

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

%

Reserved on: 7th August, 2013

Date of Decision: 24th September, 2013

+

WP(C) No.550/2012

R.K. NIMORIA, DY. COMDT.(RETD) Petitioner
Through: Mr. Jai Bansal, Advocate.

Versus

UNION OF INDIA AND ANR. Respondents
Through: Dr. Ashwani Bhardwaj,
Advocate with Mr.
Bhupinder Singh, Deputy
Commandant, BSF.

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL
HON'BLE MS. JUSTICE DEEPA SHARMA

DEEPA SHARMA, J.

1. By way of this writ petition filed in the year 2012, the petitioner has made the following prayers:-

a. Issue a writ of mandamus directing the respondents to consider and promote the petitioner to the rank of Inspector w.e.f. 16th October, 1971 when his junior batch mates of the year 1968 batch Sub- Inspectors were so promoted without his knowledge and from the back of the Petitioner and pass an order with regard to his future promotion to respective posts on due date when similarly situated employees were considered and promoted and to fix

properly at each stage of seniority in respective posts and grant all consequential benefits.

b. set aside the order dated 11th October, 2011 passed by the DIG, BSF.

2 At the outset it is pertinent to mention that this is the third round of litigation between the parties. The first writ petition no. 7639 /2001 was filed by petitioner on 19th December, 2001 and the second writ petition no. 15159/2006 filed on 27th September, 2006. He also filed Review Petition No. 223/2011 on 28th March, 2011 and then the contempt petition no. 791/2011 which was decided on 24th October, 2011.

3. The brief facts of the case are that the petitioner was enrolled in BSF as Sub-Inspector (Direct Entry) on 17 May, 1968 as a Scheduled Caste in the reserved category. After completion of basic training at BSF Academy Takanpur w.e.f 17th May, 1968 to 17th February, 1969, he was posted to 02 Bn BSF at Dartiwala, Gujarat then deployed at Rajasthan under Punjab Frontier till Oct 1970. Thereafter, he was posted to 103 Bn BSF, Hazaribagh (Bihar) at Training Centre and School and remained posted there till 18.10.1975. He was posted to 52 Bn BSF in Oct 1975 and further posted to 47 Bn BSF in 1976 under erstwhile North-Western Frontier, Srinagar.

4. The petitioner was considered for promotion as Inspector by DPC held in Srinagar Frontier on 09th October, 1975. The said DPC recorded following remarks against the name of the petitioner:-

“FAIL IN RECORDS AND IN AGGREGATE EVEN AFTER RELAXATION AS SCHEDULED CASTE.”

5. Thus he was not empanelled by the said DPC. Some Sub-Inspectors got promotion as Subedar against existing vacancies in the Frontier where they were posted.

6. The petitioner remained posted at the Training Institution from October 1970 till 1975 (103rd Bn. BSF) Hazirabagh, Bihar and was promoted as a Subedar thereafter with effect from 06th March, 1978 against the vacancies existing in the Frontier/Headquarter where he was posted at the time of DPC. Till 1975, the promotions were made on the basis of seniority at Frontier/State where the personnel were posted.

7. Later, when it was decided by BSF for centralization of promotion/seniority of Sub-Inspectors and above, in order to extend same benefits to the petitioner as given to Shri B.R. yadav, P.C. Sharma & D.S. Ahluwalia and a few others, a review DPC was convened and seniority of 357 persons including the petitioner in the rank of Inspector was revised vide order No. 17/49/94-Pers/BSF dated 09.11.1994. An attempt was made to hold review DPC's to consider the petitioner and others for promotion to the rank of Assistant Commandant and above. However, in view of the order dated 06th April, 1995 passed in TP No. 41-55/1995 filed by Direct Recruit Assistant Commandants, the recommendation of said review DPC in respect of the petitioner and others could not be given effect.

8. A DPC held on 11/13th June, 1986 considered the petitioner

for his promotion to the rank of Assistant Commandant in BSF treated him as general category candidate. He could not be promoted. On it being realised that the petitioner falls in the reserved category, his case was reviewed by Review DPC and he was given notional promotion as Assistant Commandant with effect from 01st April, 1987 i.e. from the date persons junior to him were promoted. By order No.C-17011/2001/CC/Pers/BSF dated 24th March, 2005 the petitioner was given arrear of pay and allowances for the said period. The amount of arrears was paid to him vide Cheque No. 2486674 dated 19th May, 2005.

9. As the petitioner had been originally promoted as Assistant Commandant with effect from 01st April, 1988, thus he could not be considered for his promotion to the rank of Deputy Commandant by the DPC held in 1992. However, on revision of his seniority and antedating of date of his promotion as Assistant Commandant on 01st April, 1987, a review DPC was held on 24th November, 1992 and on the basis of the recommendation of said DPC, the petitioner was promoted as Deputy Commandant with effect from 13th February, 1993. Since he was promoted as Deputy Commandant on 13th February, 1993, he could not be promoted as Second in Command in the year 1994, as he was not in the zone of consideration for such promotion. As a result he was not promoted as Commandant in the year 1996. The petitioner retired in the rank of Deputy Commandant on 30th April, 1998 and is being paid pension accordingly.

10. The petitioner had filed WP(C) No. 7631/2001 before this

Court seeking direction for his promotion to the rank of Inspector with effect from 1st February, 1972, Assistant Commandant with effect from 14th June, 1976, Deputy Commandant with effect from 06th July, 1986, Second in Command with effect from 01st January, 1994 and Commandant with effect from 25th October, 1996 and for re-fixation of his pension in the rank of Commandant. The said writ petition was disposed of vide order dated 19th December, 2005 with following directions:-

“It is not in dispute that the dispute involved in this writ petition is covered by the judgment titled as B.S. Naruka & Ors Vs. UOI CWP No. 1673/1992 rendered by Division Bench of this Court. Accordingly the representation made by the petitioner dated 18.04.1987 shall be considered in accordance with the above judgment. In case the petitioner is aggrieved by the disposal of the representation it is open to him to challenge the same in appropriate proceedings. The writ petition stand disposed of.”

11. Pursuant to the above judgment of the Hon’ble Court, the petitioner had submitted a representation dated 16th January, 2006 along with copy of the order dated 20th July, 2005 of this court case regarding relief sought for antedated promotion and copy of his representation dated 18th April, 1987.

12. As per the detailed order, the representation of the petitioner was disposed of in the light of the decision of this Court in the case

of B.S.Naruka & Ors Vs. UOI in CPW No. 1673/1992 and it was held that the seniority was correctly fixed as per old rules and he earned subsequently promotion on that basis.

13. The petitioner had challenged the dismissal of his representation titled as R.K. Nimoria, DC (Retd.) Vs. UOI & Ors in Writ Petition No. 15159/2006.

14. After discussing the brief history of the litigation, this court in the said writ petition had summarised the contention of the petitioner as under:-

“(i) His batch mates of 1968 were promoted as Inspector with effect from 12th December, 1971, 1972, 1973 & 1974 while he was not so promoted. In para 30 of his petition he mention the names of S/Shri B.R. Yadav, D.S. Ahluwali, P.C. Sharma, Hoshiyar Singh Dahiya, R.S. Nei, S.S. Chahar & R.K. Singh, who according to him were his batch mates and were promoted ahead of him.

(ii) No common seniority list of Sub-Inspector was maintained centrally at Headquarters of BSF.

(iii) His service record was not placed before DPC held to consider him for his promotion as Assistant Commandant.”

15. In the said writ petition, the respondents had filed their counter reply and had contended that the seniority list had been

maintained in terms of Rule 123 and 124 and had duly followed the procedure for selection of Sub-Inspectors (Platoon Commandant) for List 'E' and promotion from Sub Inspector (Platoon Commandant) to Inspector (Company 2 I/CS).

16. After discussing the Rules 123, 124 and 136, this court had reached to the following conclusion in the said writ petition:-

“17. As can be seen from the order dated 19.12.2005, passed by a Division Bench of this Court in WP(C) No. 7639/2001 which petition was filed by the petitioner, it is not in dispute that the issue raised by the petitioner, has to be decided in light of the law laid down by the Division Bench of this Court in the writ petition filed by B.S. Naruka and others.

18. Thus there is no substance in the contention of the petitioner that the seniority of Sub-Inspectors in BSF till July 1975 should not have been maintained on State wise (Frontier wise basis). Similarly there is no substance in his contention that when his batch mates were promoted against the vacancies in their own Frontiers/States against the vacancies available there, he should also have been automatically promoted. The Controversy has already been set at rest in the case of B.S. Naruka and others. Petitioner himself agreed that his representation

dated 18.04.1987 should have been considered in terms of judgment in the case of B.S. Naruka. The respondents have passed order dated 05.05.2006. We find no reason to take a view different from what is already taken in the case of B.S. Naruka on the issue of maintenance of Frontier/State wise seniority and promotion of Sub-Inspectors from such seniority against the vacancy available in the Frontier. In para 9 of the Counter Reply, the respondents have categorically stated that the petitioner remained posted in Training Institution from Oct 1970 to Oct 1975. In para 8 of the Counter reply the respondents have stated that the petitioner was not superseded by his juniors posted in the Training Institution up to promotion as Inspector from 12.12.1971 is not substantiated and is not tenable. As is stated by respondents in para 9 of the counter reply, S/Shri B.R. Yadav and P.C. Sharma and Ors Sub-Inspectors who were promoted as Inspector w.e.f 12.12.1971 were posted in other Frontiers and got promotion against the vacancies available in their Frontiers/Sectors. As has been pronounced upon in the case of B S. Naruka, the promotion of said Sub-Inspectors against the vacancies available in their Frontier does not give any right to petitioner

for automatic promotion, even when there was no vacancy in his Frontier.

19. Since the claim of the petitioner for promotion as Sub-Inspector from 12.12.1971 is not substantiated, his claim for consequential promotions as Deputy Commandant, 2IC, and Commandant on the basis of claim for promotion as Sub-Inspector from 12.12.1971 from 14.06.1976, 20.05.1986, 07.08.1994 & 23.10.1996 can also be not accepted. Since the petitioner retired as Deputy Commandant, he is entitled to pension as Deputy Commandant only and not as Commandant.

X X X X X X X X X X X X

Moreover, in the writ petition filed in the year 2006, the challenge to use of certain words in the orders passed on 16.12.1998 and 24.03.1999 would be barred by latches.

20. However, we are not dismissing the present writ petition on latches alone, but in view of the facts and circumstances noted hereinabove particularly the fact that no person junior to the petitioner in the training institution was promoted above the petitioner and we reiterate by way of conclusion that till the Rules of 1975 came into force no integrated seniority list of Sub-Inspectors

*was maintained. Lists were maintained
Frontier/State wise ”*

17. The petitioner, thereafter, presented a Review Petition No. 223/2011 seeking review of the said order of this court. The said review petition had been dismissed by this court vide order dated 19th May, 2011. However, petitioner was allowed to make a representation on limited grievance raised by him in his Review Petition.

18. In view of the liberty given to petitioner to file a representation, the petitioner had filed a representation and his representation was disposed of by DIG BSF vide his detailed order dated 11.10.2011. The petitioner has challenged the impugned order dated 11.10.2011 before this court by the way of present writ petition.

19. From the above, it is apparent that the above noted findings of this court in various writ petitions have attained finality. These issues stands finally decided between the parties and cannot be re-agitated before this court for the simple reason that the earlier findings of this court are binding. These findings include the following:-

(i) From the order dated 19th December, 2005 in Civil Writ Petition of 7639/2001, it is apparent that the findings in the case of B.S. Naruka & Ors. Vs. UOI is binding on the parties. In B.S. Naruka & Ors. Vs. UOI, this court has held that the said rules do not contemplate automatic promotion. Merit and suitability of the concerned officer would be the primary test but seniority has also

to be taken into consideration. In the B.S. Naruka case, this court has also held that the seniority has to be determined on the basis of continuous service of a person in the concerned Frontier/State.

The court has held as under:-

“Rules 123 and 124 provide for maintenance of list of seniority of Sub-Inspectors and Inspectors as State-wise and Frontier-wise respectively. Even for the said purpose some organizations were to be treated as “State” and “Frontier”.

(ii) In WP(C) No. 15159/2006, the court has categorically held that no person junior to the petitioner in the Frontier to which the petitioner was attached to during the period 1971 to October 1975 has been promoted. During this period, petitioner was attached to 103 Bn BSF, Hazaribagh (Bihar) at Training Centre and School. Thus, it is clear that no person junior to the petitioner in the Training Centre and School Hazari Bagh had superseded the petitioner.

(iii) In review petition No.223/2011, the petitioner was only permitted to agitate the issue as to why the persons junior to him in his Frontier were recommended for promotion when his name was not considered or recommended for promotion in DPC held on 22-23 July, 1971 in New Delhi, 27 to 29 July, 1972 in New Delhi and on 30th and 31st January, 1974.

20. In the present writ petition, the petitioner has challenged the non recommendation of his name in the above said 3 DPC's, held on 22-23 July, 1971 in New Delhi, 27 to 29 July, 1972 in New

Delhi and on 30th and 31st January, 1974. His plea is that the names of his juniors were recommended in those DPC's and the grounds of challenge are that the said act of respondent is unjust, arbitrary and unconstitutional and violates his fundamental rights and that he was also vandalised and that he who belonged to Scheduled Caste category, was not only superseded by his juniors of same Frontier/State but also by General Category candidates and that because similarly placed employees cannot be treated in different manner and has prayed that he be considered and promoted to the rank of Inspector w.e.f. 16.10.1971 when his junior batch mates of the year 1968 batch Sub- Inspectors were so promoted without his knowledge and from the back of the Petitioner and pass an order with regard to his future promotion to respective posts on due date when similarly situated employees were considered and promoted and to fix properly at each stage of seniority in respective posts and grant all consequential benefits and set aside the order dated 11th October, 2011 passed by the DIG, BSF.

21. It is contended by the respondents that no doubt persons junior to the petitioner in his Frontier were recommended by DIG in exercise of his powers in Section 136, however, the DPC find them unfit and they were not considered for promotion and in both the DPCs held on July and January, 1972, persons senior to the petitioner were promoted. As regards, the DPC held on January 30-31, 1974, it is submitted that according to HQ DG BSF, New Delhi letter No. 17 (1)73-ORG/BSF dated 24 Nov 1973 and Signal

No. R-3252 dated 05 Nov 1973, Sub-Inspectors of Training Institutions and HQrs Reserve Battalions having seniority only up to 30.04.1968 were considered by DPC for List 'E' Test held in New Delhi and Petitioner had joined on 17.5.1968 so not eligible.

22. It is further submitted that SI Prakash Chand Sharma, who was appointed as SI (DE) on 18th May, 1968 and was junior to the petitioner, was not falling within the cut-off date of seniority fixed for List 'E' test. Hence, he was not eligible for consideration by the DPC and was not allowed to appear in the DPC List 'E' test held on 30 & 31 January 1974 and was not also given any marks by the DPC. In fact, his case was not considered by the DPC being ineligible even though his name was merely recorded in the DPC proceedings. It is submitted mere recording of name does not in any way amount to supersession of the petitioner in promotion to the rank of Inspector.

23. It is further contended that the promotion is not a matter of right. It is further contended that as per Rule 119, the names of suitable candidates were required to be sent by Commandant and that the petitioner was not found suitable by his Commandant and his name was not sent for DPC List E since he had also not passed the pre-promotion test. It is argued that the petitioner has racked up this issue after almost 40 years that his name was not recommended by his Commandants although names of his juniors were recommended to DPCs held on 22-23 July, 1971 in New Delhi, 27 to 29 July, 1972 in New Delhi and on 30th and 31st January, 1974 and that he had not alleged any bias at any time prior

to his raising these issues in his review petition dated 28th March, 2011.

24. It is further argued that petitioner had not felt any bias or violation of his fundamental rights at the relevant time that is why he had not raised this issue at any stage even in his earlier writ petitions and therefore his contentions had no merit in it. His rights of promotion were not affected by not sending his name for the said three DPCs since no person junior to him in his Frontier was promoted in those DPCs and there was no deprivation of his right to promotion.

25. Attention is also drawn to the fact that the petitioner has claimed his promotion to the rank of Inspector from three different dates in three writ petitions filed by him. In writ petition 7639/2001, he has claimed his promotion w.e.f 1st February, 1972. In the second writ petition 15159/2006 he has claimed his promotion w.e.f 12th December, 1971 and in this writ petition, he has claimed his promotion w.e.f. 16th October, 1971. It is argued that this very fact clearly shows that the petitioner is misusing the process of law.

26. We have given careful consideration to the rival contentions of the parties and the arguments forwarded by their learned counsels.

27. It is a fact that even after the failure of the petitioner to get an order in his favour that he was entitled to promotion to the rank of Inspector w.e.f 12.12.1971 in his writ petition No. 15159/2006 he has racked up this issue afresh in the present writ petition

wherein he has made following prayer :-

“a. Issue a writ of mandamus directing the respondents to consider and promote the petitioner to the rank of Inspector w.e.f. 16th October, 1971 when his junior batch mates of the year 1968 batch Sub- Inspectors were so promoted without his knowledge and from the back of the Petitioner and pass an order with regard to his future promotion to respective posts on due date when similarly situated employees were considered and promoted and to fix properly at each stage of seniority in respective posts and grant all consequential benefits.”

28. By the order of this court dated 19.05.2011 while disposing of his review petition no. 223/2011, the petitioner was confined only to limited issues. This court issued the following directions:-

“1.After some arguments learned counsel for the petitioner concedes that the issue projected in the application seeking review are not the ones which were pleaded in the pleadings constituting the writ petition and thus learned counsel seeks leave to withdraw the application seeking review, stating that the petitioner intends to file a representation before the department for appropriate orders.

2. Facts to be noted are that the petitioner has a grievance of his not being promoted as an Inspector when his entitlement enured and claims that persons junior to him were promoted. This

has affected the further promotional rights of the petitioner, as claimed by the petitioner.

3. It is not in dispute that prior to the year 1975, promotions were effected frontier wise and there were no centralized promotions.

4. In other words, persons who joined BSF in the same year and on the same post, depending upon the Frontier to which they were assigned, earned promotions on different dates.

5. As regards the petitioner, we note that this is the second round of litigation. The first round of litigation came to an end when order dated 19.12.2005 was passed disposing of WP (C) No. 7631/2001 filed by the petitioner in which it was directed that the petitioner would make a details representation which would be decided by a speaking order.

6. Petitioner made a representation on 16.01.2006 which was disposed of vide order dated 05.05.2006. It is said order which was questioned in the writ petition.

7. Learned counsel for the petitioner concedes that in the representation dated 16.01.2006 issues now being sought to be projected by way of review were not raised.

8. We note that the issue which the petitioner is

now seeking to urge pertains to SI Rattan Singh Raghwa, SI Laxman Singh Mehta and SI Balbir Singh being considered in the year 1971. Petitioner claims that these 3 persons were junior to him. Conceding that the 3 did not earn a promotion, grievance raised as to why was petitioner not considered in the DPC, which met on 23rd July, 1971.

9. Similarly, petitioner raised a grievance with respect to the DPC which met on 27th, 28th and 29th July 1972. Petitioner states that SI Om Prakash Arya, Si Y.P. Singh, SI Hoshiar Singh Dahiya and SI Ram Singh, all junior to the petitioner were considered. Conceding that they were not promoted, grievance raised is of petitioner's name not even being considered.

10. Further grievance is to the DPC which met in the year 1974 where in one SI Prakash Chand Sharma, stated to be junior to the petitioner was considered for promotion. Though not promoted, grievance raised is that petitioner's case was not even considered.

12. Under the circumstances we permit learned counsel for the petitioner to withdraw the application seeking review and reserve the right for the petitioner to file a representation within 6

weeks from today but limited to the aforementioned grievance of the petitioner. No other grievance would be permitted to be raised in the representation and needless to state the representation shall be decided with a reasoned order within 12 WP (C) 15159/2006.

Weeks of receipt of the representation.

X X X X X X X X X X X X

15. *Be that as it may it would be for the department to look into the grievance which petitioner has been permitted by us to be raised in the representation which he would be filing. The respondent would be entitled to consider its records while deciding the same.*

16. *If petitioner is aggrieved by the order passed he shall have remedies as per law, but only on the limited issue.”*

29. The petitioner, however, in the present writ petition, has again racked up the issue that persons junior to him were promoted when he contended that he was denied right of his promotion despite being eligible and competent for promotion which has been provided to his batch mates and even Juniors comprising the same State/Frontier. He has named few as under:-

Name	Unit	Date of Apptt	Date of Promotion (As Inspt.)	Retired as
------	------	---------------	----------------------------------	------------

SI Rajender Singh	100 Bn 6.4.1968	16.10.1971	Comdt- Temporary, Not confirmed not pre-promotion qualified.
SI Rattan Singh	100Bn 21.5.1968	15.10.1971	Comdt-do-
Raghav			
SI DS Ahluwalia	100Bn 21.5.1968	15.10.1971	DIG –do-
SI BR Yadav	58Bn 18.5.1968	12.12.1971	Comdt –do-
SI OC Dogra	54Bn 7.7.1969	1.5.1973	DIG –do-
R.K. Nimoria (Petitioner)	TC 17.5.1968	6.3.1978	Asstt. Comdt-

**Confirmed on 1.1.1971,
Pre-Promotion qualified
Graduate, SC Category**

30. In the Counter Affidavit, the respondents have stated that the persons enumerated by the petitioner in his writ petition belonged to different State/ Frontier.

Parawise reply given by the respondent is as under:-

S.No.	Contention of the Petitioner.	Factual Position
1	SI Rajinder Singh, 100 Bn Date of apptt as SI 06.04.68 Date of Promotion 16.10.71 as Inspector Retired as Comdt	He was not junior to the petitioner as he was holding the rank of Sub-Inspector w.e.f. 06.04.68. He was promoted to the rank of Inspector w.e.f 17.12.1971 while he remained posted in North-Western frontier. Based on his promotion as Inspector, he earned subsequent promotions

- on his own merit and suitability and retired as Second-in-command (21C) w.e.f. 30-11-2001 his date of birth being 16-11-1944
- 2 SI Rattan Singh Raghav, 100 Bn
 Date of apptt as SI 21.05.68
 Date of Promotion 15.10.71 as Inspector
 Retired as Comdt
 He was considered by the DPC held in North-western frontier on 10 to 12 May 1972 and was promoted to the rank of Inspector wef 15.10.72 against the vacancy of that frontier.
 - 3 SI DS Ahluwalia, 100 Bn
 Date of apptt as SI 21.05.68
 Date of promotion 15.10.71 as Inspector
 Retired as DIG
 He was considered by the DPC held in North-Western Frontier on 10 to 12 May 1972 and was promoted to the rank of Inspector wef 01.12.72 against the vacancy of that Frontier. Based on his promotion as Inspector, he earned subsequent promotions on his own merit and suitability and retired as DIG/CLO wef 31-10-2008 being his date of birth 20-10-1948
 - 4 SI BR Yadav, 58 Bn
 Date of apptt as SI 18.05.68
 Date of Promotion 12.12.71 as Inspector
 Retired as Comdt
 He was considered by the DPC held in North-Western Frontier on 28 to 30 June 1971 and was promoted to the rank of Inspector we.f. 12.12.71 against the vacancy of that frontier. Based on his promotion as Inspector, he earned subsequent promotions on his own merit and suitability and retired as Commandant wef 30-04-2004 being his date of birth 04-04-1947

- 5 SI OC Dogra, 54 BN He was considered by the DPC
 Date of apptt as SI held in North-western Frontier
 07.07.69 on 28 to 30 June 1971 and was
 Date of Promotion promoted to the rank of
 01.05.73 as Inspector Inspector wef 12.12.71 against
 Retired as DIG the vacancy of that Frontier.
 Based on his promotion as
 Inspector, he earned subsequent
 promotions on his own merit
 and suitability and retired as
 DIG. Wef 30-06-2010 being his
 date of birth 01-07-1950
- 6 R K Nimoria, (Petitioner) The petitioner remained posted
 TC&S/103 Bn BSF in 103 Bn BSF (HQrs Reserve
 Date of apptt as SI Battalion) under Training
 17.05.68 Centre & School, Hazaribagh
 Date of Promotion 06- with effect from 09-10-1970 to
 03-78 as Inspector 18-10-1975. During the period
 Retired as Dy. Comdt. from **09-10-1970 to 1807-1975**,
 his frontier for the purpose of
 conducting his List 'E' test was
 as referred in the Explanation to
 Rule 124 of the Central Reserve
 police Force (Fourteenth
 Amendment) Rules, 1967
 according to Rule 136(2) of said
 Rules up to 18th July 1975 and
 during the period from **19-07-**
 1975 to 18-10-1975, his sector
 for the purpose of conducting
 his List 'E' test was as referred
 in the Proviso to Rule 8 of the
 BSF (Subordinate Officers and
 Under Officers) Promotion and
 Seniority Rules, 1975,
 according to Proviso to Rule
 18(3) of said Rules. In exercise
 of the powers vested in him

under Rule 136(1) of the Central Reserve Police Force (Fourteenth Amendment) Rules, 1967, the Commandant 103 Bn BSF/TC&S BSF Hazaribagh had not found the petitioner suitable for promotion to the rank of Inspector due to inadequate confidential record of service and also no qualifying Junior Leader Course as mandated in Rule 119 read with Rule 128 of said Rules. Hence, the Commandant 103 Bn BSF/TC&S BSF Hazaribagh had not submitted nomination/recommendation of the petitioner for promotion to the rank of Inspector and accordingly, his case was not considered by the DPC List E met in 1971 and 1972 in New Delhi. Further, the petitioner had not come under the zone of consideration prescribed for DPC List E met in 1974 in New Delhi and as such, was not considered by the DPC. The petitioner was graded as 'Unfit' by the subsequent DPC List E which met in 1975 recording remarks "***Fails in records and aggregate even after relaxations as Schedule Caste***'. The Petitioner was graded as 'fit' by the next DPC empanelled and promoted to the rank of Inspector with effect

from 06.03.1978 and his date of promotion as Subedar (Inspector) is correct as per the record. Based on his promotion as Inspector, he earned subsequent promotions on his own merit and suitability and retired as Deputy Commandant w.e.f. 30-04-1998 being his date of birth 06-04-1943.

Thus, the contention of the petitioner that juniors from his Frontier/State were promoted is baseless.

31. In case B.S. Naruka & Ors. Vs. UOI, this court while deciding the issue of seniority held that:

“50. Interpretation of statutory rules would depend upon the text and context thereof. For the afore-mentioned purpose the entire rules are to be read in their entirety and then Chapter by Chapter and then provision by provision. The said rules do not contemplated automatic promotion. Merit and suitability of the concerned officer would be the primary test but seniority has also to be taken into consideration.

52. It is also beyond any cavil of doubt that whereas Sub-Inspectors are under the control of the Deputy Inspector-Generals, the Inspectors are under the control of the Inspector-Generals. Rules 123 and 124 provide for maintenance of list of seniority of Sub-Inspectors and Inspectors as State-wise and Frontier-wise respectively. Even for the said purpose some organizations were to be treated as "State" and "Frontier". It is also not

in dispute that undergoing the pre-promotion Course as specified in Rule 128 is mandatory for promotion. It may be that an employee has wrongly been denied entry in such Courses but Therefore an appropriate order could be passed, but that by itself, in our considered opinion, cannot be a ground for holding that all the Sub-Inspectors and Inspectors irrespective of their position and date of promotion and irrespective of the fact that as to whether they had undergone the requisite training for promotion would be entitled to promotion as a matter of right. The answer to the said question must be rendered in the negative.

53. The rules do not say that automatic promotion would be granted upon completion of three years. Grant of promotion would not only depend upon the existence of vacancy but also on the intention of the Central Government to fill up the same.

54. No employee has a right to obtain a writ of or in the nature of mandamus directing the respondents to promote him to a rank irrespective of the fact as to whether he may be found suitable on merit therefore or not.

55. At several stages of promotion not only the vacancy position is required to be considered but also the merit of the respective candidates are also required to be considered.”

In this case, this court has held that as per the rules, the seniority list for promotion is to be maintained State/ Frontier wise under BSF Rules 1969.

32. Therefore, the contention of the petitioner that persons junior to him were promoted, falls to the ground in view of the fact that

these persons are not from his Frontier/State but belong to North-Western Frontier and because it is now a settled law that up to the year 1975 when the BSF Rules were amended, the seniority of the Sub-Inspectors and other ranks were to be maintained as per their seniority in their Frontier/State.

33. The grievance of the petitioner is also that although names of his juniors in his State/Frontier were sent for consideration and promotion to three DPC's, his name was not sent and that his rights were violated. It is also argued by the petitioner that it is immaterial that the recommended names of his juniors were rejected by DPCs.

It is argued by learned counsel for respondent that no right of the petitioner was violated since no person junior to him was promoted and that contention of the petitioner is highly belated.

34. The Border Security Force (BSF) was constituted after war of 1965, in terms of the provision of Central Reserve Police Force Rules (CRPF) 1955 by the Central Government in exercise of its power conferred u/s 18 of CRPF Act 1949. Rule 117 of these Rules provides that except Rule 55 to Rule 71 (both inclusive), Rule 75, Rule 76 and Chapter XV, thereof all the other rules of CRPF 1955 were applicable to BSF constituting subordinate officers. Rule 119 (2) specify the competent authorities in respect of members of the BSF thereof:-

1.	2.
----	----

Constables and under officers Sub-Inspectors (Platoon Commanders) Inspectors (Company 21/c)	Commandant Deputy Inspector General Inspector General.
---	--

35. Rule 118 prescribes that the promotion in all ranks shall be based on merit and suitability in all respects with due regard to seniority.

36. Rule 136 prescribes the procedure for selecting Sub-Inspector (Pl. Comdr.) for List 'E' and promotion from SI to Inspr. Coy 2 I/C which reads as under:-

“136. Procedure of selecting Sub-Inspr (Pl, Comdr.) for List 'E' and promotion from SI to Inspr. (Coy 2 I/C).

(1) Once every year the Comdt. Shall recommend to the IG through DIG concerned such Sis (Pl. Comdrs) whom he considered suitable for promotion to the rank of fnsprs. (Coy 2 I/C).

(2) The IG of the frontier shall constitute a Board consisting of himself and all DIGs under him and two Comdts. of Bns: Provided that in respect of the frontier referred to in the explanation to Rule 124, the Board shall consist of the DG BSF, the Comds. of the BSF Academy Tekanpur, BSF Trg. School H/bagh. CSWT BSF Indore and two Comdts of the BN in the HQrs. reserve and when the DG BSF is unable to preside over the Board

he shall nominate an officer not below the rank of DIG to preside.

(3) The Board shall consider the record of service of the nominees, their performance in the courses and seniority, and test then on parade and interview them.

(4) The Board shall prepare a list of names of officers found fit for inclusion in list 'E'.

(5) THE NAMES WILL BE ARRANGED IN THE ORDER OF SENIORITY (emphasis is ours).

Provided that in case where the Board considers the performance, merit and record of service of an officer of outstanding merit, the board may place his name above his seniors.

(6) A gradation list of Sis (PI Comdrs.) approved for inclusion in list 'E' shall be maintained at the HQrs. of the BSF."

37. Under the Rules, it was for the Commandant of the petitioner to recommend his names to IG through DIG concerned. The Commandant was to send the names of those persons whom he considered suitable for promotion to the rank of Inspectors. In the case of the petitioner, his then Commandant did not found the petitioner suitable for promotion to the rank of Inspector and that is why his name was not recommended to the IG through DIG for promotion for relevant various DPCs. The DPC could consider the name of petitioner, only when it was recommended by his then Commandant.

38. The petitioner has not alleged any bias against his Commandants in the last 40 years. Even in his present petition he has not contended any bias against his Commandants manning that post at the time of relevant DPCs.

39. The petitioner therefore has not at any stage during his service or thereafter questioned non recommendation of his name by his Commandants for 3 DPCs held during 1971-1974. It was only after his superannuation that he had for the first time while filing his petition in 2001 has claimed his promotion to the rank of Inspector w.e.f 1.12.1972.

40. It is also a cardinal principle of law that if any act has been challenged on the ground of bias or on the ground that his rights had been vandalized, the party is required to place on record the facts and the contentions which lead to such bias. The petitioner has not contended any element of bias against his various Commandants who were the authority to recommend his name for the DPC's held between 1971 to 1974.

41. Moreover, the petitioner has also failed to show that he had suffered any prejudice or any of his right had been violated by the act of the respondents. No junior to the petitioner had been promoted to the rank of Inspector in these three DPC's. In these three DPC's, the persons promoted as Inspectors were all senior to the petitioner.

42. It is contended by the learned counsel for the respondent that even for the sake of argument, if we were to suppose that the name

of the petitioner would have been recommended in those DPC's, even then he would not have been promoted because the persons promoted in these DPC's were senior to the petitioner and his fate would have been the same as of others and thus no prejudice has been caused to the petitioner.

43. The Hon'ble Supreme Court has defined the term 'bias' in the case of State of Gujarat and Nar. Vs. Hon'ble Mr. Justice R.A. Mehta (Retd.) and Ors. reported in Civil Appeal Nos. 8814-8815 of 2012 and S.L.P. (C) Nos. 2625-2626 and 2687-2688 of 2012 as under:-

“The apprehension of bias must be reasonable, i.e., which a reasonable person would be likely to entertain. Bias is one of the limbs of natural justice. The doctrine of bias emerges from the legal maxim - nemo debet esse judex in causa propria sua. It applies only when the interest attributed to an individual is such, so as to tempt him to make a decision in favour of, or to further, his own cause.

While deciding upon such an issue, the court must examine the facts and circumstances of the case, and examine the matter from the view point of the people at large.”

44. Again, the Hon'ble Supreme Court in the case titled as Chandra Kumar Chopra Vs. Union of India (UOI) and Ors. cited in Criminal Appeal No. 665 of 2002 after taking into consideration

the law laid down in various authorities including Manak Lal Vs. Dr. Prem Chand MANU/SC/0001/1957, AIR 1957 SC 425, Gullapalli Nageswara Rao and Ors. Vs. Andhra Pradesh State Road Transport Corporation and ANr. (1959) Supp. 1 SCR. 319, A.K. Kraipak and Ors Vs. Union of India and Ors. MANU/SC/0427/1969, AIR 1970 SC 150, Dr. S.P. Kapoor Vs. State of Himachal Pradesh and Ors. MANU/SC/0715/1981: 4 SCC 716, Ranjit Thakur Vs. Union of India and Ors. MANU/SC/0691/1987 : (1987) 4 SCC 611, M/s Crawford Bayley and Company and Ors. Vs. Union of India and Ors. MANU/ SC/2985/2006: AIR 2006 SC 2544, S. Parthasarathi Vs. State of Andhra Pradesh MANU/SC/0059/1973: (1974) 3 SCC 459 and Metropolitan Properties Company (F.G.C.) Ltd. Vs. Lannon (1969) 1 QB 577, 599 has summarised as under:-

“22. From the aforesaid pronouncement of law, it is discernible that mere suspicion or apprehension is not good enough to entertain a plea of bias. It cannot be a facet of one’s imagination. It must be in accord with the prudence of a reasonable man. The circumstances brought on record would show that it can create an impression in the mind of a reasonable man that there is real likelihood of bias. It is not to be forgotten that in a democratic polity, justice in its conceptual eventuality and inherent quintessentiality forms the bedrock of

good governance. In a democratic system that is governed by Rule of Law, fairness of action propriety, reasonability, institutional impeccability and non-biased justice delivery system constitute the pillars on which its survival remains in continuum.”

45. It has also been held by the Hon’ble Supreme Court in the case titled as State of Punjab Vs. Davinder Pal Singh and Ors. etc Vs. Davinder Pal Singh Bhullar and Ors. etc reported in AIR 2012 SC 364 that the plea of bias should be taken at the earliest. The Hon’ble Court has observed as under:-

“21. In Manak Lal (Supra), this Court held that alleged bias of a Judge/official/ Tribunal does not render the proceedings invalid if it is shown that the objection in that regard and particularly against the presence of the said official in question, had not been taken by the party even though the party knew about the circumstances giving rise to the allegations about the alleged bias and was aware of its right to challenge the presence of such official. The Court further observed that waiver cannot always and in every case be inferred merely from the failure of the party to take the objection. “Waiver can be inferred only if and after it is shown that the party knew about the relevant facts and was aware of

his right to take the objection in question.

Thus, in a given case if a party knows the material facts and is conscious of his legal rights in that matter, but fails to take the plea of bias at the earlier stage of the proceedings, it creates an effective bar of waiver against him. In such facts and circumstances, it would be clear that the party wanted to take a chance to secure a favourable order from the official/court and when he found that he was confronted with an unfavourable order, he adopted the device of raising the issue of bias. The issue of bias must be raised by the party at the earliest."

46. It is apparent that the petitioner was all the time aware that his name has not been sent to DPCs held during 1971-74 but he did not raise any objection in his representations or earlier writ petitions. He has raised the contention of bias etc for the first time in his review Petition No. 223/2011 dated 28th March, 2011 i.e. after almost 40 years of the incident. No reasonable explanation is forthcoming from petitioner. The objection of the petitioner premised on bias on the part of the authorities appears to be a desperate attempt of the petitioner to obtain a relief which had been denied to him in his earlier litigation. The petitioner has failed to convince us that he had suffered any prejudice or any of his substantive right has been taken away from him or that he was vandalised or that there had been a violation of Article 14 of the

Constitution of India.

47. The petitioner has failed to prove the facts and circumstances to show the element of bias against him. It is clear that no person junior to the petitioner in his frontier/State had superseded him and his right of promotion as per his seniority in his frontier/State was not adversely effected.

48. Even otherwise, it would be improper to ask the respondents to consider the name of the petitioner at this stage when more than 40 years have been passed and much water has flown since then. The petitioner had retired on superannuation in the year 1998. All his colleagues and seniors in his frontier including the then Commandants and DIG's etc and the persons promoted in these DPC's also must have retired by now and the hands of the clock cannot be turned back to 40 years after the event. Even otherwise it would be a futile exercise as he being junior to the persons promoted in these DPC's had his name being sent because in all these DPC's only the persons senior in his Frontier/State were promoted. The career prospects of the petitioner had not been adversely effected at any stage by the act of the respondent.

49. There is another angle to this case also. The present petition is barred under order 2 Rule 2 of the Code of Civil Procedure (CPC).

The Hon'ble Supreme Court in its judgment titled as Kunjan

Nair Sivaraman Nair Vs. Narayanan Nair and Ors. reported in Civil Appeal No. 838 of 2004 (Arising out of SLP (Civil) No. 7653/2002) has discussed the provision of order 2 CPC as under.

“A mere look at the provisions shows that once the plaintiff comes to a court of law for getting any redress basing his cause of action, he must include in his suit the whole claim pertaining to that cause of action. But if he gives up a part of the claim based on the said cause of action or omits to sue in connection with the same, then he cannot subsequently resurrect the said claim based on the same cause of action. So far as Sub-rule (3) is concerned, before the second suit of the plaintiff can be held to be barred by the same, it must be shown that the second suit is based on the same cause of action on which the earlier suit was based and if the cause of action-is the same in both the suits and if in the earlier suit plaintiff had not sued for any of the reliefs which it had failed to press into service in that suit cannot be subsequently prayed for except with the leave of the court. It must, therefore, be shown by the defendants for supporting their plea of bar of Order II, Rule 2, Sub-rule (3) that the second suit of the plaintiff filed is based on the same cause of

action on which its earlier suit was based and that because it had not prayed for any relief and it had not obtained leave of the court in that connection, it cannot sue for that relief in the present second suit.”

The expression “cause of action’ has acquired a judicially-settled meaning. In the restricted sense cause of action means the ‘circumstances forming the infraction of the right or the immediate occasion for the action. In the wider sense, it means the necessary conditions for the maintenance of the suit, including not only the infraction of the right, but the infraction coupled with the right itself. Compendiously the expression means every fact which it would be necessary for the plaintiff to prove, it traversed, in order to support his right to the judgment of the Court. Every fact which is necessary to be proved, as distinguished from every piece of evidence which is necessary to prove each fact, comprises in cause of action.”

50. The Hon’ble Supreme Court has again discussed the scope of Order II Rule 2(2) and (3) in its recent judgment decided on 7th September, 2012 in Virgo Industries (Engl.) P. Ltd. v. Vetrutetech Solutions P. Ltd and held that:-.

“The object behind enactment of Order II Rule 2(2) and 3(3) of the Cod of Civil Procedure is not far to seek. The Rule engrafts a laudable principle that discourages/Prohibits vexing the Defendant again and again by multiple suits except in a situation where one of the several reliefs, though available to a Plaintiff, may not have been claimed for a good reason. A later suit for such relief is contemplated only with the leave of the Court which leave, naturally, will be granted upon due satisfaction and for good and sufficient reasons. The situations where the bar under Order II Rule 2(2) and 3(3) will be attracted have been enumerated in a long line of decisions spread over a century now. Though each of the aforesaid decisions contains a clear and precise narration of the principles of law arrived at after a detailed analysis, the principles laid down in the judgment of the Constitution Bench of this Court in Gurbux Singh v. Bhooralal”.

51. Discussing the object behind the enactment of Order II Rule 2(2) and (3) of the CPC has held as under:-

“The cardinal requirement for application of the provisions contained in Order II Rule 2 (2) and (3), therefore, is that the cause of action in the later suit

must be the same as in the first suit. It would be wholly unnecessary to enter into any discourse on the true meaning of the said expression ie.. cause of action, particularly, in view of the clear enunciation in a recent judgment of this Court”

“Cause of Action” has been defined as meaning simply a factual situation existence of which entitles one person to obtain from the Court a remedy against another person. The phrase has been held from earliest time to include every fact which is material to be proved to entitle the Plaintiff to succeed, and every fact which a Defendant would have a right to traverse. ‘Cause of action’ has also been taken to mean that particular action the part of the Defendant which gives the Plaintiff his cause of complaint, or the subject-matter of grievance founding the action, not merely the technical cause of action.”

52. In all the three writ petitions, the petitioner has claimed his promotion to the post of Inspector antedated to his actual date of promotion to the post of Subedar i.e 06.03.1978. In the first Writ Petition No. 7639/2001 of the petitioner, he has claimed his promotion to the rank of Subedar w.e.f. 01.02.1971. Since his representation was pending before the authorities, the court had issued the direction to the authorities to dispose of the said representation. In his second writ petition no. 15159/2006, the

petitioner has claimed his promotion to the rank of Subedar w.e.f. 12.12.1971. In this writ petition again, the petitioner has claimed that promotion should be antedated that is he should be promoted to the rank of Subedar w.e.f. 16.10.1971 then his actual date of promotion. All the three writ petitions were and are therefore for the same cause of action, that is, “antedating the petitioner’s promotion to the post of Subedar”. In the first writ petition no. 7639/2001, the issue was not decided on merit as matter was referred to the authorities with direction to dispose of the representation of petitioner. In the second writ petition no. 15159/2006 of the petitioner, this court has determined the rights of the petitioner and is clearly held:-

“18. Thus there is no substance in the contention of the petitioner that the seniority of Sub-Inspectors in BSF till July 1975 should not have been maintained on State wise (Frontier wise basis). Similarly there is no substance in his contention that when his batch mates were promoted against the vacancies in their own Frontiers/States against the vacancies available there, he should also have been automatically promoted.

X X X X X X X X X X X X

We find no reason to take a view different from what is already taken in the case of B.S. Naruka on the

issue of maintenance of Frontier/State wise seniority and promotion of Sub-Inspectors from such seniority against the vacancy available in the Frontier. In para 9 of the Counter Reply, the respondents have categorically stated that the petitioner remained posted in Training Institution from Oct 1970 to Oct 1975.

X X X

X X X

X X X

X X X

As has been pronounced upon in the case of B S. Naruka, the promotion of said Sub-Inspectors against the vacancies available in their Frontier does not give any right to petitioner for automatic promotion, even when there was no vacancy in his Frontier.

20. However, we are not dismissing the present writ petition on latches alone, but in view of the facts and circumstances noted hereinabove particularly the fact that no person junior to the petitioner in the training institution was promoted above the petitioner and we reiterate by way of conclusion that till the Rules of 1975 came into force no integrated seniority list of Sub-Inspectors was maintained.”

53. Thus, court has given clear findings that the petitioner was not

entitled for his promotion to the post of Inspector prior to the actual date of promotion. This issue therefore stands finally determined. All the pleas challenging his promotion to the post of Inspector from any other date then the actual date of his promotion ought to have been taken up by the petitioner in his previous writ petitions.

Order I Rule 1 of Code of Civil Procedure, 1908 provides that every suit shall be framed so as to afford the grounds for final decision upon the said end to prevent further litigation concerning them. Again Order II Rule 2 states that it is required that every suit shall include the element of the claim of the plaintiff which he is entitled to in respect of cause of action.

54. When we apply these principles to the facts of the present case, it is apparent that, as discussed above, in the earlier writ petitions, the petitioner had claimed his promotion to the post of Subedar at an earlier date then his actual promotion which had taken place on 06.03.1978. The Division Bench of this Court in his writ petition No. 15159/2006 has clearly held that the policy of maintaining the seniority State/Frontier wise was correct and was as per the rules applicable to the petitioner and that the petitioner had no right to automatic promotion in the absence of any vacancy in his frontier/State and that he had been rightly promoted and that he was not entitled to the promotion antedated.

55. As per the principles laid down in Code of Civil Procedure, 1908, the petitioner cannot re-agitate the same issue which was the

subject matter of his earlier writ petitions and wherein that issue which was between the same parties and on the same cause of action (not being promoted in three DPC's), cannot be permitted to be re-agitated by way of fresh writ petition on different plea, approach to the issue, especially after a lapse of 40 years.

56. For the aforesaid reasons, we find no merit in this writ petition. The same is dismissed. No order as to costs.

(DEEPA SHARMA)
JUDGE

(GITA MITTAL)
JUDGE

September 24 , 2013
Sapna