

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

Judgment delivered on: December 22, 2014

+ **W.P.(C) No.3570/2013**

GURNAM SINGH Petitioner

Through: Mr. Puneet Khurana, Advocate

versus

UNION OF INDIA & ORS Respondents

Through: Mr. Saquib, Advocate

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

HON'BLE MR. JUSTICE NAJMI WAZIRI

JUDGMENT

KAILASH GAMBHIR, J

1. The present writ petition has been filed under Articles 226 and 227 of the Constitution of India for fixation of his seniority on the post of Assistant Commandant in SC category from the date of his selection along with his batchmates of Batch No.26 and not with AC/DE at Sr. No.29.

2. The case of the petitioner in brief is that he was selected for appointment to the post of Assistant Commandant (Direct Entry) in BSF through SSB CPOs AC Examination, 1999 and had successfully

undergone the written examination, physical efficiency test and interview conducted by the Special Selection Board and was declared successful for appointment to the said post. After having qualified the said tests, he was required to qualify the medical test in which he was found to be medically unfit on 21.12.1999 as he failed to fulfill the chest requirement criterion. Through a letter dated 19.04.2000, the respondents informed the petitioner about his results and further intimated him that if he so desired, he may file an appeal for the review of his medical examination. The petitioner preferred an appeal against the order of the respondents declaring him to be medically unfit, supporting his case by the medical certificate dated 02.05.2000 duly issued by the Government Civil Surgeon, Yamuna Nagar, Haryana but the respondents failed to take a decision to constitute a Review Medical Board for his medical re-examination. Under such circumstances, he filed a Civil Writ Petition No.12398/2002, titled *Gurnam Singh v. Union of India & Ors.* before the Punjab & Haryana High Court and the said writ petition was disposed off vide order dated 09.08.2002, with the observation that the respondents were expected to respond to the petitioner's appeal, accompanied by the certificate (Annexure P-1) within a period of two

months from the date when the certified copy of the order therein was brought to their notice. The respondents did not comply with the aforesaid direction given by the Punjab & Haryana High Court in a time bound manner which led the petitioner to move a Civil Miscellaneous Application bearing CM APPL. No.3231/2003 in the said Writ Petition before the High Court but during the pendency of this application, he was required to appear before the Review Medical Board on 19.02.2003 wherein he was declared to be medically fit. Thereafter, he was issued an appointment letter dated 29.03.2005 for the post of Assistant Commandant (Direct Entry) and was directed to report to the BSF Academy on 31.01.2005 for undertaking the basic training course. The petitioner underwent training for the AC (DE) course which commenced w.e.f. 07.02.2005 and thereafter, his seniority was fixed above the candidates of AC (DE) course at Sr. No.29. The petitioner being aggrieved claims that his seniority should be fixed along with his batchmates of AC (DE) course at Sr. No.26 as it was not on account of his fault that there was a delay in his medical re-examination by the Review Medical Board.

3. Arguments on behalf of the petitioner were addressed by Mr. Puneet Khurana, Advocate and in support of his arguments, he placed reliance on a Division Bench judgment of this Court in W.P. (C) No. 5400/2010 titled as *Avinash Singh & Ors. v. Union of India & Ors.*, decided on 26th May 2011. He also submits that a Special Leave Petition was preferred by the respondents against the said judgment but the same was dismissed by the Supreme Court vide order dated 12th September 2011. He strongly urged that directions be given to the respondents, to grant seniority to the petitioner on the post of Assistant Commandant (Direct Entry) as per his merit in the selection list of Sr. No.26 Batch alongwith all consequential benefits including his entitlement to be covered by the old pension scheme under the Central Civil Service (Pension) Rules, 1972 as they were in force till 31st December, 2003.

4. The aforesaid contentions raised on behalf of the petitioner have been refuted by Mr. Saqib, the learned counsel for respondent Nos. 1 and 2 and the stand taken by them in their counter affidavit is that the petitioner was duly informed about his right to file an appeal for the review of his medical examination vide letter dated 19th April 2002, however, he did not take steps to file an appeal alongwith his other batch

mates, who had preferred appeals for review of their medical examination. He further stated that the entire process, including review of the medical examination for SSB CPOs (AC) Examination, 1999 was concluded during August 2000. He also stated that after a gap of about two years, the petitioner had filed a writ petition vide CWP No.12398/2002 before the Punjab and Haryana High Court to seek a direction for his appointment alongwith his batch- mates and for his training for the post of Assistant Commandant, BSF. The said writ petition was disposed off by the Punjab and Haryana High Court by giving a direction to the respondents to respond to the appeal filed by the petitioner for the review of his medical examination within two months from the date when the certified copy of the order therein was brought to their notice. A copy of the said order dated 9th August, 2002 was received by the Headquarters of BSF through the petitioner's Advocate and pursuant to the appeal preferred by the petitioner for review of his medical examination, he was directed to appear before the Standing Medical Board, Safdarjung Hospital, New Delhi on 19th February, 2003. This Review Medical Board declared the petitioner to be medically fit and this was informed to the petitioner through a letter dated 2nd April,

2003. Since appointment to a Group A post was involved, therefore, it was necessary to seek prior approval of the Ministry of Home Affairs and accordingly, the matter was taken up by respondent Nos. 2 to 4 with the Ministry of Home Affairs vide Office UO Note dated 30th April, 2003.

5. He further contended that vide MHA UO Note dated 31st December 2003, a decision was taken to appoint the petitioner on the post of AC (DE) in BSF subject to satisfactory verification of his character and antecedents. Vide office letter dated 15th January, 2004, D.M. Yamuna Nagar was requested to verify the character and antecedents of the petitioner and a verification report was received by respondent Nos. 2 to 4 from S.P. Yamunanagar on 24th February, 2004. Vide letter dated 16th December, 2004, the petitioner was offered the appointment and was directed to report to the BSF Academy on 31st January, 2005 for undertaking the basic training course. It is also contended on behalf of the respondents that the petitioner underwent basic training for AC (DE) post Sr.No.29 which commenced with effect from 7th February, 2005 and his seniority had been accordingly fixed above the candidates of AC(DE) candidates of Sr.No.29 in accordance with the provisions of Rule 7 of BSF (General Duty Officer) Recruitment Rules, 2001.

6. He further stated that the seniority of the petitioner has been rightly fixed alongwith the candidates of batch Sr.No.29, in strict adherence of the provisions of Rule 7 of BSF (General Duty Officer) Recruitment Rules, 2001.

7. To support the stand of the respondents, the learned counsel for the respondents placed reliance on a judgment of the Supreme Court in *Rohtas Kumar and Ors. v. Om Prakash Sharma & Ors.*, AIR 2013 SC 30. He also argued that the decision of the Division Bench in *Avinash Singh* (supra) is based on completely different facts from the facts of the present case and therefore, the dicta of the said judgment will not apply to the present case.

8. We have heard the submissions of the learned counsel for the parties and also perused the judgments relied upon by the parties.

9. The petitioner herein belongs to the Scheduled Caste category and had participated in the recruitment process to seek appointment to the post of Assistant Commandant (Direct Entry) in BSF through SSB CPOs (AC) Examination, 1999 conducted by the Special Selection Board. He was successful in the written examination, physical efficiency test, and the interview conducted by the Special Selection Board. He was declared

successful in the merit list at Sr.No.26 with Roll No.10700383. He was thereafter, detailed for his medical examination. However, after his medical examination, he was declared to be medically unfit due to inadequate chest measurement. Through a letter dated 19th April, 2000 he was informed of having failed to qualify the medical test and also that in case he was not satisfied with his result, he may prefer an appeal for review of his medical examination. According to the petitioner, he had preferred an appeal against the said decision of the respondents and alongwith his appeal, he had also filed a medical certificate dated 2nd May, 2000 issued in his favour by the Government Civil Surgeon, Yamunanagar, Haryana, but no decision on the said appeal was taken by the respondents, due to which he filed a Civil Writ petition No.12398/2002 before the High Court of Punjab and Haryana and the said writ petition was disposed off on 9th August, 2002 with the following directions to the respondents:-

“The respondents are expected to respond to the appeal accompanied by certificate annexure P1 within two months from the date a certified copy of this order is brought to their notice.

Writ petition stands disposed off accordingly.

August 9, 2002.

Sd/- Swatantar Kumar, Judge

Sd/- S. S. Saron, Judge.”

10. Since the aforesaid directions were not complied with by the respondents, the petitioner moved Civil Miscellaneous Application No.3231 of 2003 in the aforesaid writ petition and while it was pending consideration before the High Court, he was required to appear before the Central Standing Medical Board, Safdarjung Hospital, New Delhi on 19th February, 2003 and this led to passing of the following order by the High Court:-

“It is not necessary to issue notice to the counsel for the non-applicant inasmuch as it is submitted by the learned counsel for the Union of India that the order in furtherance to the direction of the Court as contained in the order dated 09.08.02 has already been passed. Nothing survives. This petition is accordingly disposed off. Delay in complying with the order of this Court is condoned.

CM stands disposed off.”

February 21, 2003.

Sd/- Swatantar Kumar, Judge

Sd/- S. S. Saron, Judge.”

11. The Medical Board declared the petitioner to be medically fit and he was directed to report to the office of respondent No. 3 vide letter

dated 2nd April, 2003. The petitioner reported to the concerned office of respondent No. 3 and also submitted the relevant documents as were required. Thereafter, vide letter dated 16.12.2004, he was offered appointment to the post of Assistant Commandant (Direct Entry) Course at Sr.No.29. The petitioner completed his basic training of 55 weeks from February, 2005 to February, 2006 and thereafter, was posted to 132 Battalion BSF, however, he was given seniority on his merit alongwith the Batch of Sr.No.29. On this, the petitioner made representations dated 17.09.2007 and 15.02.2010 to respondent Nos.2 and 3, respectively, for the review of his seniority and for re-fixation of his seniority from the date of his selection in AC (DE) at Sr. No. 26. Thereafter, he made another representation dated 29.12.11 to respondent Nos.2 and 3. On 11.01.2012, he was intimated that his case had been taken up with the Headquarters and the decision was awaited. However, no steps were taken thereafter. Consequently, he sent a legal notice dated 30.08.12 to the respondents seeking redressal of his grievance but that too went unanswered. Aggrieved by the respondents' inaction, the petitioner filed the instant writ petition.

12. Thus, there is a factual dispute between the petitioner and respondents with regard to whether the petitioner had filed an appeal alongwith his other batch mates at Sr.No.26 before the Review Medical Board or not. The learned counsel for the respondents took a stand that the relevant records concerning the selection of the candidates, pursuant to BSF (General Duty Officer) Recruitment Rules, 2001 were weeded out as per the applicable instructions on the completion of the recruitment process and therefore, they were not in a position to apprise the Court as to whether the petitioner as a matter of fact had preferred any appeal alongwith the bank draft of Rs.100/- and the necessary medical certificate when his other batchmates had also sought their medical re-examination. The petitioner has not placed on record any copy of the bank draft of Rs.100/- which was alleged to have been annexed by the petitioner alongwith his appeal seeking medical re-examination, although he has placed on record a copy of the Medical Certificate as was issued in his favour by the Civil Surgeon, Yamunanagar dated 2nd November, 2000 declaring him to be fit with regard to meeting the criteria of chest measurement.

13. During the course of hearing of the case, the learned counsel for the petitioner was directed to place on record, a copy of the writ petition i.e. CWP No.12398/2008 which was filed by the petitioner before the Punjab and Haryana High Court. On perusal of the averments made in the writ petition, we found the reference of a bank draft No.454377 dated 3.5.2000 drawn on State Bank of India, Yamunanagar in favor of D.C. (Administration-III) HQ DG, BSF, New Delhi and also that the petitioner had annexed the Medical Certificate dated 2.5.2000 as referred to above. It has also been stated that the appeal was filed by the petitioner through speed post on 3.5.2000.

14. In the absence of relevant records produced by the respondents, as the same have already been weeded out, the Court has no option but to give credence and weightage to the said factual assertion made by the petitioner in the aforesaid writ petition filed before the Punjab and Haryana High Court. Therefore, we are persuaded to assure that the petitioner did file an appeal to seek a fresh medical examination by the Review Medical Board alongwith bank draft No. 454377 dated 3.5.2000, for a sum of Rs.100/- drawn on State Bank of India, Yamunanagar in

favour of D.C. (Administration-III) HQ DG, BSF, New Delhi alongwith the Medical Certificate dated 2.5.2000.

15. Another reason for accepting the version of the petitioner as correct is that the petitioner had been taking his remedy vigorously and diligently and had it not been so, he would not have filed the said writ petition before the Punjab and Haryana High Court in the year 2002 and also the Civil Miscellaneous Application in the year 2003. The Court also cannot lose sight of the irresponsible and lethargic conduct of the respondents, which is well established from the fact that despite directions given by the Punjab and Haryana High Court, the medical examination of the petitioner was not conducted by the respondents in the time bound manner and not only that, they further took unduly long time in issuing a letter of appointment to the petitioner, which incidentally was issued as late as 16th December 2004.

16. In the background of the aforesaid facts, we cannot accept that there was any kind of lapse on part of the petitioner in timely seeking his medical examination before the Review Medical Board. Therefore, we have no hesitation in taking a view that the petitioner deserves to be given seniority alongwith his batchmates of Sr.No.26 as per his seniority in the

merit list, instead of the batchmates of Sr.No.29, on the completion of his basic training for the post of Assistant Commandant (Direct Entry). Sub-rule 3(iv) of Rule 7 of BSF (General Duty Officer) Recruitment Rules, 2001 clearly envisages that seniority of the officers, subject to the provisions of clauses (i) to (iii) shall be determined according to the date of their continuous appointment in that rank. For better appreciation of the position, Rule 7 of BSF (General Duty Officer) Recruitment Rules, 2001 is reproduced as under:-

- “(1) All officers holding a higher rank shall be senior to the officers holding a lower rank.*
- (2) In a particular rank seniority of Officers appointed to any post shall be determined in accordance with the order of selection for appointment to that post.*
- (3) Subject to the provisions of sub rule (2) inter se seniority amongst officers holding the same rank shall be as follows namely:-*
 - (i) Seniority of officers promoted on the same day shall be determined in the order in which they are selected for promotion to that rank.*
 - (ii) Seniority of direct entrants shall be determined in accordance with the aggregate marks obtained by them before the Selection Board and at the passing out examination conducted at the Border Security Force Academy;*
 - (iii) Seniority of temporary officers subject to the provisions of clauses (i) and (ii) shall be determined on the basis of the order of merit at the time of their selection and officers selected*

on an earlier batch will be senior to officers selected in subsequent batches;

- (iv) *Seniority of officers, subject to the provisions of clauses (i), (ii) and (iii), shall be determined according to the date of their continuous appointment in that rank;*

Provided that in case of direct entrants, the date of appointment shall be the date of commencement of their training course at the Border Security Force Academy.”

17. As per the aforesaid provision, the case of the petitioner will have to be considered as one of continuous appointment on that rank as he was also a direct recruit alongwith his other batchmates and was at Sr.No.26 in the merit list after having qualified all the requisite tests and the proviso of the said Rule, on which reliance was placed by the learned counsel for the respondents, will not be applicable to the petitioner's case. It would be useful to refer here, the following observations made in the judgment of the Division Bench of this Court in **Avinash Singh** (supra) and we also find ourselves in agreement with the same, as the seniority of a person must be reckoned with reference to his merit position in the seniority list of his batchmates. The relevant paragraphs are reproduced hereunder:-

“18. We highlight in the instant case the fortuitous circumstance of the petitioners being made to join as Assistant Commandant on 08.08.2005 is not the result of anything created by the petitioners but is a result of a supine indifference and negligence on the part of the ITBP officials.

19. Thus, petitioners would be entitled to their seniority as Assistant Commandant with respect to their batch-mates in the context of the merit position in the select panel. We make it clear, the seniority as Assistant Commandant of the entire batch would be a reflection of the merit position in the select list and not the date of joining.

20. It is trite that where a thing is deemed to come into existence everything which logically flows therefrom has to be followed and the imagination cannot boggle down. In other words, the effect of the petitioners' seniority being reckoned with reference to the select panel would mean that the petitioners would come at par with their brethren who joined on 02.11.2004. Since their brethren were granted 1 year qualifying service relaxation, petitioners would be entitled to the same benefit and additionally for the reason the next below rule requires that if a person junior in the seniority position acquires the necessary qualifying service, the person above has also to be considered for promotion.’

18. In the light of the aforesaid discussion, the writ petition is allowed with the following directions to the respondents, that they shall:-

- i) redraft the seniority list of SSB CPOs, 1999 and place the petitioner as per his merit in the select list of Batch Sr. No. 26.*
- ii) treat the petitioner to be governed by the old pension scheme under Central Civil Service Pension Rules, 1972.*
- iii) grant all consequential benefits including his seniority as per his merit alongwith his batchmates in SSB CPOs, 1999,*

except the actual salary for the post of Assistant Commandant, to which he was entitled since he assumed charge on the said post.

19. The writ petition stands disposed off in the aforesaid terms.

KAILASH GAMBHIR, J.

NAJMI WAZIRI, J.

DECEMBER 22, 2014
v/pkb