

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

% Judgment Reserved on: January 12, 2011
Judgment Delivered on: February 08, 2011

+ **W.P.(C) 4781/2010**

KULDEEP SAINI Petitioner
Through: Ms.Rekha Palli, Advocate

versus

UOI & ORS. Respondents
Through: Mr.A.S.Chandhiok, ASG with
Mr.Ravinder Aggarwal, Advocate
for R-1 to R-5
Ms.Jyoti Singh, Sr.Advocate with
Mr.Anil Gautam, Advocate for R-6

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 Reporter or not?
3. Whether the judgment should be reported in the Digest?

PRADEEP NANDRAJOG, J.

1. Border Security Force (herein after referred to as "BSF") is a border patrol agency of India. Established on December 1, 1965, BSF is a Para-Military Force of India and its primary role is to guard international borders of India during peacetime and also prevent transitional crime. There are various cadres in BSF, two of which are General Duty cadre and Law Officers cadre, commonly known as Law Branch.

2. The hierarchical structure of General Duty cadre is as follows: - Director General ← Special Director General ← Additional Director General ← Inspector General ← Deputy Inspector General ← Commandant ← 2I/C ← Deputy Commandant ← Assistant Commandant.

3. The hierarchical structure of Law Branch is as follows: - Chief Law Officer ← Law Officer Grade I ← Law Officer Grade II.

4. On 26.12.1977 the Ministry of Home Affairs, Government of India notified Border Security Force, Chief Law Officer and Law Officers Recruitment and Conditions of Service Rules, 1977 (herein after referred to as the "1977 Rules"). The relevant portion of Rules 3 and 7 of 1977 Rules reads as under:-

"3. Appointment to the posts of Law Officers:-

(1) Appointment to the post of Law Officer Grade I:
- The posts of Law Officers Grade I, may be filled in any of the following manner, namely:-

(a) by promotion of an officer who has been a Law Officer Grade II, in the Force for not less than five years; or

(b) by appointment of a person who:-

(i) is or has been an Assistant Judge Advocate General in any of the Armed Forces of the Union; or

(ii) is or has been a member of the State Judicial Service for a period of not less than ten years or has held a Gazetted post in the Legal Department of a State Government for a period of not less than ten years; or

(iii) is or has been a Central Government employee who is a Law Graduate and who has had experience in Legal Affairs in a Gazetted post for not less than ten years; or

(iv) is a Law Graduate and has been a prosecution counsel in a Gazetted rank under the Central or State Government for not less than ten years and has held the rank of Superintendent of Police or equivalent post.

.....”

“7. Power to relax: - Where the Central Government is of the opinion that it is necessary or expedient so to do, it may, for reasons to be recorded in writing, relax any of the provisions of these rules with respect to any clause or category of persons.”

5. On 08.02.1988 the Ministry of Home Affairs, Government of India, notified Border Security Force, Chief Law Officer and Law Officers Recruitment and Conditions of Service (Amendment) Rules, 1988 (herein after referred to as the “1988 Rules”). The relevant portion of Rule 3 of 1988 Rules reads as under:-

“3. In rule 3 of the Border Security Force, Chief Law Officer and Law Officers Recruitment and Conditions of Service Rules, 1977, -

(a) in sub-rule (1), -

(i)

(ii) in clause (b), sub-clauses (i) to (iv) thereof shall be re-numbered as sub-clauses (ii) to (v) and before the sub-clause (ii) as so re-numbered, the following sub-clause and explanation shall be inserted, namely :-

“(i) is a Law Graduate and has held the post of Deputy Commandant or equivalent post in the Force

for a period of not less than two years and has not less than 10 years of group 'A' service, out of which he has had legal experience of not less than 8 years.

Explanation – Law Officer Grade II of the Force with above qualifications, eligibility of service and experience will also be eligible for consideration under this sub-clause;"

...."

6. On 17.09.1984 and 09.10.1984 petitioner Kuldeep Saini and respondent No.6 V.S. Yadav respectively, were appointed as Assistant Commandant (General Duty), a Group A post, in BSF.

7. Since they were law graduates the petitioner and the respondent No.6 were attached with the Law Branch of BSF on 07.06.1987 and 23.08.1988 respectively.

8. On 21.09.1989 the petitioner and the respondent No.6 got promoted to the post of Deputy Commandant (General Duty).

9. In the year 1994 Directorate General Border Security Force, Ministry of Home Affairs, Government of India issued an advertisement for appointment to the post of Law Officer Grade II in BSF by direct recruitment. Both the petitioner and the respondent No.6 applied for being appointed to the said post. Whereas the respondent No.6 got selected the petitioner failed to make it to the selection list. On 22.04.1994 the respondent No.6 was appointed to the post of Law Officer Grade-II.

10. On 18.07.1995 Directorate of General Border Security Force, Ministry of Home Affairs, Government of India issued a seniority list dated 01.07.1995 of the officers working in General Duty cadre of BSF. Be it noted here that the petitioner was placed at serial number 633 in the said seniority list.

11. In June 1995 the Directorate General Border Security Force, Ministry of Home Affairs, Government of India issued an advertisement for filling up two vacancies to the post of Law Officer Grade-I in BSF. The relevant portion of the said advertisement reads as under:-

“FILLING UP OF THE POST OF LAW OFFICER GDE-I (COMBATISED POST EQUIVALENT TO GDE OF SENIOR SP) IN BORDER SECURITY FORCE ON DEPUTATION/RE-EMPLOYMENT BASIS.

The two vacancies of Law Officer Gde-I (Combatised) Group-‘A’ Gazetted post in the pay scale of Rs.3700-5000/- are required to be filled up in the Border Security Force by transfer on deputation/re-employment basis by the following categories of officers:-

- (a) a Law Graduate who has held the post of Deputy Commandant or equivalent in the Force for a period of not less than two years and has not less than 10 years of Group-‘A’ service out of which he has had legal experience of not less than 8 years; or
- (b) Suitable serving, retired or released officer who is or has been an Assistant Judge Advocate General in any of the Armed Forces of the Union; or
- (c) a member of State Judicial service who is in such service for a period of not less than ten years or has held a Gazetted post in the Legal Department of a State Government for a period of not less than ten years; or

(d) a Central Government employee who is a Law Graduate and who has had experience in Legal Affairs in a Gazetted post for not less than ten years; or

(e) a Law Graduate who has been a prosecuting counsel in a Gazetted rank under the Central or State Government for not less than ten years and has held the rank of Superintendent of Police or equivalent post.

.....

4. The terms and conditions of deputation will be governed as per the provisions contained in the Government of India, Ministry of Personnel Public Grievances & Pension (Deptt. of Personnel & Trg) letter No.2/29/91-Estt (Pay.II) dated 05.01.1994.”
(Emphasis Supplied)

12. On 27.06.1995 Directorate General Border Security Force, Ministry of Home Affairs, Government of India issued an Office Memorandum incorporating the contents of the aforesaid advertisement and circulated the same to the various ministries. Along with the said Office Memorandum, the Directorate also circulated a Pro Forma application, the relevant portion whereof reads as under:-

“8. Whether willing to considered for transfer on deputation or re-employment....” (Emphasis Supplied)

13. Both the petitioner and the respondent No.6 applied for being appointed to the aforesaid post of Law Officer Grade-I advertised by BSF.

14. On 01.03.1996 the Departmental Selection Committee met and empanelled four officers namely, Ex. Major T.N. Tiwari, Shri D.S. Ahluwalia, the petitioner and the respondent

No.6, for appointment to the post of Law Officer Grade- I and recommended as follows:-

- | | | |
|-------|---|---|
| “(i) | Ex-Maj T.N. Tiwari, ALA MoL | Immediate appointment as LO Gde-I on deputation basis for 3 years against existing vacancy. |
| (ii) | Shri D.S. Ahluwalia
Law Officer Grade-II | Appointment as LO Gde-I subject to relaxation of 4 months legal experience and availability of vacancy. |
| (iii) | Shri Kuldeep Saini
Dy Commandant | Appointment as LO Gde-I as and when vacancy arises. |
| (iv) | Shri V.S. Yadav
Law Officer Grade-II | Appointment as LO Gde-I <u>subject to relaxation of 6 months legal experience</u> and availability of vacancy.”
<i>(Emphasis Supplied)</i> |

15. On 27.06.1996 Personnel Directorate, BSF issued a posting order requiring the petitioner and the respondent No.6 to start working as Law Officer Grade-I with immediate effect.

16. Since there were two existing vacancies to the post of Law Officer Grade-I the department gave offer of appointment to the said post to Ex.Major T.N.Tiwari and Shri D.S.Ahluwalia. Whereas Shri D.S.Ahluwalia accepted the said offer and was appointed to the post of Law Officer Grade I on 08.10.1996 Ex.Major T.N.Tiwari did not accept the said offer and thus the department cancelled the offer given to Ex.Major T.N.Tiwari in October 1996.

17. On 12.11.1996 another vacancy arose to the post of Law Officer Grade-I. On 15.11.1996 the department gave offer of

appointment to the post of Law Officer Grade-I to the petitioner. Vide an application dated 18.11.1996 issued by him to Personnel Directorate, BSF the petitioner expressed his willingness to accept the said offer and further requested that the department should grant him notional promotion to the rank of 2IC as his juniors in General Duty cadre have been promoted to the said rank.

18. Vide signal dated 27.11.1996 issued by Deputy Director (Personnel), BSF the petitioner was appointed to the post of Law Officer Grade-I with effect from 12.11.1996. The relevant portion of the signal dated 27.11.1996 reads as under:-

“From Pers(.) Appointment of Law Officer Grade-I (.) Sh. Kuldeep Saini Dy.Comdt. IRLA No.30603 is appointed as Law Officer Grade-I in BSF W.E.F. 12 Nov, 96 and posted to Ftr. HQ R & G (.) Charge assumption report be furnished to all concerned (.) formal order follows.” (*Emphasis Supplied*)

19. Vide Office Order dated 12.12.1996 issued by Directorate General Border Security Force, Ministry of Home Affairs, Government of India the President sanctioned the appointment of the petitioner to the post of Law Officer Grade-I. The relevant portion of the said order reads as under:-

“I am directed to convey the sanction of the President to the appointment of Shri Kuldeep Saini (IRLA No.30603) Deputy Commandant of BSF as Law Officer Grade I on officiating basis, in the pay scale of Rs.3700-5000 with effect from 12.11.96.

....

3. His appointment has the approval of the Government of India, Ministry of Home Affairs, New

Delhi vide their UO ID No.1426/96.Pers.III dated 17.09.96.” (Emphasis Supplied)

20. On 28.11.1996 another vacancy arose to the post of Law Officer Grade I. On 11.12.1996 the respondent No.6 was appointed to the post of Law Officer Grade-I with effect from the same date.

21. On 24.08.1998 an Office Order was issued by Ministry of Home Affairs, Government of India whereby the scale of pay for the post of Law Officer Grade – I was upgraded from Rs.12,000 – 16,500/- to Rs.14,300 – 18,300/-. The relevant portion of the said Office Order reads as under:-

“I am directed to convey the sanction of the President to the creation/abolition of the following posts to bring them at par with their counterparts in the NSF and Coast Guard:-

....

(b) Creation of Law Officer Gr.I in the scale of Rs.14,300-18,300/- by abolishing the posts in the existing revised scale of Rs.12,000-16,500/-.

2. The amendments in the Recruitment Rules of BSF Law Officers mentioned above may be made so as to bring them at par with those of Law Officers in the Coast Guards.

3. The existing incumbents will be appointed against the up-graded posts only when they fulfill the requirements of amended Recruitment Rules and the posts may be operated in the present grade till regular appointments are made.” (Emphasis Supplied)

22. On 13.04.1999 Ministry of Home Affairs, Government of India notified Border Security Force, Chief Law Officer and Law

Officers Recruitment and Conditions of Service (Amendment) Rules, 1999 (herein after referred to as the “1999 Rules”). Rule 3 of Rules 1999 and the relevant portion of the Schedule appended thereto reads as under:-

“3. Method of recruitment, age-limit and other qualifications – The method of recruitment to the said posts, age-limit, qualifications and other matters relating thereto, shall be as specified in columns (5) to (14) to the said Schedule.

SCHEDULE

Name of the post	No. of posts	Scale of pay	Whether selection post or Non-Selection post	Method of Recruitment whether by direct recruitment or by promotion or by deputation or absorption and percentage of the posts to be filled by various methods	In case of recruitment by promotion/deputation /absorption, grades from which promotion/deputation /absorption to be made
Law Officer Grade-I	8	Rs.14,300- 18,300/-	Selection by merit	By promotion failing which by deputation/absorption/regular employment	I By Promotion: (i) Serving Law Officer Grade-II with 09 years regular service as Law Officer Grade-II with a total of fifteen years of group 'A' service. II By deputation/absorption: (a) A law graduate holding the post of

Second-in-Command
or Commandant in
Border Security Force
with fifteen years of
Group 'A' service and
having atleast 8
years experience in
legal affairs.
...."

23. Vide Office Order dated 07.05.1999 issued by Directorate General Border Security Force, Ministry of Home Affairs, Government of India the petitioner was granted notional promotion to the post of 2IC with effect from 14.11.1996. The relevant portion of the said Office Order reads as under:-

"I am directed to convey the sanction of the President to the appointment of Shri Kuldeep Saini, DC, IRLA – 30603 (now Law Officer Gde – I) on promotion to the grade of 2IC notionally wef 14.11.1996 i.e., the date when his junior was so promoted w.r.t. the DPC dated 30.09.96, in the pay scale of Rs.4100-5300 (pre-revised).

...."

24. On the same date i.e. 07.05.1999 another Office Order was issued by Directorate General Border Security Force, Ministry of Home Affairs, Government of India whereby the petitioner was again promoted to the petitioner to the post of Law Officer Grade-I with effect from 15.11.1996. The said Office Order reads as under:-

"In continuation of this HQ Signal No.R-3268 dated 27.11.96, Order No.17/59/96-Pers/BSF dated 12.12.96 and Order No.17/59/96-Pers/BSF dated 07.05.99, I am directed to convey sanction of the

President to the appointment of Shri Kuldeep Saini, 2IC (now LO Gde-I), IRLA-30603, BSF as Law Officer Grade – I in BSF on_officiating basis in the pay scale of Rs.3700-5000 (Pre-revised) wef 15.11.96.

2. His appointment has the approval of the Government of India Ministry of Home Affairs, New Delhi vide their UO ID No.1426/96-Pers.III dated 17.09.1996” (Emphasis Supplied)

25. On 17.09.1999 Directorate of General Border Security Force, Ministry of Home Affairs, Government of India issued a seniority list dated 12.09.1999 of the officers working in General Duty cadre of BSF. Be it noted here that the name of the petitioner did not find a mention in the said seniority list.

26. On 13.10.1999 another Office Order was issued by Ministry of Home Affairs, Government of India whereby the petitioner was appointed in the upgraded post of Law Officer Grade – I in the pay scale of Rs.14,300-18,300/-.

27. All this while, the respondent No.6 was making representations to the department inter-alia stating therein that the department has committed a wrong in appointing him to the post of Law Officer Grade-I on 11.12.1996 thereby making him junior to the petitioner for the reasons (i) two vacancies were available in respect of post of Law Officer Grade-I on the date when the petitioner was appointed to the said post i.e. 12.11.1996 therefore he should also have been appointed to the said post on 12.11.1996 along with the petitioner and (ii) Office Order dated 07.05.1999 appointing the petitioner from the post of 2IC to the post of Law Officer Grade-I with effect from 15.11.1996 was illegal.

28. In view of grievances raised by the respondent No.6 regarding fixation of his seniority in the post of Law Officer Grade-I, on 03.10.2008 Directorate General Border Security Force, Ministry of Home Affairs, Government of India issued a letter to the petitioner thereby requiring him to intimate his date of absorption in the post of Law Officer Grade-I in Law Officers Cadre.

29. In response to the above letter dated 03.10.2008, vide letter dated 07.10.2008 the petitioner stated that he was appointed to the post of Law Officer Grade-I not on deputation basis but on regular basis and therefore the question of his absorption in the said post does not arise.

30. Pursuant thereto, Directorate General Border Security Force, Ministry of Home Affairs, Government of India issued letter dated 23.12.2009 to the petitioner, which reads as under:-

“Sub: - **DEPUTATION/ABSORPTION IN LAW CADRE**”

I have been directed to refer to HQ DG BSF (Pers Dte) letter No.17/19/2007/Pers/BSF/30407 dated 03 Oct 2008 and your reply vide letter No.9/KS/CLO/(D&L)/BSF/8770 dated 07 Oct 2008 and to inform that the matter concerning fixation of inter-se-seniority between you and Shri V S Yadav, LO Gde-I has been duly examined by the MHA and DoP&T and following orders are issued:-

i) The appointment of Shri Kuldip Saini, DC as LO Gde-I reveals that the officer was holding the rank of LO Gde-I on deputation basis as on 12.11.1996. He was subsequently promoted as 2IC in his parent cadre on 14.11.1996 as per charge assumption

report. Thereafter, Shri Kuldip Saini was again appointed as LO Gde-I notionally w.e.f. 12.11.1996 vide BSF order dated 27.11.1996. It also transpires that both the officers (S/Shri Kuldip Saini and V S Yadav) are continuing as LO Gde-I on deputation basis without obtaining prior approval of the Competent Authority,

ii) Shri Kuldip Singh who was holding the rank of LO Gde-I on deputation basis with effect from 12.11.1996 may be repatriated to GD Cadre and ex-post-facto relaxation in the eligibility conditions to make him eligible for promotion in GD cadre along with his batch mates may be taken up with the Ministry for consideration, and

iii) The appointment of Shri V S Yadav as LO Gde-I may be treated with effect from 12.11.1996 on composite method being a Law Cadre Officer.

2. Whereas, you did not accept the appointment of LO Gde-I w.e.f. 12.11.1996 and opted for promotion as 2IC in GD stream at your own and subsequently opted for appointment as LO Gde-I in a lower grade.

3. Whereas, you have been promoted to the rank of Second-in-Command in your parent cadre (GD Cadre) retrospectively with effect from 14 Nov 1996 vide order dated 07 May 1999 and again appointed as LO Gde-I with effect from 15 Nov 1996 vide order dated 07 May 1999.

4. Whereas, your appointment as LO Gde-I with effect from 15.11.1996 vide order dated 07 May 1999 after assuming charge of 2IC, is not proper has been issued without approval of the Administrative Ministry i.e. MHA. Though there is a provision under FR-15(A) that a Govt servant could be appointed to a post carrying lower pay scale on his own request but it could be possible only if provisions for induction of officers carrying analogous posts exist in relevant RRs. In the relevant/prevaling RRs, Dy Commandant of BSF was not eligible for appointment as LO Gde-I.

5. As known to you and intimated earlier that you have not been absorbed in LO Gde-I in BSF and you continue to remain on deputation since 1996. It was further clarified that if you wish to be absorbed as LO Gde-I, then your seniority would be counted from the date of absorption and not retrospectively and you would be absorbed from the rank of Dy Commandant only as per the provisions of prevailing RRs.

6. The proposal for your reversion to parent cadre (GD Cadre) has been approved by the MHA/DoP&T. If you opt for reversion to parent cadre, a case will be taken up with the MHA for obtaining requisite relaxation for promotion vis-à-vis your batch mates in GD stream.

7. In view of the above, you are requested to intimate your option on Para 5 & 6 above, at the earliest."

31. In response to the afore-noted letter dated 23.12.2009 issued by Directorate General, the petitioner made a representation dated 21.01.2010 to the department inter-alia reiterating therein that the appointment of the petitioner to the post of Law Officer Grade-I was not on deputation basis but on regular basis. Additionally, the petitioner stated that his appointment to the said post is legal and valid as the same was made after completing/getting all the necessary formalities/approvals; that the action of the department of repatriating him from the Law Cadre to the General Duty Cadre when he had worked in the Law Cadre uninterruptedly and continuously for a period of 13 years is most inequitable and that the action of the department of repatriating the petitioner to General Duty Cadre but at the same time treating the appointment of the respondent No.6 to the post of Law

Officer Grade-I as promotion to the said post by composite method was illegal.

32. Vide Office Order dated 05.07.2010 issued by Directorate General Border Security Force, Ministry of Home Affairs, Government of India the aforesaid representation dated 21.01.2010 made by the petitioner was rejected.

33. Aggrieved by the Office Order dated 05.07.2010 rejecting the representation dated 21.01.2010 made by the petitioner, the petitioner has filed the present petition under Articles 226 and 227 of Constitution of India.

34. In view of the fact that the present petition, if allowed, would have a great impact on the seniority of the respondent No.6 in the post of Law Officer Grade-I, the respondent No.6 filed an application for impleadment before this Court, which application was allowed vide order dated 20.08.2010.

35. The stand taken by the petitioner in the present petition, as culled out from the pleadings in the petition and the arguments advanced during course of hearing of the present case, can be summarized as under:-

I That the stand of the department that the petitioner and the respondent No.6 were appointed to the post of Law Officer Grade-I on deputation basis is patently incorrect for the reason that the deputation as a mode of recruitment for the post of Law Officer Grade-I was not envisaged in 1988 Rules read with 1977 Rules. That only two modes of recruitment for the post of Law Officer Grade-I were provided in 1988 Rules read with

1977 Rules namely promotion and direct recruitment. That since the petitioner fulfilled the eligibility conditions prescribed in 1988 Rules for appointment to the post of Law Officer Grade-I by way of direct recruitment, the petitioner was appointed to the said post as a direct recruit and not as a deputationist as contended by the petitioner.

II That the fact that the word 'deputation' does not find a mention in the afore-noted signal dated 27.11.1996 and the Office Order dated 12.12.1996 issued by the department appointing the petitioner to the post of Law Officer Grade-I and the action of the department of deleting name of the petitioner from the seniority list of the officers of General Duty cadre after the appointment of the petitioner to the post of Law Officer Grade-I conclusively point towards the fact that the petitioner was appointed to the post of Law Officer Grade-I as a direct recruit and not as a deputationist.

III That all necessary formalities/approvals were completed/taken by the department before appointing the petitioner to the post of Law Officer Grade-I. In any case, it was the duty of the department to have completed/taken all formalities/approvals before appointing the petitioner to the post of Law Officer Grade-I and thus the petitioner cannot be penalized for procedural irregularities, if any, in the appointment of the petitioner to the post of Law Officer Grade-I.

IV That the appointment of the petitioner from the post of 2IC to the post of Law Officer Grade-I was not opposed to F.R.

15(a) as the department has itself admitted in the counter affidavit filed by it in this Court that the petitioner was appointed to the post of Law Officer Grade-I after taking necessary approval from the President under F.R. 15(a).

V That the petitioner had continuously and uninterruptedly worked on the post of Law Officer Grade-I for a period of 13 years after his appointment to the said post. Having allowed the petitioner to work on the post of Law Officer Grade-I for such a long period, the department is estopped from challenging the appointment of the petitioner to the said post.

36. The stand taken by the department in the present petition, as culled out from the pleadings in the counter affidavit and the arguments advanced during course of hearing of the present case, can be summarized as under:-

I To justify its stand that the petitioner was appointed to the post of Law Officer Grade-I on deputation basis, the department pleaded in its counter affidavit that even though the word 'deputation' does not find a mention in 1988 Rules read with 1977 Rules the expression 'is or has been' occurring in sub-clauses (i) to (v) of sub-clause (b) of clause 1 of Rule 3 of 1988 Rules read with 1977 Rules makes it abundantly clear that sub-clause (b) relates to deputation and not direct recruitment. That the ambiguity regarding the mode of recruitment prescribed in sub-clause (b) was clarified vide the advertisement dated June 1995 and the Office Memorandum dated 27.06.1995 issued by the department and the sample form annexed along with the said memorandum inasmuch as

the said three documents provided in express terms that the appointment to the post of Law Officer Grade-I shall be on deputation basis. However, in the written submissions filed by the department, the department has shifted from its aforesaid stand as it has been stated therein that so long as a deputationist is not sought to be permanently absorbed, a person can always be appointed on deputation even in the absence of any provision for appointment by deputation in the Recruitment Rules.

II That the department erroneously appointed the petitioner from the post of 2IC to the post of Law Officer Grade-I vide Office Order dated 07.05.1999 for two reasons namely, (i) as per 1988 Rules read with 1977 Rules, only a Deputy Commandant can be appointed to the post of Law Officer Grade-I, which was not the position in the present case and (ii) prior approval of the Ministry was essential to be obtained before appointing the petitioner from the post of 2IC to the post of Law Officer Grade-I, which was not done in the present case. That the approval referred to in the Office Order dated 07.05.1999 appointing the petitioner from the post of 2IC to the post of Law Officer Grade-I is the approval obtained by the Ministry for the appointment of the petitioner from the post of Deputy Commandant to the post of Law Officer Grade-I and not for the appointment of the petitioner from the post of 2IC to the post of Law Officer Grade-I.

III That the department had obtained the approval of the President under F.R. 15(a) before appointing the petitioner from the post of 2IC to the post of Law Officer Grade-I.

IV That two vacancies had arisen to the post of Law Officer Grade-I on 12.11.1996 and therefore the respondent No.6 ought to have appointed to the said post on the said date. However, since the petitioner was repatriated to his parent cadre which addressed the grievance of the respondent No.6 that he cannot be placed below the petitioner in the seniority list there is no requirement to change the date of appointment of the petitioner to the post of Law Officer Grade-I as the same would make no difference on the seniority of the respondent No.6.

37. In sum and substance, the stand taken by the respondent No.6 is almost identical to the stand taken by the department. The only difference being that it was strenuously urged on behalf of the respondent No.6 that since the post of 2IC was carrying more pay than the post of Law Officer Grade-I the appointment of the petitioner from the post of 2IC to the post of Law Officer Grade-I was opposed to F.R. 15(a) which bars the appointment of an officer to a post carrying less pay than the post previously held by him.

38. As already noted herein above, vide signal dated 27.11.1996 and the Office Order dated 12.12.1996 issued by the department, the petitioner was appointed to the post of Law Officer Grade-I with effect from 12.11.1996. As evident from the foregoing paras, the stand of the department is that the petitioner was appointed to the post of Law Officer Grade-I on deputation basis. The department has been taking a vacillating stand on the said aspect of the matter. Whereas in the counter affidavit it was stated by the department that the

sub-clause (b) of clause (1) of Rule 3 of 1988 Rules read with 1977 Rules relates to direct recruitment, in the written submissions the department conceded that the deputation is not prescribed as a mode of recruitment for the post of Law Officer Grade-I in 1988 Rules read with 1977 Rules but has tried to cover up the same by contending that so long as a deputationist is not sought to be permanently absorbed, a person can always be appointed on deputation even in the absence of any provision for appointment by deputation in the Recruitment Rules.

39. A careful reading of Rule 3 of 1988 Rules read with 1977 Rules shows that only two modes of recruitment to the post of Law Officer Grade-I has been prescribed in the 1988 Rules namely, promotion and direct recruitment. By prescribing the deputation as a mode of appointment to the post of Law Officer Grade-I in the advertisement dated June 1995 issued by it, the department attempted to introduce a mode of recruitment to the post of Law Officer Grade-I, which was not envisaged in the Recruitment Rules. It is settled legal position that an advertisement cannot override the provisions of Recruitment Rules.

40. However, irrespective of the fact that the department has prescribed deputation as a source of recruitment in the advertisement dated June, 1995 the conduct of the department was all along of treating as if the petitioner was appointed to the post of Law Officer Grade-I on regular basis. For instance, The signal dated 27.11.1996 and the Office Order dated 12.12.1996 issued by the department appointing the

petitioner to the post of Law Officer Grade-I with effect from 12.11.1996 nowhere provide that the petitioner is appointed to the said post on deputation basis. A deputationist holds a lien on his parent post till the time he is permanently absorbed in the deputed post however, the department deleted the name of the petitioner from the seniority list of the officers of General Duty cadre after the appointment of the petitioner to the post of Law Officer Grade-I.

41. It thus appears that there was complete hiatus between what the department was required to do by the Recruitment Rules in making appointments to the post of Law Officer Grade-I, what was attempted to be done by the department and what was ultimately done by the department. Even though the department violated the Recruitment Rules by prescribing deputation as a mode of recruitment to the post of Law Officer Grade-I in the advertisement, ultimately the appointments made by the department to the said post were in line with the Recruitment Rules.

42. So far so good for the petitioner. However the problems arose for the petitioner when 1999 Rules came into force on 13.04.1999. As per the Office Order dated 24.08.1998 issued by the petitioner only those officers working on the post of Law Officer Grade-I could be appointed to the upgraded post of Law Officer Grade-I in the pay scale of ₹14,300-18,300/- who would fulfill the eligibility conditions prescribed for the said post in 1999 Rules. As per 1999 Rules, a law graduate holding the post of 2IC or Commandant with 15 years of group A service and having atleast 8 years experience in legal affairs is eligible

to be appointed to the post of Law Officer Grade-I. Since the petitioner was working as Deputy Commandant prior to his appointment to the post of Law Officer Grade-I, he was not eligible to be appointed to the upgraded post of Law Officer Grade-I in the pay scale of ₹14,300-18,300/-.

43. To overcome the above hurdle, vide Office Order dated 07.05.1999 the department appointed the petitioner to the post of 2IC with effect from 14.11.1996 and thereafter vide Office Order of the same date i.e. 07.05.1999 the department appointed the petitioner to the post of Law Officer Grade-I with effect from 15.11.1996. Ultimately on 13.10.1999 the department appointed the petitioner to the upgraded post of Law Officer Grade-I in the pay scale of ₹14,300-18,300/-.

44. In doing the above, two gross irregularities were committed by the department. One, while appointing the petitioner from the post of 2IC to the post of Law Officer Grade-I the department did not take approval from the administrative Ministry i.e. Ministry of Home Affairs. The Office Order dated 12.12.1996 appointing the petitioner from the post of Deputy Commandant to the post of Law Officer Grade-I records that *'His appointment has the approval of Government of India, Ministry of Home Affairs, New Delhi vide their UO ID No.1426/96.Pers.III dated 17.09.1996'*. (Emphasis Supplied). The Office Order dated 07.05.1999 appointing the petitioner from the post of 2IC to the post of Law Officer Grade-I records that *His appointment has the approval of Government of India, Ministry of Home Affairs, New Delhi vide their UO ID No.1426/96.Pers.III dated 17.09.1996'*. (Emphasis Supplied). A

minute comparison of the afore-noted two Office Orders shows that the approval referred to in the Office Order dated 07.05.1999 is the approval given by the Ministry of Home Affairs for the appointment of the petitioner from the post of Deputy Commandant to the post of Law Officer Grade-I whereas by way of said Office Order the petitioner has been promoted from the post of 2IC to the post of Law Officer Grade-I. Two, the department violated 1988 Rules read with 1977 Rules in appointing the petitioner from the post of 2IC to the post of Law Officer Grade-I with effect from 15.11.1996. The relevant Recruitment Rules for the post of Law Officer Grade-I on 15.11.1996 were 1988 Rules read with 1977 Rules. 1988 Rules read with 1977 Rules provides that a Deputy Commandant having necessary experience is eligible to be appointed to the post of Law Officer Grade-I. On the relevant date i.e. 15.11.1996 the petitioner was working on the post of 2IC and not Deputy Commandant.

45. Before proceeding further, let us deal with the submission advanced by the respondent No.6 pertaining to F.R. 15 (a) and the petitioner that the department is estopped from cancelling the appointment of the petitioner to the post of Law Officer Grade-I.

46. F.R. 15(a) relied upon by the respondent No.6 reads as under:-

“F.R. 15 (a) The President may transfer a Government servant from one post to another provided that except –

(1) on account of inefficiency or misbehavior, or

(2) on his written request,

a Government servant shall not be transferred to, or except in a case covered by Rule 49, appointed to officiate in a post carrying less pay than the pay of the post on which he holds a lien."

47. In said regards, suffice would it be to state that F.R. 15(a) applies only in cases where an employee is being transferred from one post to another post within the same cadre and not where transfer is from a post in one cadre to a post in another cadre. (See the decision of this Court reported as Prem Parveen v Union of India (1973) 2 SLR 659 (Del)). Thus, F.R. 15 (a) has no application in the instant case for the reason the petitioner was not transferred but appointed from one post in a cadre to post in another cadre.

48. Whether the petitioner is right in contending that the department is estopped from cancelling the appointment of the petitioner to the post of Law Officer Grade-I?

49. It is settled law that there can be no estoppel against a statute. It has been so held by Supreme Court in the decisions reported as AIR 1962 SC 745 Mathara Prasad & Sons v State of Punjab, (2003) 12 SCC 91 Ganga Retreat & Towers Ltd v State of Rajasthan, (2006) 2 SCC 545 State of Bihar v Project Uchcha Vidya Shiskshak Sangh, (2007) 4 SCC 404 Hardev Singh v Gurmail Singh, (2009) 6 SCC 194 Sneh Gupta v Devi Swaroop (2009) 11 SCC 525 Vijay Narayan Thatte v State of Maharashtra & Ors. Thus, the department cannot be estopped from cancelling the appointment of the petitioner to the post

of Law Officer Grade-I as the said appointment was opposed to law.

50. From the above discussion, in particular para 44, it is apparent that there is a complete hiatus between what was done by the department in appointing the petitioner from the post of 2IC to the post of Law Officer Grade-I and what was required to be done by law. This hiatus needs to be removed by cancelling the appointment of the petitioner to the post of Law Officer Grade-I. Thus, the action of the department in cancelling the appointment of the petitioner to the post of Law Officer Grade-I, repatriating the petitioner to General Duty Cadre and putting forward the case of the petitioner with Ministry of Home Affairs for his promotion in General Duty Cadre vis-à-vis his batch mates is legal and justified. We note that the department has taken remedial action to undo the sufferings of the petitioner which have been caused due to the wrong committed by the department.

51. In view of the above discussion, we find no merit in the instant petition. The same is hereby dismissed.

52. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(SURESH KAIT)
JUDGE

FEBRUARY 08, 2011
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