

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

+ **WP(C) No.02/2012**

% **Date of Decision: 17.01.2012**

Nihal Singh Petitioner

Through Mr.Narender Datt Kaushik, Advocate.

Versus

Union of India & Ors. Respondents

Through Mr.Ankur Chhibber, Advocate.

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MR. JUSTICE J.R.MIDHA

ANIL KUMAR, J.

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1. The petitioner has sought directions to the respondents to grant seniority and promotion to the petitioner as per his seniority with effect from 1994, without back wages.

2. The petitioner contended that he belongs to the Scheduled Caste category and is presently employed as the Assistant Commandant in the Border Security Force. The petitioner had joined the Border Security Force as a constable on 2nd October, 1987 and he was selected as PC (DE), i.e. Sub Inspector on 5th December, 1988.

3. The petitioner had joined the 46th Battalion, BSF at Ajnala, Punjab as Platoon Commander and he was given the command of B.O.P.Majhmiya on 28th January, 1990. The petitioner as a Platoon Commander was required to give a report to the company Commander at 0700 hours daily after checking the Border Fencing personally in his area of responsibility. On 29th January, 1990 the petitioner had been carrying out the Border checking in his area of responsibility and while coming back from the patrol/checking duty he had fallen from his horse and his right femur bone was fractured. The petitioner further contended that he was treated in the BSF hospital for three months and later on he got the treatment at his own cost from a private nursing home after which he joined his duties. A court of enquiry was also conducted which opined that the petitioner fell from the horse while performing the duty and that the injury caused to him is attributable to Government duty. It was further held that it was a sudden accident and that nobody is to be blamed for it. The petitioner was thereafter, put in the medical category CEE (Temp).

4. According to the petitioner he was posted to the 49th Battalion, BSF in Kashmir and from 29th January, 1990 to May, 2000 he was placed in the medical category BEE (Temp.).

5. According to the petitioner, a patient is upgraded from category C to category B (Temp) and finally upgraded to category A. However, the petitioner after being upgraded to the category B (temp) in the year 1994 was not upgraded to the category A. It has also been emphasized that the medical board neither recommended any treatment nor prescribed any medicine/therapy to the petitioner but kept him under the low medical category.

6. It is further contended that petitioner did not make the representations as he was threatened not to represent against the alleged vindictive attitude of the respondents.

7. By a communication dated 29th September, 2005 the Commander of 14th Battalion, BSF was intimated that on up-gradation of low medical category of the petitioner on 25th March, 2000 and consideration of the DPC by the petitioner held on 11th December, 2000, the petitioner could not be given the grade as he had not secured 60% aggregate marks in all groups. The request of the petitioner for giving seniority was declined as he had not scored aggregate marks in DPC list 'E' and in that context it was advised that the petitioner should not make frequent representations.

8. In the writ petition the plea of the petitioner is that he belongs to the Scheduled Caste category and consequently has preference in promotion upto the rank of Inspector over the General candidates. It is further asserted that his batch mates were promoted to the rank of Inspector whereas the petitioner was promoted to the rank of Inspector/Subedar in the year 2002. Relying on circular dated 18th December, 2000 bearing MHA 40 No.1.45020/45/99-Pers.-II, the petitioner asserted that if the actual promotion of an officer is delayed on account of low medical category and such an officer is required to regain medical category Shape-I, the officer below such an officer can be promoted but the officer in the low medical category will regain his seniority immediately on his promotion.

9. The petitioner raised this issue a number of times, however, according to him no heed was paid to his pleas. The petitioner also blamed the respondents for not detailing him for the mandatory courses. He submitted that had he been detailed in the mandatory course then he would have got 6 marks on account of the course and thus he would have secured a total of 79 marks whereas the qualifying marks were 75 marks and he had secured 73 marks in his List 'E' exam. In the circumstances according to the petitioner, he could not make the grade on account of the lapse on the part of the respondents and hence he cannot be penalized for the same. The

petitioner also pleaded that he could not have undergone the course voluntarily as the officers are detailed only by the training department and it is the duty of the department to detail the individual for the mandatory course and avoid ineligibility for promotion.

10. The petitioner's grievance is that on account of the lapses on the part of the respondents he was promoted to the rank of Assistant Commandant only in the year 2009 and on account of this he has suffered irreparable financial loss as the petitioner is holding a lower post and grade compared to the other persons of his grade.

11. According to the petitioner a wrong done can be undone at any stage and so the petitioner has sought that he should be given the seniority with effect from 1994 but without back wages.

12. The learned counsel for the respondent, Mr.Chhibber who appears on advance notice contends that even according to the allegations made by the petitioner he was denied the promotion in 2000 as the petitioner was placed in the low medical category on 25th March, 2000 and before the DPC held on 11th December, 2000 he could not make the grade due to non scoring of 60% aggregate marks in all groups. The learned counsel has therefore, contended that the

petition suffers from delay and latches as no explanation has been given as to why the petitioner had waited for almost 11 years before challenging his non selection by DPC on 11th December, 2000. He contends that no plausible ground has been shown for seeking promotion and seniority from 1994. The learned counsel has relied on Union of India & Ors v. M.K.Sarkar, 2010 (2) SCC 59 to contend that the issue of delay and latches has to be considered with reference to the original cause of action and that the Court or Tribunal should not direct consideration or reconsideration of a dead or a stale issue or dispute.

13. The learned counsel for the petitioner on the other hand has relied on Sangram Singh v. Election Tribunal, Kotah and Anr., AIR 1955 SC 425 to contend that too technical a construction of the sections that leaves no room for reasonable elasticity of interpretation should be guarded against. The learned counsel has referred to para 16 of the said judgment at page 429 which is as under:-

“16. Now a code of procedure must be regarded as such. It is procedure, something designed to facilitate justice and further its ends: not a Penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means

designed for the furtherance of justice be used to frustrate it.”

14. This Court has heard the learned counsel for the parties in detail. Apparently, the petitioner was considered for promotion by the DPC on 11th December, 2000 and on account of petitioner being in the low medical category and since the petitioner could not make the grade due to not securing 60% aggregate marks in all groups, the DPC held on 11th December, 2000 had not recommended the petitioner for his seniority.

15. The seniority which was denied to the petitioner on 11th December, 2000 by the DPC held on that date has not been challenged by the petitioner for almost 11 years and now it is contended that the petitioner was not sent for the mandatory course as had he been sent for the mandatory course, he would have scored 6 marks more and thus the total marks obtained by the petitioner would have become 79 as he had scored 73 marks in the exam and the qualifying marks were 75 marks.

16. The learned counsel for the petitioner is, however, unable to show any cogent reason for not challenging the alleged action of the respondents for not detailing him for the mandatory courses and not

upgrading his medical category from B to A as alleged by him in 1998.

17. The learned counsel for the petitioner though has contended that he had been making representations, however, the copies of such representations have not been produced rather the plea of the petitioner is that by communication dated 25th September, 2005 the petitioner was advised to refrain from making frequent representations as the same is not permissible as per rules. If such a direction was given to the petitioner in 2005 then why the petitioner did not challenge the action of the respondent in 2005 and delay of another six years has not been satisfactorily explained.

18.. It has been held in a number of cases by the Supreme Court as also this Court that stale claims should not be entertained by the Courts and that the failure to make out grounds to condone the delay in seeking remedy in law is sufficient in itself to oust the petitioner. In this connection, reference can be made to the following precedents:

- (i) Rajalakshmiah v. State of Mysore, AIR 1967 SC 993
- (ii) J.N. Maltiar v. State of Bihar, AIR 1973 SC 1342
- (iii) C.B.S.E. v. B.R. Uppal and Ors., 129 (2006) DLT 660

(iv) Savitri Sahni v. Lt. Governor, NCT of Delhi and Ors., 130 (2006) DLT 287

19. In *Shiv Dass v. Union of India*, (2007) 9 SCC 274 the Supreme Court had held at page 277 in para 8 as under:

“8. ... The High Court does not ordinarily permit a belated resort to the extraordinary remedy because it is likely to cause confusion and public inconvenience and bring in its train new injustices, and if writ jurisdiction is exercised after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties. It was pointed out that when writ jurisdiction is invoked, unexplained delay coupled with the creation of third-party rights in the meantime is an important factor which also weighs with the High Court in deciding whether or not to exercise such jurisdiction.

20. The petitioner has not been able to make out any grounds to contend that inspite of the delay in seeking the remedy in law and in the circumstances it does not disentitle him from seeking seniority from 1994. The Supreme Court in *M.K.Sarkar* (Supra) had held that even when a belated representation in regard to a 'stale' or 'dead' issue/dispute is considered and decided, the date of such decision cannot be considered as furnishing a fresh cause of action for reviving the 'dead' issue or time-barred dispute. The issue of limitation or delay and latches should be considered with reference

to the original cause of action and not with reference to the date on which an order is passed in compliance with a court's direction. Neither a court's direction to consider a representation issued without examining the merits, nor a decision given in compliance with such direction, will extend the limitation, or erase the delay and latches. In *Amrit Lal Berry v. CCE*, (1975) 4 SCC 714, the Supreme Court had held that merely by filing repeated or delayed representations, a petitioner cannot get over the obstacles which delay in approaching the Court creates because equitable rights of others have arisen. Even in the case of the petitioner a number of promotions have taken place since 1994. In the circumstances, filing the petition in 2012 will impact those who have been promoted and given seniority since 1994. Since the petitioner is seeking seniority since 1994, then all those employees who would be impacted by the petitioner being made senior to them should have also been made party to the present petition which has not been done. The petition, therefore, is also liable to be dismissed on the ground that the equitable rights of a number of other Government servants has come into existence on account of the latches and acquiescence on the part of the petitioner. The Supreme Court in *S.S.Moghe v. Union of India*, (1981) 3 SCC 271 had held that a party seeking the intervention of the Court for enforcement of his rights should exercise due diligence and approach the Court within a reasonable

time after the cause of action had arisen and if there has been undue delay or laches on the part of such petitioner, the Court has the undoubted discretion to deny him relief.

21. The precedent relied on by the counsel for the petitioner in Sangram Singh (Supra) is not applicable to the present facts and circumstances of the case. In Sangram Singh (supra), the Supreme Court while dealing with Order 9 had held that Rule 6(1)(a) is confined to the first hearing of the suit and does not '*per se*' apply to subsequent hearing and that '*ex parte*' merely means in absence of other party.

22. The petitioner's first grievance is that his medical category was not upgraded in 1998 despite the recommendation of the medical board and thereafter in the DPC of 2000 he was not selected for giving seniority as he had not made the grade due to non scoring of 60% aggregate marks, as the petitioner had not been sent for the mandatory courses by the respondents and that he could not go on his own voluntarily for such courses. Even according to the averments made by the petitioner the cause of action had arisen in 1998 and 2000 and no cogent or justifiable reason has been disclosed by the petitioner for condoning the delay of about 11 years in approaching this Court.

23. In the circumstances, and for the foregoing reasons, the petitioner is not entitled for any of the reliefs sought by him. The petition suffers from delay and laches and, it is, therefore, dismissed.

ANIL KUMAR, J.

J.R.MIDHA, J.

January 17, 2012
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