12.1990 and was promoted as a Deputy Commandant in October 1997. On promotion he was deputed to the 15<sup>th</sup> Bn. BSF where he worked till 11.11.1997

when he was posted to the 181<sup>st</sup> Bn. where he remained till 27.2.1999. He was thereafter transferred as the Deputy Commandant (G) at Sector Headquarters Firozepur. On 14.5.2002 he was transferred to the 80<sup>th</sup> Bn. but before he could proceed to said battalion, the posting was cancelled and he remained at Firozepur till October 2003. On 29.4.2003 he was transferred to the 192<sup>nd</sup> Bn. but the order was kept in abeyance in public interest. Only on 31.10.2003 he was relieved and joined at the 192<sup>nd</sup> Bn. Even his grievance is the same as that of the two previous petitioners. The reason being his rendering service in a duty battalion for only one year and six months.

8. Ashok Kumar, the Writ Petitioner of WP(C) No.22026/2005, was appointed as an Assistant Commandant under BSF on 15.5.1989 and was promoted as a Deputy Commandant on 15.6.1995. On promotion he was posted to the 33<sup>rd</sup> Bn. where he functioned as a Deputy Commandant till June 1996. Even he, having technical qualifications, was posted in June 1996 at Sector Headquarters BSF Kolkata as Joint Assistant Director (Communication) where he remained till July 1999. He was posted thereafter as Director Staff

(Instructor) at the BSF Academy Tekanpur where he remained till June 2003. He was thereafter posted at the 16<sup>th</sup> Bn. He has the same grievance as the previous petitioners. He had rendered service in a duty battalion for one year and six months.

9. Mahabir Prasad was appointed as an Assistant Commandant under BSF in the year 1991 and was promoted as a Deputy Commandant in October 1998 and on promotion was posted at CSMT BSF Academy Tekanpur where he worked till on 14.5.2002 he was posted to the 100<sup>th</sup> Bn. But in public interest the transfer/posting order was withheld and he remained at the said academy till 24.5.2003 when he was transferred to the 100<sup>th</sup> Bn. Even his grievance is the same as that of the previous petitioners, he having rendered service in a Duty Battalion for one year and six months till February 2005, in which month persons junior to him as Deputy Commandant were promoted.

10. Kuldeep Singh was appointed as an Assistant Commandant BSF on 26.12.1990 and was promoted as a Deputy Commandant on 17.10.1997. On promotion he was posted as Director Staff (Instructor) at the BSF Academy

Tekanpur where he remained posted till July 2002. So that he could enhance his professional skills and instructional ability, the employer sent him to the Defence Services Staff College Wellington where he remained till April 2003 and on completion of the course was posted at the 44<sup>th</sup> Bn. BSF where he remained till January 2004, when he was posted at UN Mission Kosova where he remained till January 2005. In said month he was posted back at the 44<sup>th</sup> Bn. BSF. His grievance pertains to persons junior to him being promoted as 2 IC in April 2004. As on 1.1.2004, he had rendered service in a duty battalion for only seven months.

11. The case of the other petitioners pertain to a claim for promotion to other ranks.

12. Ram Mehar Singh joined service under BSF as an Assistant Sub Inspector and in October 2001 was promoted to the rank of Sub Inspector and was deputed to SHQ BSF Kupwara where he remained till April 2006 when he was transferred to the 109<sup>th</sup> Bn. BSF. His grievance is that at the DPC held in the month of March 2006, his case was not considered and persons junior to him were promoted as

Inspector on the ground that by said date he had rendered no service as an Inspector in a duty battalion.

13. Shyam Bihari and M.J.Ansari are employed under CRPF and their grievance also relates to not being promoted to the rank of Inspector and their claims being overlooked in the DPCs held when persons junior to them were promoted to the rank of Inspector. Shyam Bihari was employed as a Constable in CRPF on 20.7.1970 and on 28.3.2003 was promoted to the rank of Sub Inspector. He remained posted at the BDD Dog Squad. In the year 2007 persons junior to him were promoted to the rank of Inspector and his claim was overlooked on the ground that when the DPC met, he had rendered no service as a Sub Inspector in a duty battalion.

14. M.J.Ansari was recruited as a Constable under CRPF in the year 1970 and in the year 1984 was promoted to the rank of Lance Naik and in March 2003 was promoted to the rank of Sub Inspector and was posted at 89<sup>th</sup> Bn. CRPF. On 12.5.2003 he was posted under the Provisioning Directorate. He remained under the Provisioning Directorate till February 2007 during which period he was sent for SSICC Course to CTC-III. His grievance pertains to promotions effected to the post of

Inspector in the month of July 2007, when persons junior to him were promoted and his claim was overlooked on the ground that he had not completed two years service as a Sub Inspector in a duty battalion.

15. Till Border Security Force (General Duty Officers) Recruitment Rules 2001 were framed, the Border Security Force (Seniority, Promotion and Superannuation of Officers) Rules 1979 and the Border Security Force (Assistant Commandant) Recruitment Rules 1985 were in force and as per the said rules eligibility criteria for promotion to the post of 2 IC did not mandate that the Deputy Commandant should have worked for at least two years in a duty battalion. Similarly, the eligibility criteria for promotion to the post of Inspector did not mandate that the Sub Inspector should have worked for at least two years in a duty battalion. A similar thing happened under the CRPF. New rules were notified on 12.5.2001 and for the first time a stipulation was added that only those Sub Inspectors who had rendered a minimum of two years service in a duty battalion would be eligible for promotion to the post of Inspector. Similar was the rule for other officers.

16. In a nutshell, the grievance of all the writ petitioners is that transfer/posting is not in their hands. It is for the employer to decide as to where an employee has to be posted. The petitioners allege that it was not in their hand as to where they should be posted. Thus, the petitioners claim that the new service Rule(s) has acted to their detriment. They further allege that their posting at the various institutes where training was imparted or critical administrative duties were performed was on account of the petitioners having a much better service profile than their counterparts and also on account of the petitioners having better and superior educational or technical qualifications. Surely, petitioners contend, better qualifications cannot become a handicap. With reference to the pleadings in WP(C) No.21904/2005 and WP(C) No.9568/2006, the petitioners highlight that when Virender Singh Gehlot, who was posted at the Sector Headquarters Ferozepur was transferred on 14.5.2002 to a duty battalion, the transfer order was withdrawn in public interest and he was retained at the Sector Headquarters till 29.4.2003. The transfer/posting order dated 29.4.2003 was once again kept in abeyance in public interest and he

remained at the headquarter till he was transferred to a duty battalion on 31.10.2003. His case highlights the position that if his posting orders to a duty battalion were not withdrawn in public interest, when the DPC met in the year 2004, he would have rendered more than two years service in a service battalion. Even qua Mahabir Prasad it may be noted that while posted at the CSMT BSF Academy Tekanpur he was transferred to a duty battalion on 14.5.2002, but in public interest, the order was withdrawn and he remained at the institute for one year. Had his transfer order dated 14.5.2002 been given effect to, even he would have rendered two years service in a duty battalion when the DPC met in January 2005.

17. We need not reproduce the averments made by the writ petitioners in the various writ petitions to highlight the aforesaid submissions and note the averments in WP(C) No.15083/2006 and the response thereto. In para 2 of the said writ petition, the writ petitioner has averred that the posting/transfer of the employees of BSF is the prerogative of the Inspector General, BSF. In response to the said paragraph, in para 2 of the counter affidavit it has been averred as under:-

“In reply to the contents of paragraph 2 of the writ petition, it is stated that the petitioner is presently

serving in Border Security Force as a Second in Command and posted to Sector HQ Jaisalmer-II. It is admitted that the posting/transfer of the officers of BSF is within the discretion and prerogative of the Force HQs of BSF on operational and administrative requirement basis. It is also mentioned that the officers posted in Critic Static Appointments could not be abruptly transferred due to various operational and administrative commitments.”

18. We may note that the averments by some of the writ petitioners in their writ petitions that their posting orders to duty battalions were kept in abeyance as they were working in critical positions in non-duty battalions have not been denied in the counter affidavit filed. Not only that. The respondents have justified their action by pleading, as noted in the preceding para, that since said petitioners were posted at critical positions, the abrupt transfer/posting orders posting them to duty battalions could not be implemented. Similarly, the averments by some of the writ petitioners qua they having high academic degrees on account whereof they were specifically selected for duty at Staff Training Institutes has not been denied. Further, the respondents have admitted that meritorious persons are deputed at the various academies and training institutes. We may refer to the pleadings of the respondents in the counter affidavit filed in WP(C)

No.9568/2006. While replying to ground F urged in the said writ petition, the respondents have admitted as under:-

“Whereas it is an admitted fact that it is only the exceptionally qualified personnel who are posted to training institute and thus they cannot be penalized for their extraordinary qualifications and skills.”

19. Pertaining to the writ petitioners employed under BSF, it is pointed out, as per pleadings in the writ petitions that in March 2004 due to expansion i.e. creation of additional battalions under BSF there was a quantum jump of posts in the officers' category. Pertaining to the post of 2 IC, the quantum jump was from 161 posts to 227 posts. Said fact has been admitted in the counter affidavits filed. Similarly, there was a quantum jump in the posts of Inspectors. The point which has been pleaded and was highlighted during arguments was that due to a sudden jump in the number of posts a large number of persons became eligible for promotion. Notwithstanding the rules being amended in the year 2001 mandating two years service in a duty battalion, till the posts were increased in the year 2004, nobody was much bothered as the officers in non-duty battalions could reasonably foresee being deputed to duty battalions and completing two years service in the duty battalion. But, with the sudden increase in posts, the

equations at the ground level changed and large number of officers became eligible for promotion. The futuristic calculations tumbled like nine pins resulting in the officers posted, for no fault of theirs, in non-duty battalions forfeiting their claim for promotion. The petitioners point out that to mitigate such hardships, the BSF Rules promulgated in the year 2001, vide Rule 13 empower the Central Government to relax the provisions of the Rules with respect to any class or category of persons if it is necessary or expedient to do so. The rule reads as under:-

**"13. Power to relax. –**

Where the Central Government is of the opinion that it is necessary or expedient so to do, it may, by order for reasons to be recorded in writing, relax any of the provisions of these rules with respect to any class or category of persons."

20. The petitioners under BSF allege that they have been discriminated for the reason (unexplainable), the Central Government granted relaxation of two years service in a duty battalion for promotion from the post of Assistant Commandant to Deputy Commandant and also from the post of 2 IC to the post of Commandant i.e. the immediate junior and the immediate senior post to the post of 2 IC. Petitioners wonder as to why this was done for other posts and not for

theirs. More so, for the reason the Rule in question i.e. of rendering two years service in a duty battalion was relaxed for other posts keeping in view the sudden increase in the cadre strength spread all throughout each category of post. The further grievance of all the petitioners is that under CRPF, for the post of 2 IC, similar relaxation was given. The two writ petitioners who claim promotion to the post of Inspector under CRPF were left equally wondering as to why no relaxation was given for promotion to the post of Inspector but similar relaxation was given for the post of 2 IC. The two writ petitioners claiming relief under CRPF allege same facts arising out of a quantum jump in the cadre strength on account of creation of additional battalions in CRPF.

21. Learned counsel for the petitioners urge that the action of the Central Government, to whom, the BSF Authorities and CRPF Authorities made a request to grant across the board relaxation on account of sudden increase in cadre strength, gave selective relaxation to only some category of posts as afore-noted and denied the same to the others. The respondents justified their action, to quote from the pleadings in WP(C) No.9568/2006:-

“E. That in reply to Para-E of WP(C), it is submitted that there were sufficient Dy. Commandants available in the zone of consideration for promotion as Second-in-Command, who fulfills all the mandatory provisions of the RRs for the vacancy year 2004-05. However, there was a shortfall of officers in the category of Second-in-Command and Asstt. Commandant in the zone of consideration for their empanelment and promotion to the rank of Commandant and Dy.Commandant respectively. Relaxation in mandatory residency period/duty battalion tenure was necessitated to these categories in order to fill up the vacancies being raised during the vacancy year 2004-05. Case of Dy. Commandants for relaxation has not been taken up with MHA as there were sufficient Dy.Commandants fulfilling the eligibility conditions available in the zone of consideration for promotion as Second-in-Command.

Para-F That in reply to Para F of the WP(C), it is stated that a case was taken up with MHA by BSF to grant relaxation of mandatory duty battalion tenure, which has not been agreed to by the MHA. It is, however, admitted that a general relaxation in duty battalion and courses has been granted to CRPF upto the rank of 2 IC and below for the vacancy years 2004-05 and 2005-06 due to large scale expansion in CRPF as a one time exemption.”

22. To put it in a nut shell, contentions urged by learned counsel for the petitioners are:-

A. As admitted by the respondents, transfer postings being the prerogative of the employer, the petitioners had no say in the matter and as disciplined soldiers of a para military force, had to join the place in which the petitioners were posted. Thus, the rule requiring at least two years' service in a duty

battalion has to apply keeping in view that for no fault of theirs, the petitioners were not deputed in the duty battalion and hence the respondents were obliged to exercise the power of relaxation to all said class/group of officers who could not complete two years' duty in a duty battalion on account of administrative exigencies.

B. The respondents have exercised the power of relaxation in an arbitrary manner, in that, for the post of 2 IC under CRPF the condition of two years' service in a duty battalion has been relaxed while denying similar benefit under BSF. Further discrimination being within BSF, i.e. of relaxing said condition for the post immediately below the post of 2 IC and the post immediately above the post of 2 IC, i.e. the post of Deputy Commandant and the post of Commandant.

C. Evidenced by the service profile of petitioner Virender Singh Gahlot and petitioner Mahavir Singh, notwithstanding orders being passed posting them to duty battalion, as noted in paras 7 and 9 above, in public interest, the employer kept in abeyance the posting orders and thereby preventing them from having two years' in a duty battalion.

D. Having admitted in the pleadings that the petitioners were posted in the academies, training institutes and headquarters and not in duty battalion due to the petitioners having higher order of merit and in some case higher academic and technical qualifications, the respondents are bound to exercise the power of relaxation for otherwise, the service rules would operate arbitrarily against better qualified candidates.

23. We may note at this stage that though the petitioners have not expressly challenged the vires of the Rules promulgated in the year 2001, but copious averments have been made in the writ petitions urging that the Rule requiring two years' in a duty battalion as an eligibility condition is arbitrary. For said reason, a Division Bench of this Court which heard the writ petitions, vide judgment and order dated 3.7.2007, struck down the rule as unconstitutional. The said decision of the Division Bench was challenged before the Supreme Court in a batch of petitions seeking Special Leave to Appeal. Leave to appeal was granted. The appeals being CA No.2680/2009 to Civil Appeal No.2685/2009 were allowed vide judgment and order dated 21.4.2009, holding that since the

vires of the Rules in question was not specifically challenged, in that, there was no prayer in any writ petition to quash the rule, the Division Bench exceeded its mandate to strike down the Rule. The writ petitions were restored for fresh adjudication with a direction that the same be decided in view of the pleadings of the parties.

24. Accordingly, all the writ petitions were listed before us for fresh adjudication.

25. Since the vires of the Rule mandating two years' service in a duty battalion for promotion to the rank of Inspector in BSF as also the rank of Inspector in CRPF as also for promotion to the rank of 2 IC in BSF has not to be gone into by us and we are to proceed on the basis that the said rules are constitutional, the only issue which needs to be decided is; whether the respondents and in particular the Central Government is liable to be directed to exercise the power vested in the Central Government to relax the operation of the said Rule. Undisputably, said power of relaxing the rules in favour of a group or class of persons is vested in the Central Government and in exercise of the said power, the Central Government has relaxed the requirement of two years' service

in a duty battalion for certain category of posts in CRPF as also the BSF.

26. We note that the justification of the Central Government in so doing is that due to expansion in the two para military forces, with creation of additional battalions in the year 2004, there was a sudden spurt in the number of promotional posts and wherever the number of eligible candidates was less, the Rule was relaxed. But, whenever adequate number of candidates were available, the Rule was not relaxed.

27. Prima facie, the reason given by the Central Government appears to be attractive. But, a deeper look would evidence that having not posed the right question to itself, the Central Government may have wrongly answered the question.

28. We may illustrate as to how a question framed differently can yield diametrically different results.

29. The question whether one can smoke while praying to God would obviously elicit the answer: 'NO'. But, the question, can one pray to God while smoking, may elicit the answer: 'YES'. The reason is obvious. With the change of the subject and the predicate in the same question, the answer may be different.

30. The question before the Central Government was in the backdrop of an unprecedented situation brought about in the year 2004 with the expansion of the para military forces, as additional battalions were created. Suddenly, there was a quantum jump in the number of officers required to man the units. Though the Rules were enforced in the year 2001 and the officers were expected to write to their superior officers, if not posted in duty battalion, to post them in duty battalions so that they attain the necessary eligibility condition, but the officers did not do so for they saw no reasonable chance of becoming eligible for promotion in the near future. Besides, being selected by the department, due to their merit and higher qualifications, for serving in prestigious institutions, the officers served in said institutions for the betterment of the organization. They did not protest when, in public interest, their transfer orders posting them in duty battalions were withdrawn or kept in abeyance. One reason possibly could be that they foresaw not being superceded, as within the given cadre strength, no vacancies would have accrued in the near future. But, with the sudden increase in cadre strength, every calculation went haywire. Nobody could have foreseen the

increase in the cadre strength and the said increase was undoubtedly an unexpected event. Thus, the question which had to be posed and answered by the Central Government was: *Whether officers who were better qualified than their brethren and had a better merit in service and were posted at training institutes or headquarters, not because they so desired, but because the organization thought it prudent to post them at said institutes, were entitled as a class/group to be considered for relaxation from the applicability of the Rule requiring two years' service in a duty battalion because these officers had worked on posts wherever they were directed to work?* A further question had to be posed: *While answering the previous question, what was the effect of the employer keeping in abeyance the posting order of some of the officers to duty battalions and retaining them in non-duty battalion, in public interest, while considering the issue of relaxation?*

31. Needless to state, while answering both the questions, the Central Government had to apply its mind keeping in view the fact that transfer/posting is the prerogative of the employer and that the petitioners were posted at prestigious institutions on account of they being more meritorious and

some of them having higher qualifications as also the fact that it is duty of the employer to so deploy its staff that none is rendered ineligible if there is a requirement of serving in a particular capacity for being eligible to be considered for promotion. Thus, the problem arising on account of the sudden expansion in the cadre strength had to be considered, not in a narrow perspective by the Government, i.e. whether there were enough candidates in the feeder cadre or not, but with a holistic perspective, with reference to the questions posed by us hereinbefore.

32. Needless to state, as held in the decision reported as 1993 Supp. (3) SCC 575 Syed Khalid Rizvi & Ors. Vs. UOI & Ors., the intentment of a residuary rule empowering the employer or the Central Government to exempt the applicability of a rule is intended to remove hardships i.e. whenever a situation is shown to exist which is causing undue hardship to an officer or a group of officers, the power of relaxation must be exercised to relieve undue *hardship caused due to unforeseen or unmerited circumstances*. (See para 33 of the decision)

33. In a reverse situation, where the employer had exercised the power of relaxation and some officer had challenged the same, in the decision reported as 1996 (8) SCC 762 SBI & Ors. Vs. Kashinath Kher & Ors. the Supreme Court upheld the grant of relaxation taking note of the fact that the strict implementation of the Rule was operating harshly and in a manner unfair to some officers with reference to rendition of service in rural/semi-urban areas. It was held that the object of the relaxation being to see that nobody stole a march over the other; exercise of said power of relaxation was valid. In the decision reported as 1998 (4) SCC 179 Ashok Kumar Uppal & Ors. Vs. State of J & K & Ors., it was observed that where injustice might have been caused or is likely to be caused to any individual employee or class of employees or where the working of the rule might become impossible, the power of relaxation under the rules must be exercised.

34. It is settled law that where a power is vested in an authority and the situation exists warranting exercising of said power, non-exercise thereof would warrant the issuance of a mandamus requiring the power to be exercised. It is equally settled that while exercising a power where wrong questions

are posed or relevant facts are excluded or irrelevant facts are included, the decision would be arbitrary and liable to be set aside and a mandamus would be issued, requiring the power to be exercised strictly within the confines of the facts within which the power has to be exercised.

35. We may note that in all the cases, the authorities concerned i.e. BSF and CRPF have recommended to the Central Government that the rule requiring two years' service in the duty battalion be relaxed due to the fact that all of a sudden a quantum jump in the cadre strength took place in the year 2004, which was not expected, and if the rule is strictly enforced, junior officers would steal promotion over the senior officers. Unfortunately, while exercising the power, the Central Government posed the wrong question by considering the adequacy or inadequacy of the number of officers in the feeder channel. The power was relaxed for such posts where officers in the feeder channel were less, denying similar benefit in the other posts. The correct question which need to be posed was, as noted by us in para 30 above; the backdrop in which the questions needed to be answered was as noted in

para 31 above. The law applicable is the one as noted in paras 32 and 33 above.

36. We may note that with the increase in posts in the year 2004 and knowing fully well that the continued requirement of two years' service in a duty battalion would hamper the promotional career of the officers, the respondents have themselves, put on track mode, the identification of its officers in various non-duty posts because the respondents know and recognize that transfer/posting is not in the hands of the officers but is a prerogative of the department and the department has to ensure that it affords an opportunity to all its officers to become qualified by serving in duty battalions. This also highlights the fact that the sudden change in situation in the year 2004, being unexpected, required a proper administrative redressal.

37. We accordingly quash the decision of the Central Government declining to relax the eligibility condition of two years' service in a duty battalion for promotion to the post of Inspector and 2 IC under BSF as also the post of Inspector under CRPF.

38. A mandamus is issued to the Central Government to reconsider the issue pertaining to the promotions to the posts of 2 IC and Inspector under BSF and the post of Inspector under CRPF; the issue being exercising the power of relaxation vested under the Rules, to be exercised by the Central Government. While reconsidering the matter, the questions framed by us would be kept in mind while deciding the issue and the backdrop circumstances would be kept in mind while deciding the issue. Needless to state the decision of the Central Government would be a reasoned decision evidencing the application of mind with reference to the questions and the backdrop circumstances. The decision would be taken within a period of 8 weeks from date of receipt of this decision in the Ministry of Home Affairs i.e. the Nodal Ministry of the Central Government. We further mandate that if the decision taken is in favour of the petitioners, they would be promoted with effect from the date, persons junior to the petitioners were promoted and in said eventuality, the petitioners would be entitled to all consequential benefits such as seniority, pay fixation and arrears of pay.

39. Before parting, we may note that some of the petitioners were subsequently promoted when they acquired two years' service condition in a duty battalion and qua some, as per the averments made in the pleadings, they were being considered for promotion as they had acquired said eligibility condition. In case said petitioners have been subsequently promoted, the case of all, for back dated promotions with consequential benefits would be at par, should the Central Government extend the benefit of relaxation as per the present decision.

40. Since the issues raised in the petitions were debatable, we refrain from imposing any cost.

**(PRADEEP NANDRAJOG)**  
**JUDGE**

**(SURESH KAIT)**  
**JUDGE**

**OCTOBER 27, 2009**  
**dk/mm**