$~8 to 9, 12 to 13 and 21

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

Decided on : 17.09.2015

\+ W.P.(C) 5839/2015

RAJIV RANJAN ..... Petitioner
Through: Mr Padma Kumar S., Adv.

versus

UNION OF INDIA & ORS ..... Respondents
Through: Ms Saroj Bidawat and Ms Manisha, Advs.

And

\+ W.P.(C) 5853/2015

SATENDRA MOHAN ..... Petitioner
Through: Mr Padma Kumar S., Adv.

versus

UNION OF INDIA & ORS ..... Respondents
Through: Ms Saroj Bidawat and Ms Manisha, Advs.

And

\+ W.P.(C) 2664/2015

RAJESH KUMAR SINHA ..... Petitioner
Through: Mr Padma Kumar S., Adv.

versus

UNION OF INDIA AND ORS. ..... Respondents
Through: Mr R.Mishra and Mr M.K. Tiwari, Advs.

And

\+ W.P.(C) 2667/2015

PRAMOD KUMAR NAIK ..... Petitioner
Through: Mr Padma Kumar S., Adv.

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versus

UNION OF INDIA & ORS. ..... Respondents
Through: Mr R.Mishra and Mr M.K. Tiwari, Advs.
along with Mr Arvind Sharma, DC, BSF

And

\+ W.P.(C) 163/2014

DEVENDER KUMAR VERMA ..... Petitioner
Through: Mr Prashant Sivarajan, Adv.
versus
UNION OF INDIA & ORS ..... Respondents
Through: Mr Vivek Goyal, CGSC for respondents
along with Mr Arvind Sharma, DC, BSF

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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The writ petitions are partly allowed.

For detailed judgment, the decision dated 17.09.2015 in *W.P.(C) No. 5830/2015* titled ***Shoorvir Singh Negi vs. Union of India & Ors.*** may be referred to.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

SEPTEMBER 17, 2015
BG

$~$~7 to 9, 12 to 13 and 21

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

Decided on : 17.09.2015

\+ W.P.(C) 5830/2015

SHOORVIR SINGH NEGI ..... Petitioner
Through: Mr Padma Kumar S., Adv.

versus

UNION OF INDIA & ORS ..... Respondents
Through: Ms Saroj Bidawat and Ms Manisha, Advs.

And

\+ W.P.(C) 5839/2015

RAJIV RANJAN ..... Petitioner
Through: Mr Padma Kumar S., Adv.

versus

UNION OF INDIA & ORS ..... Respondents
Through: Ms Saroj Bidawat and Ms Manisha, Advs.

And

\+ W.P.(C) 5853/2015

SATENDRA MOHAN ..... Petitioner
Through: Mr Padma Kumar S., Adv.

versus

UNION OF INDIA & ORS ..... Respondents
Through: Ms Saroj Bidawat and Ms Manisha, Advs.

And

\+ W.P.(C) 2664/2015

RAJESH KUMAR SINHA ..... Petitioner
Through: Mr Padma Kumar S., Adv.

versus

UNION OF INDIA AND ORS. ..... Respondents
Through: Mr R.Mishra and Mr M.K. Tiwari, Advs.

And

\+ W.P.(C) 2667/2015

PRAMOD KUMAR NAIK ..... Petitioner
Through: Mr Padma Kumar S., Adv.

versus

UNION OF INDIA & ORS. ..... Respondents
Through: Mr R.Mishra and Mr M.K. Tiwari, Advs.
along with Mr Arvind Sharma, DC, BSF

And

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DEVENDER KUMAR VERMA ..... Petitioner
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versus

UNION OF INDIA & ORS ..... Respondents
Through: Mr Vivek Goyal, CGSC for respondents
along with Mr Arvind Sharma, DC, BSF

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. In all these petitions, the common grievance urged is that the petitioners are entitled to reckon their seniority and pensionable service with effect from the date they were declared as successful candidates in the original selection process in which they participated The facts pertaining to W.P.(C) Nos.5830/2015, 5839/2015, 5853/2015, 2664/2015 and 2667/2015 are common inasmuch as the petitioners had participated in the recruitment process and were declared successful for the examination held in the year 2000.

2. It is contended that the position taken by the Border Security Force (BSF)—the main respondent—in granting seniority with effect from the date of continuous service based upon its interpretation of Rule 8 of the Border Security Force Rules, 2002 is untenable.

3. The brief facts necessary for deciding the cases are that all petitioners were declared successful in the recruitment process in which they originally participated—mostly in the year 2000. Apparently, the examination was held in 1999 and the results were declared thereafter the next year. The petitioners were initially declared unfit for one reason or the other. When they were declared fit, the petitioners joined the concerned batch/batches according to the availability of vacancies in the batch of training. The facts relating to W.P.(C) No.5830/2015 are that the writ petitioner was found unfit on account of knock knee on 16.03.2002. After his Review Medical

Board on 17.01.2003, he was declared fit. He thereafter joined in the year 2004. In W.P.(C) No.5839/2015, the petitioner was declared medically unfit on 11.02.2002 on account of hydrocele. He apparently underwent surgery and was subsequently declared fit. However, he could not immediately be appointed because there was a discrepancy in the name as between the certificate produced by him and name disclosed in the application form. Ultimately, he could join only in January, 2005. In W.P.(C) No. 5853/2015, the petitioner was declared unfit on account of hyper tension and obesity. On examination by the Review Board on 18.06.2003 subsequently, he was declared fit; he too joined the service later sometime in 2004. In W.P.(C) No.2664/2015, the petitioner was declared unfit on account of hydrocele. On account of the subsequent corrective surgery, he was examined by the Review Medical Board which declared him fit on 16.01.2003. He joined the BSF subsequently in the later batch. In W.P.(C) No. 2667/2015, the petitioner was declared medically unfit on account of ear problem Chronic Suppurative Otitis Media (COSM). The subsequent Review Medical Board in February, 2003 declared him fit. He was subsequently appointed in 2004. The facts of W.P.(C) No.164/2015 are somewhat different. There appears to be an error in the medical examination as it was declared that he did not fulfil the requite height standard and was short by 0.5 centimetre. The result of the Medical Board was declared on 25.01.2002. The petitioner sought review medical examination which was done on 17.04.2002. He was declared fit on 11.11.2002 and he subsequently joined the BSF.

4. All the writ petitioners contend that on account of the respondent's fault, they were kept away from employment and consequently made to report in subsequent batches—not along with other recruits who were

appointed in earlier batches. In other words, the petitioners joined subsequent batches of training unlike those who had participated in the year 2000 selection/recruitment process. This was not on account of their fault, but the BSF's own processes. It was submitted that consequently the interpretation placed upon Rule 8(2) and 8(3) to deny them the seniority at par with their batches originally joined, is arbitrary. Learned counsel for the petitioners relied upon the decision of this Court in ***Naveen Kumar Jha vs. Union of India***, *W.P.(C) No.3827/2012* (decided on 02.11.2012). The Court on that occasion had relied upon a decision of this Court's earlier ruling in ***Avinash Singh vs. Union of India & Ors.*** *W.P. (C) No.5400/2010,* (decided on 26.05.2011). The Court in ***Avinash Singh*** *(supra)* highlighted as follows:-

> "17. It is settled law that if appointment is by selection, seniority of the entire batch has to be reckoned with respect to the merit position obtained in the selection and not on the fortuitous circumstance on the date on which a person is made to join.
>
> 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."

5. In ***Naveen Kumar Jha*** *(supra)*, after noticing the above observations, the Division Bench directed as follows:-

> "11. On facts it needs to be noted that the seven petitioners of WP(C) No.5400/2010 had lost out on their seniority with reference to their merit position in the Select List due to delay in conducting their Review Medical Evaluation and in the interregnum their batchmates had joined ITBP.
>
> 12. On parity of reasoning and application of law the petitioner is held entitled to his seniority being refixed as a Sub-Inspector in CRPF with reference to his merit position at the SSC Combined Graduate Level 2000 Examination i.e. those who joined CRPF pursuant to the said examination in March 2003. The petitioner has already earned promotion to the post of Inspector and accordingly we direct that he would be entitled to seniority refixed in said rank with reference to his revised seniority position in the rank of Sub-Inspector, and this would mean that the petitioner would be considered for promotion to the post of Assistant Commandant as per the revised seniority list.
>
> 13. The respondents are therefore directed to revise the seniority position of the petitioner in the two ranks within a period of four weeks from today and thereafter consider the petitioner along with other eligible persons for promotion to the post of Assistant Commandant."

6. It is also argued that the petitioners cannot be made to suffer with respect to pensionary benefits on account of the fact that the delay was caused by the respondents in issuing the appointment letters. Having been declared fit by the Review Medical Board in all cases in 2002-2003, the fortuitous circumstance that the appointment letters led to their joining after the new pension scheme came into force could not deprive them of the more

beneficial provisions of the older pension scheme which ended on 31.12.2003. In support of this argument, learned counsel relied upon ***Naveen Kumar Jha*** *(supra)*.

7. Learned counsel for the respondents relied upon an earlier Division Bench ruling of this Court in ***Roop Ram Kundu vs. UOI & Ors.*** *W.P.(C) No.3342/1999* (decided on 16.08.2012). In that case, the petitioner had been declared temporarily unfit and was subject to another medical examination conducted later. He had overcome the medical problem from which he was temporarily suffering and was subsequently declared fit barely two months after the original declaration of unfitness. The Court rejected the claim for seniority based upon the original results and stated as follows:-

> "6. Thus any challenge to petitioner's temporary medical unfitness as per the review medical board became a matter which no longer is capable of being adjudicated upon by any Court.
>
> 7. However, taking into account that the petitioner was being declared temporarily medically unfit, the authorities subjected the petitioner to another medical examination which was conducted in July 19, 1996. The petitioner had overcome the medical problem from which he was temporarily suffering. He was opined to be medically fit and accordingly an appointment letter dated September 17, 1996 was issued.
>
> 8. Now, the petitioner prays that he be accorded seniority as per his merit position obtained at the examination with all consequential benefits.
>
> 9. Suffice would it be to state that as per Rule 19 of the BSF (Subordinate Officers and Under Officers) Promotion and Seniority Rules 1975, seniority in any rank has to be determined on the basis of continuous regular appointment in that rank.

10. Being repeatedly declared temporarily medical unfit, till he was declared fit in September, 1996 resulting in appointment letter being issued on September 17, 1996, would require petitioner to be placed with respect to seniority, not with reference to the merit position which he had obtained when the examination was conducted in the year 1992 more so for the reason W.P.(C) No.149/1996 filed by the petitioner stands dismissed in default and revival whereof has not been prayed for."

8. The Border Security Force General Duty Cadre (Non-Gazetted) Recruitment Rules, 2002, to the extent they are relevant, are extracted below:-

"8. Seniority—(1) Persons holding a higher rank whether in an officiating or substantive capacity shall be senior to the persons holding a lower rank.

(2) Seniority in any rank shall be determined on the basis of continuous regular appointment in that rank.

Provided that the seniority of the personnel holding the same rank and promoted on the same day shall be determined in accordance with the order of selection for appointment to that post.

(3) Subject to the provisions of sub-rule (2) seniority of direct entry Sub-Inspector shall be determined in accordance with merit of their selection through Staff Selection Board.

Provided that the persons selected on an earlier batch will be senior to those selected in subsequent batches.

Provided further that the seniority of Constables/Head Constables selected under Limited Departmental Competitive Examination Scheme as Sub-Inspector against reserved quota shall be determined in accordance with their merit of selection

and shall be placed below the Sub-Inspector (Direct Entry) batch with whom they join training."

9. The petitioners highlight Rule 8(3) to say that seniority of direct entry Sub-Inspector would be determined in accordance with the merit of their selection through Staff Selection Board. Although this argument is attractive, the fact remains Rule 8(3) expressly states that it is "*subject to provisions of sub-rule* (2)". This in turn means that the primary rule is "*continuous regular appointment in that rank*". This Court is of the opinion that the question of an individual being "*appointed to the rank*" would imply his joining the cadre. In all these cases, the petitioners do not dispute that they had joined the cadre or the concerned post only after they were declared medically fit by the Review Medical Board—in 2003. Though they were initially declared successful in the recruitment process, their medical conditions constituted a barrier for their entry into the service. That barrier was lifted on account of their overcoming unfitness and the subsequent determination of the Review Medical Board. Obviously, therefore, they joined and started continuously working in the post of Sub-Inspector from the later dates. This interpretation is supported by the judgment in ***Roop Ram Kundu*** *(supra)*—a proceeding initiated as far back as in 1999 when the petitioner claimed seniority of merely three months. He was initially declared temporary unfit in July, 1999, but was subsequently declared successful in September, 1999. In the interregnum in ***Roop Ram Kundu*** *(supra)*, the original batch to which he belonged had already joined the training. He was, therefore, directed to join the subsequent batch. This Court is of the opinion that the BSF's position cannot be faulted given the fact that he entered the cadre or joined the post subsequently.

10. At some stage, counsel in one of the proceedings W.P.(C) No.163/2014, relied upon the order in ***Ram Pal Deshwal vs. UOI & Ors.*** *W.P.(C) No.393/2008* (decided on 07.03.2011) to state that Rule 8(2) is really meant for regulating seniority of promotees. In ***Ram Pal Deshwal*** *(supra),* the Court observed as follows:-

> *14. Suffice would it be to state that sub-rule (2) would apply in case of promotion and where the promotion is ad-hoc, temporary or stop-gap i.e. fortuitous, seniority would rank on the basis of continuous regular employment. The proviso to sub-rule (2) makes clear the ambit of the sub-rule. The proviso deals with promotions and carves out an exception to what is contemplated by sub-rule (2). The proviso, therefore, highlights the ambit of sub-rule (2).*

11. This Court is of the opinion that Rule 8(1) firstly states a general principle, i.e., those holding higher rank whether in an officiating or substantive capacity would be senior to persons those holding a lower rank. Rule 8(2) then prescribes a principle of universal application. i.e., the seniority in any rank "shall" be determined on the basis of continuous regular appointment in that rank. Thirdly, the proviso of Rule 8(2) states that the seniority of the two individuals holding the same rank "and promoted on the same day" shall be determined in accordance with the order of selection for appointment to that post. In other words, the provision carves out an exception from the general rule prescribed in Rule 8(2) of seniority on the basis of the regular appointment to the rank. The exception is that in case of promotees, the seniority is to be determined "*in accordance with the order of selection for appointment to that post*". However, the proviso is silent as to the matters left out which are part of the main provision, i.e., Rule 8(2). The corollary irresistibly, therefore is that Rule 8(2) applies for other

categories, i.e., direct recruits. If one were to construe Rule 8(2) in this manner, the mandate of Rule 8(3), i.e., that seniority of direct entry Sub-Inspector would be determined in accordance with the merit of their selection, is a rule to guide *inter se* merit of those who are appointed in the same selection process. However, it would not in any way disturb or detract from the application of Rule 8(2), i.e., the seniority in the rank has to be determined on the basis of continuous regular appointment.

12. This Court does not read proviso to Rule 8(2) in the manner sought to be urged or as appears to have been read in ***Ram Pal Deswal*** (supra). This is for the simple reason that the provision carves out an exception only for promotees and its intendment cannot be extended beyond what is prescribed. *(see S.Sundaram Pillai vs. V.R.Pattabiraman, 1985 SCR (2) 643 for the effect of operation of proviso).*

13. Respectfully, we differ from ***Naveen Kumar Jha*** *(supra)* and ***Avinash Singh*** *(supra)* as we find that no discussion of a rule akin to Rule 8 has been made in these judgments. In our opinion Rule 8 is determinative of the question of how seniority must be calculated for the present petitioners. We are also mindful that interfering in the manner sought will upset already settled seniority lists and affect persons who are not parties before us. We prefer instead the view taken in ***Roop Ram Kundu*** *(supra)*, a decision that was not brought to the notice of the court in either ***Naveen Kumar Jha*** *(supra)* or ***Avinash Singh*** *(supra)*.

14. In view of the above discussion, we are of the opinion that the petitioners claim for seniority from the date their batch mates or original batch mates who were otherwise appointed in the normal circumstances in 2000-2001 cannot succeed.

15. As far as the claim for pensionary benefits based upon the old pension scheme which ended on 31.12.2003 is concerned, we are of the opinion that a somewhat different result would have to follow. Undoubtedly, all the petitioners were declared medically fit by 2003. However, they could not be issued with appointment letters and joined subsequently in 2004 or 2005. It is here that the observations in ***Avinash Singh*** *(supra)* quoted with approval in ***Naveen Kumar Jha*** *(supra)* become relevant. Although the petitioners were declared fit earlier—at least much before the cessation of the old pension rules, there was an administrative delay in the issuance of the appointment letter asking them to join training. In these circumstances, in the interests of justice, we hold that they should be entitled to the benefits of the old pension scheme.

16. The writ petitions are allowed partly to the above extent, i.e., that the petitioners are entitled to the benefits of the old pension scheme. No costs.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

SEPTEMBER 17, 2015
BG