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

+ **W.P.(C) 3860/2017**

**NARESH KUMAR**

..... Petitioner

Through: Mr. Ankur Chhibber, Advocate.

versus

**UNION OF INDIA & ORS**

..... Respondents

Through: Mr. Arun Bhardwaj, CGSC with  
Mr. Nikhil Bhardwaj, Advocate.

**CORAM:**

**JUSTICE S.MURALIDHAR**

**JUSTICE SANJEEV NARULA**

**ORDER**

**06.12.2018**

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**SANJEEV NARULA, J**

1. The present petition under Article 226 of the Constitution of India has been filed seeking a writ of mandamus, directing the Respondents to notionally re-fix Petitioner's seniority by treating him appointed with effect from the date his batch mates were appointed. The Petitioner also seeks consequential benefits that would accrue on account of notional re-fixation of seniority, especially the benefit of the "old pension scheme".

2. By way of a common order we have decided W.P. (C) 6275/2016 and W.P. (C) 6312/2016. The factual background of the above noted cases is quite similar to the present petition. However, since the Respondents have raised additional grounds opposing this petition, we are passing a separate order.

### **Factual Background**

3. Staff Selection Commission (SSC) issued an advertisement for selection of Assistant Commandant (Direct Entry) in Central Para Military Organization by way of the SSB CPOs Examination 2001. The Petitioner applied for the said post and was declared qualified and allocated to BSF for appointment to the post of Assistant Commandant.

4. The final result of the examination was published in the Employment News dated 18<sup>th</sup> May 2002 and pursuant thereto the nodal force-Indo Tibetan Border Police (hereinafter referred to as "ITBP") issued a letter dated 15<sup>th</sup> July 2002 to the District Authority to obtain a character and antecedent verification report. The aforesaid requirement is a prerequisite for appointment of Group 'A' Officers.

5. On 17<sup>th</sup> September 2002, after getting the allocation of candidates from nodal force (ITBP), BSF issued an intimation letter dated 17th September, 2002 to the Petitioner. The said letter states that the Petitioner's appointment is subject to character and antecedents verification. The relevant portion of the letter is being reproduced as under:

"consequent upon being found medically fit by a duly constituted medical board of SSB CPOs-2001, you have been placed at the disposal of BSF for appointment. However, your final appointment is subject to the satisfactory completion of verification of your character & antecedents, for which action is being taken separately"

6. In the meantime, the basic training for the Petitioner's batchmates, who had appeared in the SSB CPO Examination -2001, commenced on 30<sup>th</sup>

December 2002.

7. Since the Petitioner's character and antecedent report was awaited, he was not allowed to commence basic training along with his batch. After a gap of nearly twenty four months, Petitioner received a letter of appointment directing him to report to BSF Academy, Tekanpur (Gwalior) on 30<sup>th</sup> January 2005.

8. The Petitioner accordingly joined the service of the Respondents and commenced training along with Assistant Commandant Batch 29.

### **Analysis**

9. The Court has heard Mr. Ankur Chhibber learned counsel appearing on behalf of the Petitioner and Mr. Arun Bhardwaj, CGSC on behalf of the Respondents.

10. While deciding W.P.(C) No. 6275/2016 and W.P.(C) No.6312/2016 we have examined several decisions of this court relating to delay in appointment and have held that in case the appointment of a candidate is delayed for reasons attributable to the employer, he cannot be deprived of his seniority. In the present case also we note that there has been a delay of 24 months on account of failure on the part of the Respondents to obtain the verification report. The reasons for such delay are solely on account of Respondents' inaction. We need not delve on this issue again and it would suffice to hold that the reasoning recorded in the said order is applicable to the present case. For the sake of clarity, the relevant portion of the said order is reproduced here under:-

*"19. The facts of the present case thus unequivocally establish that it is the Respondents who are to be blamed for depriving the Petitioners from joining the services of the Respondent along with their batch mates who had been successful under the respective examinations. Petitioners are certainly not at fault. It is also undisputed that Petitioners are losing on their seniority, as they were unable to join the training with their batchmates. The factors for the delay discussed above are squarely attributable to Respondents.*

*20. There are several other decisions of this Court, where the Petitioners who were similarly deprived of the opportunity to join with their batch mates for training, on account of delay in conducting Review Medical Examination, have been granted relief by this Court. It would thus be relevant to note few of such decisions being **Avinash Singh v Union of India 2011 SCC Online 2432**, **Gurnam Singh v Union of India (2015) 217 DLT 586 (DB)**, **Rajendra Singh v Union of India 240 (2017) DLT 576**, **Durga Nandan Srivastava in W.P. (C) No. 4348/2014**, **Amarendra Kumar v Union of India 2010 SCC OnLine Del 2565** and **Anjan Kumar Mandal v Union of India 2017 SCC OnLine Del 12028**.*

*21. We have considered the afore-noted judgments and note that this court has repeatedly held that in case the employer has caused delay in the joining of a candidate, the employee should not be deprived of his seniority. The facts of the present case are squarely covered by the aforesaid decisions of this Court as well as by the decision in **Naveen Kumar Jha** (supra). "*

11. In the present case, the learned counsel for the Respondents has raised an additional ground to oppose the petition. He argued that in view of the decision of the Supreme Court in the case of **Rohitash Kumar v Om**

***Prakash Sharma 2013 1 SCC 451*** the Petitioner is not entitled to the reliefs sought in the present petition. He further urged that Supreme Court in ***Rohitash Kumar*** (supra) has held that the seniority of direct entry officers would be from the date of their appointment i.e. from the date of commencement of their training in BSF Academy in Gwalior, Madhya Pradesh. He submitted that the fixation of Petitioner's seniority along with his batch mates of the 28<sup>th</sup> batch is not permissible. The learned counsel relied upon Section 141 of BSF Act, 1968 and submitted that separate recruitment rules for determination of seniority of BSF (General Duty Officers) have been framed. The Border Security Force (Seniority, Promotion and Superannuation of Officers) Rules, 1978 deal with seniority of Group 'A' (GD) Officers and the seniority has to be determined in accordance with Rule 7 (3) Border Security Force (General Duty Officers) Recruitment Rules, 2001.

12. Before we proceed to decide this issue, we feel it would be worthwhile to first discuss the decision of this Court in **W.P. (C) No. 19748/2005**, decided on 14th February, 2011, titled as ***Dinesh Kumar Dy. Commandant v Union of India***. The facts of the said case are quite similar to the case in hand. Dinesh Kumar successfully qualified the examination for the post of Assistant Commandant on 15<sup>th</sup> September 1991. He was declared unfit during Medical Board Examination held on 4<sup>th</sup> December 1992. He then made an application for his fitness being reconsidered by constituting a Review Medical Board (RMB). RMB met on 13<sup>th</sup> July 1994 and declared Dinesh Kumar to be medically fit and thus he became eligible for appointment to the post of Assistant Commandant. In the meantime, the

batches of the Assistant Commandant who had successfully undergone the training course were inducted on regular basis as Assistant Commandant. Dinesh Kumar was made to join with the 18<sup>th</sup> batch (2<sup>nd</sup> January 1995) and given seniority with reference to the date of joining. Since he was not given seniority with reference to 16<sup>th</sup> batch, he made several representations to the Respondents. Ultimately, his seniority was re-fixed as per the merit position in the examination held on 15<sup>th</sup> January 1991. Dinesh Kumar was then constrained to approach the Court on account of Respondents' denial to give him consequential benefits by re-fixing his seniority on the promotional post of Deputy Commandant. This Court allowed the writ petition and granted promotion with consequential benefits, except back wages. The aforesaid decision was challenged by the Respondents before the Supreme Court. However, the SLP was dismissed.

13. Now, we proceed to note the judgment of the Supreme Court in ***Rohitash Kumar*** (supra). In the said case, the Supreme Court was dealing with the interpretation of proviso to Rule 3 of BSF Rules, in calculating the seniority of direct recruits selected through the same selection process, but bifurcated into different batches (Batch 16 and Batch 17) for administrative reasons. The Respondent no. 1 therein, was a promotee and had joined training with the 16<sup>th</sup> batch i.e prior to the 17<sup>th</sup> batch, but was placed below the 17<sup>th</sup> batch in the seniority list. The Supreme Court held that the language of the rule is clear and seniority cannot be calculated from a date prior to birth in a cadre. Hence, it was held that seniority of the officials would be from the date of commencement of training, giving effect to the proviso to Rule 3. Supreme Court further held that the said proviso will have

application only in case officers who have been selected in pursuance of the same selection process are split into separate batches. In **Rohitash Kumar** (supra), the Supreme Court also noted the decision of **Dinesh Kumar** (supra) and differentiated the said decision, which is evident from para 29 of the said judgment which reads as under:

*"29. Shri R. Venkataramani, learned senior counsel for the Appellants, has placed very heavy reliance upon the judgment of the Delhi High Court (**Dinesh Kumar v. UOI and Ors.**) dated 14.2.2011 wherein, certain relief was granted to the Petitioner therein, in view of the fact that there was some delay in joining training, in relation to passing the fitness test set by the Review Medical Board. The court granted relief, in light of the facts and circumstances of the case, without interpreting Rule 3 of the Rules 1978. Thus, the said judgment, in fact, does not lay down any law. The case at hand is easily distinguishable from the above, as that was a case where seniority and promotion had been granted on a notional basis, with retrospective effect and it was held that the person to whom the same had been granted, was entitled to all consequential benefits."*

14. It is therefore interesting to note that the Supreme Court did not interfere with the decision of this Court in **Dinesh Kumar** (supra). In our opinion, this clearly indicates that the judgment of Supreme Court in **Rohitash Kumar** (supra) has to be understood and appreciated in the context of the facts of the said case.

15. Recently, this Court in **R.P. Sanwal v Union of India 2018 SCC Online Del 12582** had the occasion to consider a case involving fixation of seniority in the post of Assistant Commandant (AC) of the BSF. In **RP Sanwal** (supra), Petitioners were such officers whose appointments were delayed on

account of the fault of the Respondents. Pursuant to representations, they had got their seniority re-fixed. Respondents relying on the decision of **Rohitash Kumar** (supra), proceeded to rectify their seniority from the date of joining/training. Such Officers challenged the decision of the Respondents. While deciding the petitions we had the occasion to deal with the subject in hand in detail. While dealing with rival contentions of the parties, the judgment of the Supreme Court in **Rohitash Kumar** (supra) was considered and discussed. We also noticed and observed that the decision in **Dinesh Kumar** (supra) has not been disturbed by the Supreme Court in **Rohitash Kumar** (supra). Dr. S. Muralidhar, J, writing for the Bench, after considering several judgments has observed that the underlying principle of **Dinesh Kumar, Dy. Commandant v. Union of India** still holds good. It would be apt to reproduce the relevant paras of the judgment rendered by this Bench in **R.P. Sanwal** (supra):-

*"27. Therefore, the Supreme Court was not prepared to disturb the judgment of this Court in Dinesh Kumar (supra) by observing that it was a case where "seniority and promotion had been granted at a notional basis with retrospective effect". The fact of the matter, therefore, is that even according to the Supreme Court, as a result of its decision, the position as far as the decision in Dinesh Kumar (supra) is concerned, would not be affected.*

*28. Interestingly, Mr. Dinesh Kumar was a 1991 officer like Mr. Singh. If Rohitash Kumar (supra) was intended to disturb their cases, then clearly the Supreme Court would have recorded its finding to that effect. However, the Supreme Court considered the case of Rohitash Kumar (supra) as an inter se dispute between promotees and direct entrants and, therefore, declined to vary its order. It noted that this Court had granted relief in light*



*of the facts and circumstances of the case without interpreting Rule 3 of the 1978 Rules and thus, was of the view that Dinesh Kumar (supra) had, in fact, not laid down any law.*

*29. Interestingly, even in the order passed by this Court in the review petition filed in Dinesh Kumar (supra), this Court observed that the facts in Rohitash Kumar (supra) were distinguishable. The interpretation placed by the Division Bench of this Court of Rohitash Kumar (supra) and what the issue in Dinesh Kumar (supra) was is evident from a reading of the entire order dated 12th December 2014, which reads as under:*

*"Review Pet. No. 524/2014*

*1. The review petition is entirely misconceived. The decision of the Supreme Court pronounced on November 06, 2012 in CA No. 2133-2134/2004 on which the review is predicated is not applicable to the facts of the instant case.*

*2. Said decision holds that in view of Rule 3 of the BSF (Seniority, Promotion and Superannuation of Officers) Rules, 1978, the seniority of the directly recruited officers has not to be with respect to the merit position secured at the competitive examination. The decision notes that as per the Rule, the final merit position is with reference to the aggregate of the marks obtained at the competitive examination and at the induction course.*

*3. On facts, in said decision, persons who took the competitive examination for appointment as an Assistant Commandant in BSF could not join in the same year due to administrative exigencies. Character verification for some were received and for others it was not received. The result was that*

*some underwent the training/induction course earlier and the remainder with the next batch. Officers who underwent training in the next batch wanted seniority to be determined on the basis of the aggregate of the marks obtained in the competitive examination and at the induction course. The department took the view that the prospective appointees at the competitive examination did not undergo training in the same batches and thus those who took training at the latter batch would rank junior to those who underwent training in the earlier batch. The Supreme Court accepted the view taken by the department.*

*4. In the instant case the issue was not that of seniority. The writ petition undertook the competitive examination but his appointment as an Assistant Commandant got delayed due to late convening of a review medical board by BSF. Realizing this, BSF itself granted seniority to the appellant as an Assistant Commandant with reference to his merit position at the competitive examination held on September 15, 1991.*

*5. There was no issue on said account.*

*6. The issue which arose was when promotion to the post of Deputy Commandant became due. As per the service rule, six years service in the grade of Assistant Commandant was the eligibility condition. The juniors who had been inducted earlier rendered six years service and thus were being considered for promotion as Deputy Commandant. The Petitioner relied upon para 3.1.2 of the Office Memorandum dated March 25, 1996, relevant portion whereof has been noted in paragraph 15 of the decision dated February 14, 2011. As per the same, if juniors had become eligible for being considered for promotion,*

*eligibility norm for the senior officer had to be half the number of years of service otherwise required.*

*7. The writ petition which was decided by us interpreted the Office Memorandum in question and its effect. The petitioner had rendered three years and six months service as an Assistant Commandant. This was more than half the eligibility service of six years. Admittedly, persons junior to the petitioner had rendered more than six years of service and had become eligible for being considered to be promoted as an Assistant Commandant. In said fact, applying para 3.1.2 of the Office Memorandum dated March 25, 1996, relief was granted to the petitioner.*

*8. The review petition is dismissed.*

*9. No costs."*

*30. In one sense, the order passed in the review petition in Dinesh Kumar (supra) on 12th December 2014 is consistent with what the Supreme Court itself observed as regards the decision of this Court in Dinesh Kumar (supra) in its decision dated 6th November 2012 in Rohitash Kumar (supra)."*

16. In view of the above discussion, we are of the opinion that **Rohitash Kumar** (supra) would not come in the way of the Petitioner to seek re-fixation of his seniority. The Petitioner in the present case is seeking re-fixation of his seniority with his batch mates of SSC CPOs 2001 Examination. The Court is thus being called upon to issue directions to the Respondents to notionally re-fix the seniority on account of reasons that are solely attributable to the Respondents. On 17<sup>th</sup> September 2002, the Petitioner was informed that he was selected. It took nearly two years for the

Respondents to carry out the verification of character and antecedents. Respondents concededly delayed Petitioner's appointment. This is also evident from the counter affidavit, the relevant portion whereof is as under:

“12. That in reply to Para 1 of WP it is submitted that contents of Para are wrong and denied save and except which are matter of record. It is further submitted that as per instructions issued by GOI(MHA) regarding Character and antecedents verification issued vide OM No. 20/28/45- Estt(s) dated 7<sup>th</sup> Feb 1947 (A true copy of OM dated 07.02.1947 is annexed herewith as Annexure-R-1), "Before a person is appointed his Character & Antecedent must be verified through the DM or Dy Commissioner of the district or locality in which he is permanently resident", Accordingly, nodal force ITBP approached to District Authorities of Sikar, Jaipur & Bikaner, as mentioned by the petitioner in verification roll, to obtain Character and antecedent reports vide letter No. 2027 dated 15<sup>th</sup> July 2002 (A true copy of letter dated 15.07.2002 is annexed herewith as Annexure-R-2). However, the verification report from Bikaner District Authority was not received till commencement of Basic training of AC(DE) Batch Sri.-28 (i.e. 30<sup>th</sup> Dec 2002).

13. However, reminder letters to District Authority Bikaner vide letter dated 28.08.2002 & 04.10.2002 (A true copy of letters dated 28.08.2002 & 04.10.2002 are annexed herewith as Annexure-R-3&4, respectively) were also issued to District Authority Bikaner but the District Authority Bikaner issued the same vide letter No. 296 dated 20/01/2003 (A true copy of letter dated 20/01/2003 is annexed as Annexure-R-5) which was received by respondent authorities after commencement of BRT of AC (DE) batch Sri.- 28. Further, on receipt of CVRs from Bikaner District Authority, offer of appointment was issued to the petitioner to undergo training with next batch of AC(DE) i.e. AC(DE) Batch

Srl.-29 and was advised to report BSF Academy Tekanpur (Gwalior) on 31 Jan 2005.”

17. On account of the aforesaid delay, Petitioner could join only on 31<sup>st</sup> January 2005 and he commenced his basic training on the said date. Such a gross delay cannot be countenanced. The ratio of ***Naveen Kumar Jha*** (supra) would be attracted to the facts of the present case. The aforesaid decision is based on sound reasoning and judicial precedents. The Respondents' contention that the said judgment is not applicable is without merit.

18. We would also like to note the judgment of ***Avinash Singh v Union of India*** 2011 SCC OnLine Del 2432. In the said case, Petitioners were applying for recruitment to the post of Assistant Commandant in Central Police Forces and the process was completed somewhere in the month of June, 2004. They were then subject to a medical examination and a subsequent review medical examination on 14<sup>th</sup> October, 2004. However, the persons who had been declared fit in the first medical examination joined ITBP as Assistant Commandant on 2<sup>nd</sup> November, 2004, while the appointment process of the Petitioner got delayed till 8<sup>th</sup> August, 2005, on which date they got appointed as Assistant Commandant. This Court held that the Petitioners were entitled to re-fixation of their seniority. The relevant portions of the judgment are reproduced as under:

*"17. It is settled law that if appointment is by selection, WP(C)5400/2010 Page 5 of 6 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. Similarly, in **Anjan Kumar Mandal v. Union Of India 2017 SCC Online Del 12028**, this Court was dealing with a similar fact scenario as in the present case, in respect of CRPF officials. It was held therein that in view of the undisputed position that the Petitioner's appointment/joining was delayed due to failure on the part of the Respondents in obtaining the Verification Report in a timely manner, the Petitioner is justified in claiming his seniority at par with his batchmates. The judgment of the Supreme Court in **Rohitash Kumar** (supra) was also distinguished as being not applicable to the facts therein.

20. The Respondents have also relied upon the judgment of this Court in **W.P.(C) 6525/2016** dated 11<sup>th</sup> September 2017 in **V. Ramamurthy v. Union of India**. The said judgment pertains to cut-off date for the applicability of the old pension scheme and is not relevant.

21. In view of the afore-going discussion, we hold that the Petitioner is entitled to have his seniority notionally re-fixed at par with his batch mates who had been appointed as Assistant Commandants in 2003. We issue a writ of mandamus to the Respondents directing them to notionally re-fix Petitioner's seniority (in accordance with his merit position) with those who have joined BSF pursuant to SSB CPO Examination – 2001. Petitioner shall

also be entitled to all consequential benefits except for back wages.

22. The writ petition is allowed with no order as to costs.

**SANJEEV NARULA, J**

**S.MURALIDHAR, J**

**DECEMBER 06, 2018**

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