

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

Date of hearing and Order: September 26th, 2014

+ W.P.(C) 4840/2010

CAPTAIN BINDU SETHI

Through

..... Petitioner
Ms. Rekha Palli, Ms. Ankita
Patnaik, Ms. Garima Sachdeva &
Ms Shruti Munjal, Advocates
alongwith Petitioner in person

versus

UOI AND ORS

Through

..... Respondents
Mr. Sanjeev Narula, Central
Government Standing Counsel
alongwith Sh. Atul Saini & Sh.
S.M. Dewedi, DCs BSF

+ CONT.CAS(C) 475/2012

CAPTAIN BINDU SETHI

Through

..... Petitioner
Ms. Rekha Palli, Ms. Ankita
Patnaik, Ms. Garima Sachdeva &
Ms Shruti Munjal, Advocates
alongwith Petitioner in person

versus

RK SINGH SECRETARY & ORS

Through

..... Respondents
Mr. Sanjeev Narula, Central
Government Standing Counsel
alongwith Sh. Atul Saini & Sh.
S.M. Dewedi, DCs BSF

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

HON'BLE MR. JUSTICE NAJMI WAZIRI

ORDER

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KAILASH GAMBHIR, J. (Oral)

1. The instant writ petition has been preferred by the petitioner, Captain Bindu Sethi, invoking the writ jurisdiction of this Court for a

writ, of mandamus directing respondent Nos. 1 to 4 to consider his case for promotion to the rank of Sr. Pilot and if found fit, to grant him promotion w.e.f. 1.1.2009 with all consequential benefits. The petitioner also seeks quashing of the show cause notice dated 2.6.2009.

2. Before we examine the legitimacy of the petitioner's claim, it would be necessary to give brief summary of the facts of the case and also the various directions given by this Court from time to time. The petitioner who was earlier serving in the Indian Army had joined the BSF Air Wing in the year 1992. The petitioner was promoted as a Co-Pilot on 24.3.1995 after he had successfully completed 1000 hours of flying experience. Due to his continuous outstanding performance, he was endorsed as Captain on B-200 (Super King Aircraft) by the Director General of Civil Aviation in the year 1997 and thereafter, he was directly given the Airline Transport Pilot Licence (ATPL). On 26.9.2001, the petitioner was promoted as a Captain/Pilot and after having completed 4 years of regular service as a Captain, on 26.9.2005 he became eligible for being considered for promotion to the next higher rank of Senior Captain. As per the case of the petitioner, he fulfilled all the eligibility conditions for his promotion to the rank of Senior Captain but due to extraneous

reasons, he was denied promotion to the said rank. It is also the case of the petitioner that he had completed 1000 hours Pilot-in-Command (PIC) on BSF type of Aircraft and had also completed 4100 hours on BSF type of Multi Engine Aircraft as a Co-Pilot (50% of hours as a Co-Pilot is to be treated as PIC hours as per the DGCA Guidelines). The petitioner made several representations dated 25.10.2005, 19.6.2007, 14.2.2008 and 27.10.2008 and in the said representations, he had clearly pointed out that despite he fulfilling the requisite qualifications, no action was being taken to fill the post of Senior Captain from the feeder cadre, as required under the Recruitment Rules. It is also the case of the petitioner that pursuant to the representations made by him, a clarification was sought by the Director General, Border Security Force, respondent No. 5 herein, from the office of the Director General of Civil Aviation, respondent No. 3 herein, regarding the flying hours of the petitioner and in reply thereto respondent No. 3, vide its letter dated 31.12.2008, categorically stated that the petitioner was fully eligible for promotion as per the Recruitment Rules since 50% of flying done by the petitioner as Co-Pilot under supervision could be counted as PIC experience. It is also the case of the petitioner that regardless of the said clarification given by the Office of

the Director General of Civil Aviation, no action was taken by the respondents to promote the petitioner, owing to which the petitioner once again made further representations dated 14.10.2009 and 9.11.2009. It is also the case of the petitioner that based on the representations of the petitioner, respondent No. 2 i.e. Director General, BSF, took up the matter with the Home Ministry, respondent No. 1 herein, for considering the case of the petitioner for promotion but instead of acceding to the request of the petitioner, respondent No. 1 acted in utter violation of the Recruitment Rules and took a stand that the post of Senior Captain which fell vacant on the retirement of AVM R. Khurana, IG (Air) was meant to be filled by persons on deputation from the Indian Air Force. It is also the case of the petitioner that with a view to further victimise the petitioner, a show cause notice dated 2nd June, 2010 was issued to him by the Director General, BSF, on a very inconsequential issue, against which a separate reply dated 7.7.2010 was filed by the petitioner. It is also the case of the petitioner that vide order dated 3rd June, 2010, respondent No. 1 had rejected the case of the petitioner by taking an entirely erroneous stand that the petitioner did not possess the minimum qualification of 2000 hours of flying experience as Pilot-in-Command on a Multi Engine

Aircraft as on 1.1.2010 and therefore, was not considered eligible for promotion to the rank of Senior Captain against the vacancy for the year 2010-11. Feeling aggrieved by the said decision of the respondent No. 1 and the show cause notice dated 02.06.10 issued by the Ministry of Home Affairs, Government of India, Directorate General Border Security Force, the petitioner preferred the present writ petition on 20.07.2010. In the counter affidavit filed by the respondent No.2, the main stand taken by them is that the petitioner lacked the prescribed flying experience of a minimum 2000 hours as Pilot-in-Command on a Multi Engine Aircraft as on 1.1.2010 and therefore, the post of Senior Captain was filled up by appointing an eligible candidate on deputation basis. Respondent No. 1 also took a stand that the case of the petitioner was taken up by respondent No. 2 with respondent No.1 on the basis of the opinion of the Director General of Civil Aviation but the same was rejected by respondent No. 1 in the light of the laid down Recruitment Rule of completing the minimum 2000 flying hours as PIC on Multi Engine Aircraft, which the petitioner lacked. It is also the case of the respondents that with a view to meet the functional requirements of maintaining a large fleet of helicopters, one post of Senior Captain was transferred from

fixed wing to rotary wing in BSF Air Wing vide MHA UO dated 26.2.2010 and the decision of respondent No.1 was accordingly based on the statutory provisions of hours and also keeping in view the operational requirements. It is also the case of the respondents that the provision of deputation was introduced as a one time measure to fill up the vacancy that arose w.e.f. 1.4.2010 consequent to the retirement of AVM R. Khanna IG (Air) and in so far as the case of the petitioner was concerned, he lost his right of promotion to the rank of Senior Captain only because he could not fulfil the prescribed flying hours and not for any other reason.

3. Mr. Sanjeev Narula, the learned Central Government Standing Counsel appearing for the respondents, at the outset submits that the petitioner has already been promoted to the rank of Senior Captain (IG), BSF w.e.f. 19.02.2014 against a vacancy for the year 2011-2012.

4. The learned CGSC also submits that the respondents have fully complied with the statement made before the Court on 11.05.2011 and in fact the petitioner has been given relaxation of flying hours on Multi Engine Aircraft and it was due to this relaxation that the petitioner became eligible for promotion to the rank of Senior Captain against the

vacancy which arose in the year 2011-2012, as per the Pre- revised RR after taking into consideration the crucial date of 01.01.2012.

5. On the aspect of grant of retrospective promotion, the learned CGSC submits that there are no *mala fides* on the part of the respondents in not granting promotion to the petitioner retrospectively w.e.f. 01.12.2011 i.e., the date when vacancy to the said post had arisen on account of the DoPT Guidelines dated 10.04.1989 which envisage that when promotions are made in the order of the consolidated select list, then such promotions will only have a prospective effect, even in cases where the vacancies relate to earlier year(s).

6. Refuting the aforesaid submissions of the learned CGSC for the respondents, Ms. Rekha Palli, the learned counsel for the petitioner submits that vide letter dated 31.12.2008 sent by the office of the Director General of Civil Aviation to the Commandant (Personnel), Ministry of Home Affairs, Directorate General Border Security Force (Personnel Directorate), CGO Complex, Lodhi road, New Delhi, a categorical stand was taken that the present petitioner had already completed 1449 hrs. as PIC and 4100 hrs. as Co-Pilot as on that date and therefore, in their opinion, the petitioner met the Recruitment Rule criteria for promotion as

mentioned in the letter under reply. The learned counsel for the petitioner further emphasised that the respondents can no more take a stand that the petitioner was not eligible due to his inability to meet the criteria of certain flying hours, in the teeth of the said stand taken by the respondents themselves.

7. The learned counsel for the petitioner has placed reliance on the Communication dated 14.02.2014 from the Appointments Committee of the Cabinet (in short 'ACC'), Ministry of Personnel, Public Grievances & Pensions, Department of Personnel & Training, wherein again, the ACC has granted approval for empanelment of the petitioner to the rank of Senior Captain, BSF in the Panel Year 2011-2012 but the respondents are intentionally denying him the said promotion against a vacancy that had arisen as on 01.12.2011, as the grant of the said promotion would make him eligible for promotion to the next rank of Additional Director General and ultimately to the rank of Director General, which may not be to the liking of the non-cadre officers.

8. The learned counsel for the petitioner also submits that in similar cases, the respondents have been granting promotions on notional basis and one such example is the case of Mr. *Lalit Kumar*, which has been

produced by the learned counsel for the petitioner. The learned counsel for the petitioner also invites the attention of this Court to the order dated 18.03.2013 passed by this Court, laying special emphasis on para 9(iii) of the same, wherein, the Court gave a clear direction that in case the petitioner is ultimately appointed to the rank of Senior Captain, he shall be entitled to all consequential orders of seniority etc. as may be due to him in such a position, irrespective of the date on which the person was appointed on deputation. The learned counsel for the petitioner further invites attention of this Court to the internal noting of the Law Ministry which has been given in response to the opinion given by the BSF, in the light of the order dated 11.05.2011, passed by this Court and the opinion given was that there is no confusion as to the applicability of the RRs existing as on 11.05.2011 wherein the post of Senior Captain has to be filled up by promotion or failing which , by deputation. Thus, as on 01.12.2011 if Mr. Bindu Sethi, the petitioner herein fulfils the RRs which were existing on 01.12.2011 then, he shall have to be considered in terms of the commitment made by the Government Counsel in the order dated 11.05.2011. In the said advice, the Ministry also made it explicitly clear that failure to comply with the order dated 11.05.2011 passed in CM

APPL. No.6705/2011 in W.P.(C) 4840/2010 will amount to contempt of Court by the Ministry of Home Affairs and BSF.

9. The learned counsel for the petitioner also submits that the said advice given by the legal department was approved by the Law Secretary and also by the then Minister of Law & Justice.

10. Pursuant to the direction given by this Court vide order dated 15.07.2014, the respondents have filed their additional affidavit through Mr. Kuldeep Saini, Dy. Inspector General (Personnel), HQ DG BSF, CGO Complex, New Delhi.

11. We may also mention here that the contempt petition vide CCP No.475/2014 was also preferred by the petitioner to seek initiation of contempt proceedings against the Secretary, Ministry of Home Affairs, Director General (BSF) and the Special Director for wilful disobedience of the order dated 11.05.2011 passed by this court in the main writ petition.

12. Before we examine the merits and demerits of the case of the petitioner, some of the directions given by this Court on various applications preferred by the petitioner and in the main petition would be of great significance. CM No. 3390/2011 was preferred by the petitioner

seeking a direction from this Court to pass an ad interim stay order to restrain the respondents from filling the post of Senior Captain by resorting to deputation during the pendency of the present writ petition and vide order dated 11th March, 2011 the following order was passed:

“C.M.No.3390/2011

Application stands disposed of directing that any appointment to the post of Senior Captain by way of deputation would be subject to any orders, which may be passed in the writ petition and if a person is appointed as a Senior Captain by way of deputation or otherwise, the fact that the offer/appointment is subject to orders which may be passed in the writ petition would be communicated to the person concerned.”

13. Another CM was filed by the petitioner on 6th March, 2011 to seek a direction to the respondents to consider the case of the petitioner for promotion, as per the existing Recruitment Rules before resorting again to fill the vacancy by deputation. In this application, the petitioner submitted that the deputationist – AVM A.P. Garud was likely to be reverted back to his parent cadre very soon and as per the existing rules, the post of Senior Captain was required to be filled by promotion and failing which, it could be filled by deputation and therefore, before resorting to fill the vacancy again by deputation, the case of the petitioner

requires due consideration for the said promotion and while disposing off this application, the Court passed an order dated 11.05.2011, which reads as under:-

“CM No.6705/2011

1. Learned counsel for the respondents states that as and when the post of Senior Captain would be filled up, the same would be with reference to the existing Recruitment Rules and that before resorting to deputation it would be seen whether a departmental candidate is available and fulfils the requirements of the Recruitment Rules to be considered for promotion.
2. The application stands disposed of.”

14. The aforesaid order dated 11th May, 2011 is at the centre stage of the controversy, as non-compliance of the same lead to the filing of a separate contempt petition by the petitioner vide CCP No.475/2012. We will deal with this aspect in the later part of the order. Another CM No. 6419/2012 was moved by the respondents so as to bring on record certain additional facts. Vide order dated 22nd August, 2012, this Court had directed the respondents to file an additional response to the contentions raised by the petitioner that despite repeated directives from the Ministry of Law and Justice, Ministry of Home Affairs and DOPT, the DPC was not conducted in 2011. The Court in this order had also made it clear that no order passed by the Court has the effect of precluding the respondents

from holding the original DPC in accordance with the law. The order dated 22nd August, 2012 is reproduced hereunder:-

“CM No.6419/2012

We have heard learned counsel for the parties on this application.

The respondents shall place on record the date on which Air Vice Marshal A.P. Garud was promoted in the Air Force to the rank of Air Marshal and the dates on which he drew the benefits in this position.

The respondents shall also file an affidavit in response to the petitioner’s contention that despite repeated directives from the Ministry of Law and Justice, Ministry of Home Affairs and DOPT, the DPC was not conducted in 2011. Such affidavit shall be filed within two weeks from today. The petitioner may file response thereto before the next date. There is no order precluding the respondents from holding the original DPC in accordance with law.”

15. Pursuant to the direction given by the Court, the respondents had filed an affidavit of Shri Vikas Chandra, Deputy Inspector General (Personnel) of the BSF and taking note of the stand taken by the said officer in his affidavit, the Court expressed its strong displeasure over the conduct of the respondents in not convening the DPC for a period of over one year. The Court observed that to state that the DPC could not be convened on account of administrative exigencies is completely

intolerable. Taking note of the submission of the learned ASG that the DPC shall be convened within a period of three weeks from the date of the said order, the Court had directed that the respondents shall ensure that the DPC is convened and held within a period of four weeks from that date, in accordance with the prescribed procedure and rules and result thereof shall be placed before the Court on the next date of hearing. The said order is reproduced as under:-

“20.11.2012

“1. The respondents have filed an affidavit of Shri Vikash Chandra, Deputy Inspector General (Personnel) of the BSF (at page 315) wherein it is deposed as follows:-

“xxx 5. As regards the petitioner’s contention that despite repeated directive from the MoL&J, MHA and DoP&T, the DPC was not conducted in 2011, it is submitted that the matter remained under consultation with MoL&J for advice regarding the method of filling up the vacancy and applicability of RRs in this case in view of suppression of old RRs by Revised RRs notified on 11.11.2011. Finally, a DPC was convened on 25.4.2012 for considering promotion of the eligible officers to the rank of Sr. Captain/IG to fill up the vacancy caused by premature repatriation of AVM A P Garud. However, the said DPC was deferred for want of some clarification with regard to applicability of vacancy year i.e. 2011-12 or 2012-2013; and determination of the crucial

date of eligibility i.e. 01.01.2011 or 01.01.2012, etc.

6. It is also submitted that in a meeting held under the Chairmanship of Home Secretary with the representatives of BSF, DoP&T and MoL on 27.3.2012, it was decided that BSF may file an application in the Hon'ble High Court of Delhi to bring on record the additional facts regarding notification of fresh RRs for the post of Senior Captain/IG in BSF on 11.11.2011 and the relevant provisions thereof and clearly bring out the needs for issuance of such RRs and also the fact that no step has been taken which is against the interests of the applicant i.e. Shri Bindu Sethi. Accordingly, an Application under Section 151 of Code of Civil Procedure has been filed before the Hon'ble Delhi High Court on 15.5.2012.

7. It is further submitted that the matter has again been considered in the light of the Hon'ble Court direction vide order dated 22.8.2012. Accordingly, a Departmental Promotion Committee (DPC) meeting had been convened to be held on 12.10.2012 vide MHA (Pers-III Desk) under office note No.17/92/2011-Pers/BSF/Pers-III dated 4th October, 2012, for considering empanelment of the eligible Captains/Pilot (DIG) for promotion to the rank of Senior Captain in BSF for the vacancy year 2012-13. Further, the MHA vide under office note No.17/92/2011-Pers/BSF/Pers-III dated 8th Oct 2012 has intimated that as per the commitment made by the respondents before the Hon'ble High Court and advice of DoP&T as well as MoL&J the instant DPC is to be held as per the pre-revised RRs for the post of Senior Captain in

BSF Air Wing with the crucial date for determining the eligibility as on 01.01.2012. However, due to administrative reasons, the DPC's Meeting scheduled to be held on 12.10.2012 has been postponed vide MHA under office note No.17/92/2011-Pers/BSF.Pers-III dated 10th Oct 2012. (Copy of letter No.UO 17/92/2011-Pers-III dated 8th Oct 2012 and UO 17/92/2011-Pers/BSF/Pers-III dated 10th Oct 2012 has been annexed herewith as Annexure R-10 Colly)."

2. We were orally informed on 16th October, 2012 by learned counsel for the respondents that the Departmental Promotion Committee (hereinafter referred to as "DPC") which was scheduled for 12th October, 2012 could not be held on account of administrative reasons and the same shall be convened shortly.

3. Mr. Rajeev Mehra, learned ASG on instructions from Mr.Dinesh Mahur, Director (Personnel) with the Ministry of Home Affairs who is present in court, submits that DPC could not be convened even thereafter till date again on account of administrative reasons.

4. The instant writ petition is concerned with appointment to the post of a Senior Captain with the Border Security Force. The petitioner who is present in person, submits that there are only two posts of Senior Captain in the entire Border Security Force. He submits that the post for which the DPC is to be convened, is lying vacant for the last one year. He further informs that the incumbent in the other post has also resigned.

5. It needs no elaboration that the vacancies in senior

positions in organizations as the Border Security Force, which is a para military force, work extreme prejudice to public interest. The matter, therefore, brooks no delay at all. The above narration would show that the respondents are unreasonably dragging their feet in convening the Departmental Promotion Committee. Merely stating that the DPC could not be convened on account of administrative exigencies in the circumstances is completely intolerable. No acceptable reason whatsoever is disclosed for not convening the DPC and as a result we are unable to see any justification for not convening a DPC for a period of over one year despite the depositions on affidavit and the statement noticed by us above. These circumstances compel us to issue peremptory directions. Mr. Rajeev Mehra learned ASG submits that the DPC in question shall be convened in three weeks from today.

6. It is accordingly directed that the respondents shall ensure that the DPC in accordance with prescribed procedure and rules, is convened and held within a period of four weeks from today. The result thereof shall be placed before the court on the next date.

List on 17th December, 2012.

Copy of this order be given dasti under the signatures of the court master.”

16. On the next date i.e., 17.12.12, the learned ASG representing the respondents informed the Court that the DPC in terms of the order dated 20th November, 2012 was held on 10.12.2012 and the matter subsequently was pending with the ACC to approve the recommendations

of the DPC and thereafter, the matter was to be placed before the Prime Minister. The matter was accordingly adjourned by the Court for 18th February, 2013 so as to enable the respondents to apprise the Court on the next date of hearing about the outcome of the DPC. In the meanwhile, another CM was preferred by the petitioner vide CM no. 20067/2012 and in this CM, the grievance raised by the petitioner was that the respondents, in a most contemptuous manner were taking the crucial eligibility date as 1.1.2011 instead of 1.1.2012 so as to again declare the petitioner, unfit for promotion to the said rank of Senior Captain on the ground of falling short of the requisite flying hours. On this CM, this Court vide order dated 15.1.2013 gave the following orders:-

CM No.20067/2012

- 1. Despite opportunity, reply has not been filed. The petitioner has expressed a grave apprehension that in order to scuttle the rights of the petitioner, the respondents have not complied with the statement made by them in the affidavit dated 16th October, 2012 (pgs. 316, 317) filed by Border Security Force ('BSF'), wherein it was clearly stated that **"DPC is to be held as per the pre-revised RRs for the post of Senior Captain in BSF (Air Wing) with the crucial date for determining the eligibility as on 1st January 2012"**.*
- 2. On 20.11.2012 Mr. Rajeev Mehra, learned ASG, on instructions, from Mr. Dinesh Mahur, Director*

(Personnel), Ministry of Home Affairs had submitted that the DPC could not be convened only on account of administrative reasons and time was sought for convening the same and for placing results before us. This has not been done despite the matter having been adjourned twice.

- 3. Ms. Rekha Palli, learned counsel for the petitioner has expressed apprehensions of violation of the orders passed by this Court the respondents have not convened the DPC of officers who were eligible as on 1st January 2012 with the sole intention to deprive the petitioner from his rightful consideration.*
- 4. The respondents certainly cannot conduct the DPC contrary to the statement made in the affidavit and otherwise in court.*
- 5. In this view of the matter the respondents shall ensure that they comply with the statement made in the affidavit dated 16th October 2012 (at pages 316 and 317) and shall ensure that the DPC had considered such officers who were eligible as on 1st January 2012.*
- 6. Let a copy of this order as well as the affidavit filed by the respondents be served upon the ACC before whom the matter is stated to have been pending before it considers the proceedings of the DPC in the instant matter.*
- 7. It is made clear that any action taken by the respondents with regard to the proceedings of the DPC shall remain subject to the orders passed in the present petition.*
- 8. The respondent shall ensure that they file their reply within two weeks from today.*

9. A copy of this order be given dasti under the signature of the Court Master.

10. List on 18th February 2013 i.e. the date already fixed.”

17. Vide order dated 18th February, 2013, the Court had directed the respondents to place a copy of their affidavit dated 16th October, 2012 as well as a copy of the order passed by this Court on 15th January, 2013 before the Appointments Committee of the Cabinet. Another CM vide CM No. 3036/2013 was preferred by the petitioner to seek a restraint order against the respondents from filling the post of Senior Captain/IG in the BSF Air wing by deputation before considering the case of the petitioner for promotion. On this application, the Court gave the following directions vide orders dated 15th March, 2013 and order dated 18th March, 2013 and the same are reproduced as under:-

“Order dated 15.03.2013

CM No.3036/2013

1. We are informed that Mr. Dinesh Mahur, Director (Personnel), Ministry of Home Affairs is present to explain the movement of the files with regard to appointment of Senior Captain on deputation and pursuant to the Departmental Promotion Committee. He is however unable to inform us the complete position as according to him, the file is being processed by the Department of Personnel and Training (DOPT) which he states, is actually

a secretariat of the Appointment Committee of the Cabinet. It is submitted that the Director from this department should be able to apprise us of the correction position.

- 2. In view of the fact the application is under active consideration and given the urgency expressed by both sides, we post this application for further consideration on 18th March, 2013 when the concerned Director, DOPT shall remain present in Court. The matter will be taken up at the top of the board on that date.*
- 3. In view of the above, AVM J.S. Klare who has been appointed on deputation to the post of Senior Captain in the BSF shall not join till the next date of hearing.*
- 4. The petitioner may file rejoinder to the response filed by the respondents before the next date of hearing.*

Dasti under signature of the Court Master”

“ORDER DATED 18.03.2013

CM No.3036/2013

1. We have heard learned counsel for the parties as well as Mr. Dinesh Mahur, Director (Personnel), Ministry of Home Affairs and Mr. Chetan Jain, Director ACC Secretariat.
2. The applicant has made grievance that despite the orders dated 11th May, 2011 and 15th January, 2013 passed by this Court, the respondents have failed to effect the appointment to the post of Senior Captain in BSF (Air Wing) by promotion and instead are attempting to fill the post of Senior Captain I.G. in the BSF (Air Wing) by deputation

so as to avoid the orders of the court and to enable such officer to claim seniority over the person regularly appointed by DPC. The parties have filed reply and rejoinder to this application.

3. It is not necessary for the purpose of the order which we propose to pass to examine the contentions by either side which are left open for consideration at the appropriate stage in appropriate proceedings.
4. The respondents have placed before us a tabulation of the dates on which they too took steps to fill up one post of Senior Captain in BSF (Air Wing) on repatriation of AVM A.P. Garud on deputation.
5. The respondents have orally made submissions with regard to the steps taken for appointing a person as Senior Captain pursuant to the consideration by the Departmental Promotion Committee (which conducted its proceedings on 10th December, 2012). It appears that the matter is yet to be placed before the Appointment Committee of the Cabinet and is presently pending with the Ministry of Home Affairs.
6. We are informed by Shri Rajeeve Mehra, learned ASG appearing for the respondents that he has been instructed to inform this Court that the matter shall be scrutinised by the Minister of Home Affairs at the earliest who shall be apprised of the orders dated 22nd November, 2012 and 15th January, 2013 passed by this Court. Mr. Mehra, learned ASG assures this Court that the matter shall be expeditiously processed and the appropriate orders be passed at the earliest.

We accept the submission and assurance made by Shri Rajeeve Mehra, learned ASG appearing on

behalf of the respondents and express confidence that the matter would be proceeded with expeditiously, given, not only the rights of the petitioner, but the nature of appointments involved.

7. Ms. Rekha Palli, learned counsel for the petitioner has drawn our attention to the following averments made in CM No.20067/2010 (Page 328 of the paper book) by the petitioner:-

“7. That however, on basis of the representations made by the Petitioner, the matter was referred to the Ministry of Law and Justice who repeatedly advised the Respondents to consider the Petitioner on basis of Recruitment Rules existing as on 11.05.2011 which opinion was also endorsed by the DOPT but still the Respondents in order to prevent the Petitioner from earning his due promotion filed an Application being CM NO.6419/2012 seeking liberty from this Hon’ble to fill the vacancy of Senior Captain as per the Rules existing as on May 2012 i.e. the Rules notified on 12.05.2011 and it is only after this Hon’ble Court vide its order dated 22.08.2012 directed the Respondents to give details as to when AVM A P Garud was empanelled for promotion to the rank of Air Marshal as also the advise given by Ministry of Law and Justice and DOPT that the Respondents then filed an Affidavit dated 16.10.2012 before the Hon’ble Court wherein they submitted that they had decided to hold the DPC for considering the Petitioner’s case for promotion as per the pre-revised Recruitment Rules for the post of Senior Captain with the crucial date for determining the eligibility as on 01.01.2012, which eligibility date had been

fixed after consultation with DOPT.

9. That vide the aforesaid affidavit dated 16.10.2012 the Respondents also informed this Hon'ble Court that the DPC had been scheduled initially for 25.04.2012 whereafter the clarification regarding the eligibility date being 01.01.2012 had been received and the DPC thereafter been scheduled for 12.10.2012 but the same was again deferred and would likely to be re-convened very soon.

10. That on 12.11.2012 this Hon'ble Court had noticed the fact that though as per the affidavit filed by the Respondents the DPC had been convened on 12.10.2012 for considering empanelment of eligible Captains/Pilot for promotion to the rank of Senior Captain for the vacancy year 2012-13 with the crucial date for determining eligibility being 01.01.2012 but the DPC had been postponed on administrative grounds and therefore the Respondents were directed to convene the DPC within three weeks.

11. That though the Respondents were duty bound to convene the DPC with the crucial eligibility date being 01.01.2012 as undertaken by them before the Hon'ble Court but as per the information of the Petitioner, the Respondents specially Mr. Arvind Ranjan, Special Director General (Respondent No.3 in the Contempt petition) has in a most contemptuous manner considered the case of the Petitioner by taking the crucial eligibility date as 01.01.2011 thereby the Petitioner has been declared to be unfit on the ground that he is falling short of the requisite flying hours as

pilot in command by 23 hours 30 minutes. It is further pertinent to mention that Sh. Arvind Ranjan had convened the DPC as Acting Director General and that too in the absence of the Special Secretary (IS) who was the member of the DPC but was on leave when the DPC was convened on 10.12.2012.

12. It is submitted that in the above DPC held on 10.12.2012 by taking the crucial date as on 01.01.2011 not only the Petitioner has been declared to be unfit but a person at least three years' junior to him has been recommended for promotion and that too in violation of the DOPT's OM dated 25.3.1996 and therefore it is evident that the Respondents are trying to repeatedly mislead this Hon'ble Court and deprive the Petitioner who is a most meritorious officer to his right to be promoted to the rank of Senior Captain and that too when they have admittedly already given both the local rank and pay (by way of MACP) of the rank of Senior Captain to the petitioner."

8. Our attention is drawn to the reply filed by the respondents. Perusal thereof would show that there is no specific denial to the above averments made by the petitioner and reply contains only vague denials.

9. The petitioner has made a strong grievance in the proceedings before us as well as the objections to the conduct of the DPC which may go to the root of its jurisdiction. If the submissions of the petitioner are found correct, the same may result in rendering the same illegal and in violation of specific and prescribed procedure. It is therefore necessary that these contentions of the petitioner be also placed before the authorities who may take a considered view

in the entire matter specially as the proceedings of the DPC are to be scrutinised for the purpose of according an approval or passing of any other order thereon.

In view of the above, we direct as follows:-

- (i) Let a copy of the present order be placed before the Minister of Home Affairs considering the proceedings of the DPC.
- (ii) It is further directed that appointments if any made by the respondents to the post of Senior Captain in the BSF (Air Wing) on deputation shall be subject to further orders which may be passed in the present proceedings.
- (iii) It is clarified that the appointee, if any, shall be informed that in case the petitioner is ultimately appointed to the post of Senior Captain, he shall be entitled to all consequential orders of seniority, etc. as may be due to him in such position irrespective of the date on which the person is appointed on deputation.

This application is disposed of in the above terms leaving all issues raised by the petitioner open for consideration in appropriate proceedings.

Dasti under signature of Court Master.” ”

18. The petitioner in the meanwhile made further representations to the Cabinet Secretary and on the said representations a decision was taken on 10th July, 2013 by the Ministry of Home Affairs approving the proposal sent by the Director (Personnel), Ministry of Home Affairs. Order dated

18th July, 2013 incorporating the said note of the Director (Personnel) ,

Home Affairs is reproduced as under:-

- “1. In the instant case one of the issues raised by the petitioner is the prayer of petitioner for direction to respondents to consider his candidature for the post of Senior Captain in the Border Security Force, Air Wing in accordance with the rules which applied on the date when the appointment to the post became due. In this regard, the petitioner has made representations to the respondents. It is further complained that the respondents conducted meeting of the Departmental Promotion Committee which did not abide by the rule position or the undertaking given to this court.
2. It appears that the petitioner’s representations to the respondents on this issue were being actively considered. We are informed that a decision dated 10th July, 2013 approving the proposal by the Director (Personnel) of the Ministry of Home Affairs has been passed. For the purpose of convenience, we set out here under the proposal which has been approved at the highest level on 10.7.2013:

CF-155190/13
Ministry of Home Affairs
(Pers.III Desk)

Reference preceding note pre-pages 111-114/n and remarks of the Secy (IS) and the HS on pre-pages 114-115/n, regarding DoP&T’s observations O.M. dated 16.5.2013 (F/PUC/431/C) on this Ministry’s proposal for filling up the post of Senior Captain in BSF by promotion.

2. The matter was discussed by JS (P-II) and

Dir (Pers) with Secy (IS) and HS on 10.07.2013. The points on which DoP&T has sought comments of this Ministry on the representations made by Capt/Pilot (IG-LR) Bindu Sethi before the Cabinet Secretary along with comments of BSF (pages 99-103/n) may be perused at para 2 of note on pre-pages 111-112/n.

3. As regards DoP&T's observation that the DPC considered Confidential Reports for the period from 2006-07 to 2010-11 instead of 2005-06 to 2009-10 for the vacancy year, 2011-12 for which BSF has requested MHA to comment upon, it is submitted that DPC has considered ACRs of both the officers for preceding five years strictly in accordance with the instructions with reference to crucial date i.e. 01.01.2011. The conclusion drawn by DoP & T vide para 2 (iv) of their letter dated 16th May, 2013 (F/PUC) is perhaps based on the synopsis included in the DPC's folders which were prepared by BSF based on the crucial date of 01.01.2012 for the vacancy year, 2012-13.

4. However, in order to settle long pending court case, BSF has now requested to convey approval for counting of 50% of the flying done by Capt/Pilot Bindu Sethi as Co-Pilot as PIC experience in accordance with the DGCA's instructions or to accord relaxation to complete mandatory flying hours as on 14.01.2011 instead of 01.01.2011 as the officer had completed prescribed flying hours and became eligible for promotion on 14.01.2011 for considering his promotion during 2011-12 on the following grounds:

(i) The officer has completed prescribed flying hours as on 14.01.2011 (just after 13 days).

(ii) The officer is having instructor/examiner rating which is the ***DGCA's ultimate qualification for a pilot.***

(iii) He has been conferred with a local rank of Sr.Captain/IG with effect from 05.08.2011.

(iv) The officer (Capt/Pilot Dilbagh Singh) junior to him was granted relaxation in flying hours twice i.e. once for his initial appointment to the post of Co-Pilot and subsequently for promotion to the rank of Cap/Pilot (DIG).

5. In the mean time, after the DPC meeting was held on 10.12.2012, following developments have happened:-

i. One of the posts of captain/Pilot (DIG) in BSF Air Wing has been upgraded to the level of Senior Captain on 23.01.2013 and thus two vacancies in the rank of Senior Captain are now required to be filled.

ii. In view of a long pending Court case, delay of about 7 months already caused in ACC's approval after the DPC meeting was held on 10.12.2012, DG, BSF has now requested MHA to

consider relaxation in experience requirements of Capt Bindu Sethi (refer para 3 at 103/n), to consider Capt. Bindu Sethi for promotion to Sr. Captain for the vacancy year 2011-12.

6. In view of above developments, following options are available for consideration:-

(a) To furnish a reply to DoPandT's query as per comments given in para 2, 4 and 5 of note on pre-pages 111-113/n, with the request to get the proposal approved from the ACC.

OR

(b) In view of above developments (para 5 above), the ACC's proposal may be withdrawn immediately and convene a fresh DPC (before the next date of hearing of Contempt Petition Filed by Capt/Pilot in his WP No.4840/2010 fixed on 18.07.2013). Meanwhile, we may also process BSF's proposal (para-3/pre-page-103/n refers) with DoPandT for considering relaxation in prescribed flying experience in respect of Capt/Pilot Bindu Sethi.

7. In case, option at para 6 (b) is considered appropriate, approval of Hon'ble HM may be solicited.

(Dinesh Mahur)
Director (Pers)
10.07.2013"

3. It is informed by the learned standing counsel for the respondent that expeditious steps to implement the above decision would be taken and the DPC would be convened at the earliest.

In view of the above, we direct as follows:

- (i) The respondents shall ensure that the decision noted above is effected in accordance with the applicable rules and regulations within a period of eight weeks from today and the decision taken is communicated to the petitioner.

List on 10th October, 2013.” ”

19. As can be seen from the above order, the learned Counsel representing the respondents took a stand that expeditious steps to implement the above decision would be taken by the respondents to convene the DPC at the earliest and taking note of the said submission of the counsel for the respondents, the Court had directed that the respondents shall ensure that the decision noted above is effected in accordance with the applicable rules and regulations within a period of eight weeks from that date. On 20.11.2013, counsel for the respondent informed the Court that the matter is at the final stage of consideration at the PMO and the matter, thereafter, was adjourned for several dates. In the meanwhile, a review petition was preferred by the respondents to seek

review of the order dated 15.1.2013, which was later withdrawn by the respondents. The case of promotion of the petitioner to the rank of the Senior Captain/IG was considered by the DPC on 5.9.2013 and this time, his case was placed after granting necessary relaxation in deficiency of the required hours of PIC flying experience by the MHA/DOPT on 29th July, 2013 for the vacancy, in the panel year 2011-12. Vide their letter dated 14th February, 2014, the Appointments Committee of the Cabinet approved empanelment of the petitioner for the vacancy in the panel year 2011-12 and Captain Dilbagh Singh in the panel year 2012-13 for their promotion in the grade of Senior Captain, BSF. Based on the said approval granted by the ACC, the Ministry of Home Affairs vide their letter dated 19th February, 2014 granted promotion to the petitioner to the rank of Senior Captain/IG in BSF in the panel year 2011-12 w.e.f. the date of assumption of charge on the said post and until further orders. The petitioner felt aggrieved even by this order because of not being granted retrospective promotion w.e.f. 1st December, 2011 by which date the earlier deputationist had vacated office. Taking note of the submissions of the counsel for the petitioner, the Court vide order dated 2nd May, 2014 directed the counsel for the respondents to take clear instructions in this

regard from the respondents in the light of the orders dated 11th May, 2011, 16th October, 2012, 15th January, 2013 and 18th March, 2013 passed by the Court. On 26th May, 2014 further time was granted to the respondents to explain the reasons for the undue delay caused in holding a fresh DPC by the respondents and to show that no mala fides are attributable for the said delay. The respondents however did not come forward to explain the reasons for the same due to which the Court was constrained to impose a cost of Rs. 50,000/- on the respondents and it is only after this, that the respondents came forward to file the additional affidavit of Mr. Kuldeep Saini, Deputy Inspector General Personnel, BSF.

20. After protracted legal battle, filing of several representations, passing of various orders by this Court, the uphill task of making the bureaucracy move in the right direction to redress the grievance of the petitioner to seek promotion to the higher rank of Senior Captain/ I.G. could be finally achieved by the order dated 19th February 2014, passed by the respondents. The petitioner has already assumed the charge on the said post on the afternoon of 19th February 2014 and to this extent, the petitioner can heave a sigh of relief that his fight and struggle ultimately

brought fruitful results. This is an irony in our country that even for legitimate claims whether in service or in other fields, one has to struggle a lot and pass through all kinds of harassment and trauma and the struggle is exasperating more for the persons who are honest to the core and do not indulge in any kind of flattery or sycophancy.

21. The petitioner filed the instant writ petition in July 2010, to seek a direction against the respondents for the consideration of his case for promotion to the rank of Senior Captain with effect from 1.1.2009. The petitioner who was fully eligible to be considered for promotion to the post of Senior Captain except the fact that he had no requisite flying experience of minimum 2000 hours on Multi Engine Aircraft. As per the petitioner, he has fulfilled this requirement too, because he had completed 4100 hours of BSF type of Multi Engine Aircraft as a co-pilot and as per the norms, 50% of hours as co-pilot are treated as PIC hours as per the DGCA Guidelines. It is also the case of the petitioner that the respondent No.5 i.e., BSF has sought a clarification from the Director General, Civil Aviation regarding the flying hours of the petitioner and in response to that the Director General, Civil Aviation vide letter dated 31st December 2008 addressed to the Directorate General, BSF, took a clear stand that

50% of the flying done by the petitioner as a co-pilot under supervision, could be counted as PIC experience and therefore, in their opinion, the petitioner was eligible in all respects to meet the Recruitment Rules criteria for his promotion to the rank of Senior Pilot.

22. As per the Recruitment Rules, the vacancy for the post of Senior Pilot was to be filled by promotion from the feeder cadre, failing which by deputation/absorption/short term contract/re-employment. The post of Senior Captain fell vacant on the retirement of AVM R. Khurana, IG (Air). For the said post, the respondents proceeded to appoint a person on deputation instead of appointing the petitioner who was not only the senior most Captain but also one of the most decorated officers in the BSF (Air Wing). The ground for denying promotion to the petitioner was that he did not possess the requisite experience of minimum 2000 hours as Pilot-in-Command on Multi Engine Aircraft as on 1st January 2010. This denial of the petitioner's right, for his promotion to the next higher rank of Senior Captain started his course of legal challenge and struggle.

23. As we have already stated above that so far as the claim of the petitioner for his promotion is concerned, the same already stands granted by the respondents and now the Court has to primarily deal with the

following two issues:-

- i) Whether the petitioner is entitled to retrospective promotion with effect from 1st December 2011;
- ii) Whether there is any delay on part of the respondents in holding the DPC and if so, whether the delay was intentional and malafide so as to deprive and deny the petitioner his right for promotion to the said rank of Senior Captain/I.G.?

24. To examine the claim of the petitioner for his retrospective promotion from 1st December 2011, let us first refer to the eligibility conditions as laid down under the relevant Recruitments Rules for promotion to the said rank of Senior Captain, which reads as under:-

“SCHEDULE

Name of Post	Number of post	Classification	Scale of pay	Whether selection-cum-seniority or selection by merit
1	2	3	4	5
1. Senior Captain	*2 (Two) (1999) *subject to variation dependent on workload	General Central Service Group ‘A’ Gazetted, Non-Ministerial (Combatised)	Rs.18,400-500-22,400	Selection by merit

Whether benefit for added years of service admissible under rule 30 of the Central Civil Service Pension) Rules, 1972	Age limit for direct recruits	Educational and other qualifications required for direct recruits	Whether age and educational qualifications prescribed for direct recruits will apply in the case of promotees
6	7	8	9
Yes	Not applicable	Not applicable	Not applicable

Period of probation, if any	Method of recruitment whether by direct recruitment or by promotion or by deputation/ 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.
10	11	12
Not applicable	By promotion failing which by deputation/ absorption/short term contract/re-employment.	(I) Promotion:- Captain and Senior Operation officer (Pilot) with four years service in the grade and having following qualifications:- i) Current Airlines transport licence/ Senior Commercial Pilot licence with current flight Radio Telephone Operator Licence with current Instrument rating; ii) 5000 hours flying experience. iii) Minimum 2000 hrs as Pilot in command on multi engine Air-craft with 1000 hours PIC in BSF type of

		Aircraft. iv) DGCA Endorsement of Pilot in command on BSF type of Aircraft. (II) Deputation/Absorption Short term contract: Officers below fifty six years of age under Central Government/ State Government / Public undertaking: holding analogous posts or with four years regular service in posts in the pay scale of Rs.16,400 – 20,000 with experience as under:- a) 5000 hrs flying experience as pilot including minimum 2000 hrs Pilot-in-Command on multi engine with 1000 hrs PIC on BSF type of Air Craft. b) Holding licence as in (I)(i) above.
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25. It is not in dispute between the parties that the petitioner duly fulfilled the eligibility criteria for promotion to the rank of senior captain/I.G. as on 1st December 2011 except that he was short of 23.34 hours PIC flying experience on Multi Engine Aircraft. As per the petitioner, this requirement too has been fulfilled and for that he draws support from the letter dated 31.12.2008 sent by the Director General of Civil Aviation, wherein they had taken a view that 50% of flying done as co-pilot can be counted as PIC experience and in the case of petitioner, he had done 4100 hours as co-pilot. Therefore, he fulfilled the criteria of the requisite flying experience as PIC on Multi Engine Aircraft. The

respondent nos. 1 and 2 did not subscribe to the said view taken by the Director General, Civil Aviation. So far as the vacancy was concerned, the same existed and as per the Recruitment Rules, the post of Senior Captain was to be filled by promotion from the feeder cadre and failing which, by deputation, absorption, etc. The petitioner is an officer of feeder cadre but since the petitioner was considered ineligible because of the deficiency in flying experience on Multi Engine Aircraft, the decision was taken by the Ministry of Home Affairs to offer the post to a deputationist and accordingly, AVM A.P. Garud of IAF was appointed as Senior Captain on deputation with effect from 28th May 2010. Respondents have also referred to a MoU signed by the Ministry of Home Affairs and Ministry of Defence, wherein the decision was taken to transfer one post of Senior Captain from fixed wing to rotary wing in BSF (Air Wing) in order to meet functional requirements of maintaining a large fleet of helicopters. It is also the case of the respondents that although the petitioner did not meet the eligibility criteria for his promotion to the rank of Senior Captain as on 1st January 2011 but nevertheless a proposal was sent to the Ministry of Home Affairs for the upgradation of two posts of Captain (Pilots) as Senior Captain/I.G. It was

also proposed that till the materialisation of such a proposal for the upgradation of two posts, the senior most Captains (Pilots/DIGs) may be conferred with the Local Rank of Senior Captain/I.G. It is also the case of the respondents that while this proposal was under examination with the Ministry of Home Affairs, the Ministry of Home Affairs under the provision of BSF Rule 14-A(3)(ii) had conveyed the approval for granting Local Rank of Senior Captain/Inspector General to the petitioner and one Shri Dilbag Singh vide their UO dated 3rd August 2011. It is also the case of the respondents that so far as the proposal for upgradation of these posts of Senior Captain was concerned; the same was not agreed to by the Ministry of Home Affairs/DoPT. It is also the case of the respondents that AVM A.P. Garud was pre-maturely repatriated from BSF w.e.f 30th November 2011 and consequently a vacancy of Senior Captain had accrued with effect from 1st December 2011. It is also the case of the respondents that the Recruitment Rules were revised and notified on 11th November 2011 wherein the provision was made for filling up the two posts of Senior Captain in the ratio of 50% each, i.e. 50% by promotion and 50% by deputation. The petitioner apprehended that with a view to frustrate his right, there would be a move to amend the

Recruitment Rules and again some person will be brought on deputation to the said post of Senior Captain. CM No. 3390/2011 was moved by the petitioner in this regard and while disposing off the application, the Court directed that any appointment to the post of Senior Captain by way of deputation would be subject to any orders, which may be passed in this writ petition.

26. In another application moved by the petitioner vide C.M. Appl. No. 6705/2011, the Court vide order dated 11.05.2011 made the position explicitly clear by recording the submission of the counsel for the respondents that as and when the post of Senior Captain is filled up, the same would be with reference to the existing Recruitment Rules and that before resorting to deputation, it would be seen whether any departmental candidate was available and whether he fulfilled the requirements of the Recruitment Rules, to be considered for promotion.

27. The said order dated 11th May 2011 unequivocally spells out that the case of the petitioner was to be considered with reference to the existing Recruitment Rules. Secondly, before the respondents proceed to fill the vacancy on deputation, they would first see whether a departmental candidate from the feeder cadre is available or not and

thirdly whether such candidate fulfils the requirement of recruitment Rules applicable to the said promotional post of Senior Captain. Series of other directions were given by this Court and the important ones have already been reproduced above.

28. As can be seen from the various orders reproduced above, the emphasis of the Court was to ensure that the case of the petitioner for promotion to the next higher rank of Senior Captain is considered by the DPC without any loss of time and to grant him promotion, if he fulfils the eligibility criteria. In the order dated 18th May 2013, passed by this Court, it was duly clarified that in case the petitioner is ultimately appointed to the post of Senior Captain then he shall be entitled to all consequential orders of seniority, etc., as may be due to him in such position irrespective of the date on which the person is appointed on deputation.

29. As a result of various directions given by this Court, a DPC was held by Ministry of Home Affairs on 5th sep 2013 to fill up the two vacancies of incumbent posts of Senior Captain which had accrued due to pre-mature repatriation of AVM A.P. Garud i.e. with effect from 30th November 2011 and voluntary retirement of Shri J.S. Thind, Senior Captain with effect from 27th November 2012. Pursuant to the

recommendations made by the DPC, the Appointments Committee of the Cabinet (ACC) vide letter dated 14th February 2014 had approved the case of the petitioner for promotion to the post/rank of Senior Captain in BSF for the vacancy for the year 2011-2012 and that of the other officer for the panel year 2012-2013. This could be done by the respondents in the case of the petitioner after necessary relaxation in deficiency of required flying hours PIC experience on Multi Engine Aircraft was granted by the Ministry of Home Affairs on 29th July 2013. The crucial date to test the eligibility of the petitioner against the vacancy for the year 2011-2012 was to be assessed as on 1st November 2011 and as on this date, he was having deficiency of 23.34 hours PIC experience on Multi Engine Aircraft, although this shortfall was made up by the petitioner as on 14th January 2011.

30. As per the respondents, the proposal was submitted to the Ministry of Home Affairs by the respondent – BSF to convey their decision by accepting one of the two suggestions given by them so as to decide the long pending Court case. The two suggestions which were given by respondent No. 2 to Ministry of Home Affairs are reproduced hereunder:-

“(i) Convey approval for counting of 50% of the flying done by Shri Bindu Sethi, Captain (Pilot) as co-

pilot under supervision as PIC experience in accordance to the DGCA's letter dated 31.12.2008 and as requested vide this Dte UO dated 20th Aug, 2009.

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(ii) Since the officer has already completed the requisite hours of PIC experience on multi engine aircraft as on 14.01.2011, he may be granted necessary relaxation to become eligible for consideration in promotion during the vacancy year 2011-12 as the officer is having instructor/examiner rating, which is itself DGCA's ultimate qualification for a pilot. Moreover, he has been conferred with Local rank of Sr. Captain/IG w.e.f. 5.8.2011 and never granted any relaxation in eligibility criteria. Whereas, the officer junior to him was granted relaxation in eligibility criteria twice i.e. during initial appointment and at the time of his promotion from Co-pilot to the rank of Captain (Pilot) as per details already given in preceding para."

31. As already stated above, the necessary relaxation to meet the deficiency in flying hours was accorded by the MHA and grant of such relaxation by the MHA was not for the first time as an officer junior to the petitioner was granted relaxation in eligibility criteria twice i.e., during his initial appointment and at the time of his promotion from co-pilot to the rank of Captain Pilot as aforementioned.

32. It is quite intriguing and distressing to note that this process of granting relaxation, which is permissible under the MHA/DoPT Rules

could be resorted to by the respondents even earlier and had the relaxation been granted to the petitioner earlier, the petitioner could have been promoted, if not in the year 2011-12 but at least immediately after the vacancy had arisen on the repatriation of AVM A.P. Garud on 30th November 2011. It is more shocking that all this happened despite various directions were given by this Court in the present writ petition filed by the petitioner and also after filing of a contempt case by the petitioner.

33. The right of an eligible employee to be considered for promotion has been held to be a fundamental right granted under Article 16 of the Constitution of India and the guarantee for a fair consideration in matters of promotion under Article 16 virtually flows from guarantee of equality as enshrined under Article 14 of the Constitution of India. (Held in ***Union of India & Another v. Hemraj Singh Chauhan and others***, (2010) 4 SCC 290).

34. On the issue as to when a person be granted promotion with retrospective date, the Division Bench of this Court in ***Sunil Kumar Mehra v. MCD and Anr***, 209 (2014) DLT 595 after placing reliance on various decisions of the Supreme Court summarised the legal position in

the following para:-

“21. The Bench had held that the cornucopia of case law noted above brings out the position:-

- (i) Service Jurisprudence does not recognize retrospective promotion i.e. a promotion from a back date.*
- (ii) If there exists a rule authorizing the Executive to accord promotion from a retrospective date, a decision to grant promotion from a retrospective date would be valid because of a power existing to do so.*
- (iii) Since mala fides taints every act, requiring a person wronged to be placed in the position but for the mala fide or tainted exercise of power, promotion from a retrospective date can be granted if delay in holding DPC is attributed to a mala fide act i.e. deliberately delaying holding DPC with the intention to deprive eligible candidates the right to be promoted.*
- (iv) If due to administrative reasons DPC cannot be held in a year and there is no taint of malice, no retrospective promotion can be made.”*

35. Promotion is the only incentive in a service career. In the absence of any promotion to a higher rank, not only would the growth and development of the individual officer stop but the department or the institution too gets affected equally. Stagnation of an employee, without there being any chance of promotion to a higher rank, could well deter the

employee from taking any initiative to achieve higher targets, goals and objectives for the ultimate development and growth of the department and office, which the officer serves.

36. Promotion in any service career is a very important event, which every employee aspires for. Any unjust and arbitrary denial of this right to an employee would be a gross violation of his fundamental right of equality before law and equal protection of the laws as enunciated under Article 14 of the Constitution of India. Once, this right of consideration for promotion has been held to be fundamental, then such right must accrue to the petitioner immediately after any post falls vacant or is created or at least within a reasonable period of time. Any unreasonable or arbitrary delay to such right of an employee would amount to unjust denial of his legitimate right for consideration of his case for promotion and the same would also be in violation of his fundamental rights. It is often seen that in many cases, employees are denied their promotion during their service period and it is only through Court's intervention that a person gets his promotion, often post retirement, just for deriving financial benefits. In the Armed and Para-Military Forces, denial of such right of timely promotion is more agonising, as any unreasonable delay

on part of the authorities not only denies a member of the Forces, a higher rank but also the privilege of tenure of service commensurate with the higher rank.

37. In the facts of the present case, the petitioner had filed this writ petition on 20.07.2010 when he was denied promotion against a vacancy arising due to the retirement of AVM R. Khurana, IG (Air) and instead of considering the case of the petitioner, the vacancy was filled by bringing a person on deputation that too from a junior post. It is an admitted case of the parties that the petitioner duly fulfilled the eligibility criteria for appointment to the said post of Senior Captain as on the relevant date, except that there was deficiency in his flying experience of minimum 2000 hours PIC on Multi Engine Aircraft and on this aspect the Director General of Civil Aviation vide their letter dated 31st October 2008 had certified that 50% of the flying done as co-pilot under the supervision can be counted as PIC experience and therefore in their opinion, petitioner who had completed 4100 hours as co-pilot would be qualified for promotion to the rank of Senior Captain but the said Expert opinion given by the concerned department was not taken into consideration by the Ministry of Home Affairs. Granting of relaxation of hours was already

within the competence of the Ministry of Home Affairs as the relevant rules in this regard confers discretion to the Central Government to relax any of the provisions of the rules with respect to any clause or category of persons where the Government is of the opinion that it is necessary or expedient to do so and then it may by order do so by recording the reasons in writing. This relaxation ultimately came in favour of the petitioner by an order dated 29th July 2013 passed by the Ministry of Home Affairs and it is only after the grant of this relaxation that the petitioner ultimately received the appointment letter dated 19.02.14. The similar exercise could have been resorted to by the respondents much earlier and having not done so, we have no hesitation in saying that the delay on part of these respondents is clearly attributable to legal malice or malice in law and the delay also appears to be malafide and intentional and therefore, we are of the view that the petitioner is entitled for retrospective promotion with effect from 1st December 2011 with all consequential benefits arising therefrom.

38. With regard to the second issue, the respondents have tried to give justification for the delay on their part for not holding the DPC in the year 2011-2012 in para 19 of their additional affidavit and the reasons given

by them in this para are reproduced as under:-

“19. The DPC for promotion from Captain/Pilot (DIG) to the rank of Sr. Captain (IG) could not be held for the vacancy year 2011-12 due to following reasons:-

(i) Initially no vacancy of Sr. Captain/IG was anticipated during the vacancy year 2011-12 as out of two sanctioned posts, one post was held by AVM AP Garud, VM on deputation basis and another post was held by Shri J.S. Thind, cadre officer.

(ii) Due to premature repatriation of AVM A.P. Garud, VM to IAF w.e.f. 30.11.2011, one post of the Sr. Captain/IG fell vacant w.e.f. 01.12.2011. However, before accrual of vacancy of the incumbent post, the Revised Recruitment Rules, 2011 came into existence w.e.f. 11.11.2011 and as per the Revised Recruitment Rules 2011, the vacant post was to be filled by deputation against 50% quota authorized for deputationists.

(iii) Shri Bindu Sethi, Captain/Pilot (DIG) now Sr. Captain/IG who was the senior most officer in the feeder grade was not eligible for promotion during the vacancy year 2011-12 due to 23.30 hrs. less PIC flying experience. In order to consider his promotion against the said vacant post for the vacancy year 2011-12 and not to fill up the same on deputation from the IAF, as per the Revised Recruitment Rules 2011, Shri Bindu Sethi filed a writ petition No. W.P.(C) No.4840/2010 before the Hon'ble High Court of Delhi which remained subjudice till grant of necessary relaxation in deficiency of 23.30 hrs. PIC flying experience by the MHA/DoP&T in July 2013 based on the interim direction passed by the Hon'ble High Court of

Delhi.

(iv) From the above facts it has been found that, there was no intention to delay the DPC as the case remained subjudice before Hon'ble High Court and decision of the MHA/DoP&T for granting of necessary relaxation in deficiency of 23.30 hrs. PIC flying experience as prescribed in the Pre Revised RR 1999."

39. In para 13 of the same additional affidavit, the respondents have taken a stand that the petitioner was conferred with the Local Rank of Senior Captain/I.G. with effect from 5th August 2011 and he was never granted any relaxation in eligibility criteria while the officer junior to him was granted relaxation in eligibility criteria twice i.e., during initial appointment and at the time of his promotion from co-pilot to the rank of Captain (Pilot). We fail to comprehend that when relaxation could be granted to an officer junior to the petitioner, then why a similar relaxation wasn't granted to the petitioner who was just deficient of 23.34 hours PIC flying experience on Multi Engine Aircraft.

40. We are also at a loss to understand that when Director General, Civil Aviation by their letter dated 31.12.2008 gave the opinion certificate, stating that since the petitioner had flying experience of 4100 hours as co-pilot and 50% of the same could be counted as PIC experience, then why the certification from the expert body was not given

any weightage and for what reasons. We also cannot see any justification for the respondents not giving due weightage to the views expressed by the Law Ministry in the Note dated 16th December 2011 and 3rd December 2012 wherein, the Law Ministry had opined on 1st December 2011, that if the petitioner fulfilled the eligibility criteria under the recruitment rules which existed as on 11th May 2011, then he shall have to be considered in terms of the commitment made by the Government Counsel in terms of the order dated 11.5.2011. The opinion further cautioned that failure on part of the respondents to comply with the order dated 11th May 2011 shall amount to contempt of Court against the officers of the Ministry of Home Affairs and BSF.

41. In the light of the foregoing discussion, it is quite apparent that the delay on part of the respondents in holding the DPC to consider the case of the petitioner was deliberate and malafide as he was denied the right to be considered for promotion to the next higher rank of Senior Captain within a reasonable period of time after the vacancy had arisen on the repatriation of AVM A.P. Garud on 30.11.2011. Such action cannot be sustained in law. We find merit in the petition filed by the petitioner and accordingly the petitioner is held entitled to retrospective promotion with

effect from 1st December 2011.

42. So far as the CCP is concerned, the Court has not yet issued any notice. Having taken into consideration the stand taken by the respondents in their additional affidavit and various directions given by this Court from time to time and more particularly, the statement made by the Government counsel on 11th May 2011, we are of the prima facie view that the contempt proceedings should be initiated against the respondents.

43. In view of the aforesaid discussions, the present writ petition filed by the petitioner is allowed and is disposed off accordingly. However, notice of the contempt petition is ordered to be issued to the respondents to show cause as to why the contempt proceedings be not initiated against the respondents, returnable on 18th November 2014.

44. The registry is directed to place a copy of this order in the file of CCP and to place the contempt matter before the roster bench.

KAILASH GAMBHIR, J.

NAJMI WAZIRI, J.

SEPTEMBER 26, 2014
v/pkb