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

+ **W.P.(C) 10139/2009**

PARMOD KUMAR KAUSHIK & ORS ..... Petitioners

Through: Mr. H. S. Dahiya, Advocate.

versus

UOI & ORS ..... Respondents

Through: Mr. Ajay Digpaul, CGSC with  
Ms. Madhuri Dhingra, Advocate.

And

+ **W.P.(C) 1415/2012**

PRAMOD KUMAR KAUSHIK ..... Petitioner

Through: None.

versus

UOI AND ORS ..... Respondents

Through: Mr. Ajay Digpaul, CGSC with  
Ms. Madhuri Dhingra, Advocate.

**CORAM:**

**JUSTICE S.MURALIDHAR**

**JUSTICE SANJEEV NARULA**

**ORDER**

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**07.01.2019**

**SANJEEV NARULA, J:**

**CM No.3069/2012 in W.P.(C) 1415/2012**

1. By this application, the Petitioners are seeking interim orders for further promotion of Respondent No.4 to the post of Assistant Commandants (Accounts Officer). In a similar application being CM No.855/2009 in

WP(C) No.10139/2009, the Petitioner had sought stay of the operation of seniority list dated 14<sup>th</sup> October, 2008. While disposing of the said application, it was ordered that promotion, if any, shall be subject to the outcome of the writ petition.

2. We are informed that Respondent No.4 has since superannuated and, therefore, at this stage, no further orders are called for and accordingly the application is disposed of.

**W.P.(C) 10139/2009 & W.P.(C) 1415/2012**

3. The Petitioners presently serving as Inspector/Accountants with Indo-Tibetan Border Police Force (hereinafter referred to as 'ITBP') have filed the present petition questioning the refixation of their seniority as a result whereof, Respondent No. 4 (Sh. Yograj Sharma) has been given seniority above the Petitioners in the post of Inspector/Accountant.

4. The brief facts of the case are that the Petitioner No. 1 and Petitioner No. 2 joined ITBP as Head Constable/CM on 19<sup>th</sup> April, 1986 and 4<sup>th</sup> August, 1986, respectively. Both the Petitioners were promoted as Sub-Inspector/CM (SI/CM) in February 1993 and were further promoted as Inspector/CM on 29<sup>th</sup> October, 2002. The seniority list of the post of Inspector/CM circulated vide memorandum dated 9<sup>th</sup> August 2004, placed the Petitioners at Sr. No. 56 and 57 respectively.

5. As per the recruitment rules for the post of Inspector/Accountant, the post is filled by way of absorption, on the basis of merit by Inspector/Combatant

Ministerial of ITBP who have successfully undergone Cash and Accounts Course conducted by Institute of Secretariat Training or Management or in other recognized institute and being in medical category SHAPE-1. The process of selection is on merit.

6. The post of Inspector/Accountant and Inspector/CM are separate and hence have distinct rules. Vide letter dated 30<sup>th</sup> December, 2003, nominations were invited for eligible and willing Inspector/CM's to join as Inspector/Accountant by way of absorption. It is stated that Respondent No. 4 was under suspension at that time and was ineligible to apply for the said post, yet his name was illegally forwarded and considered for selection. The Selection Committee held its proceedings in the month of February/March in the year 2004 and found Respondent No. 4 unfit for selection. However, Petitioner No. 1 and Petitioner No. 2 were found fit and accordingly they were appointed to the post of Inspector/Accountant vide order dated 12<sup>th</sup> April, 2004 and 21<sup>st</sup> June, 2004, respectively. The appointment letters state as under:-

“No. 1-21017/04/200/Pers-II/277  
Directorate General, I.T.B.Police  
MHAI Govt. of India  
Block-2, CGO Complex  
Lodhi Road, New Delhi-03.

dated 12/4/04

#### ORDER

The following Inspectors/CM of various units ITB Police have been selected for appointment on absorption basis on the post of Inspector(Accountant) in ITB Police in the pay scale of Rs. 6500-200-10500/- and posted to Dte/CRO as mentioned against

each.

| S.No.       | Regd No. | Rank/Name         | Unit             | Date of relieving<br>From Unit/Date of<br>Reporting at Dte.<br>Genl. | Posted to  |
|-------------|----------|-------------------|------------------|----------------------------------------------------------------------|------------|
| 1.798030234 |          | Insp/CM SHQ (J&K) |                  | 01.04.04(FN)                                                         | CRO        |
|             |          | I.S. Pundir       | Attach Dte. Genl | 01.04.04(FN)                                                         |            |
| 2.850030239 |          | Insp/CM 10tn Bn   |                  | 04.04.04(AN)                                                         | CRO        |
|             |          | Rajpal Singh      |                  | 05.04.04(FN)                                                         |            |
| 3.860070199 |          | Insp/CM Parmod    | ITBP Academy     | 05.04.04(AN)                                                         | Dte. Genl. |
|             |          | Kumar Kaushik     |                  | 07.04.04(FN)                                                         |            |

2. Personnel mentioned at SI. No. 1 & 2 are directed to report to ACO, ARO, ITB Police, R.K. Puram, New Delhi while SI. No.3 is to report DCAO, Dte. Genl ITB Police. Concerned Branch to issue their formal orders provided they are in medical category Shape-1.

3. On their appointment as Inspector (Accountant) on absorption basis, they will sever all connections in their previous post of Inspector/CM.

4. This issues with the approval of competent authority.”

And

“Dated 21.06.2004.

#### ORDER

In compliance of the Order No. 1-21018/2/2002-Pers-2-9404-dated 17.06.2004 of Directorate General, ITB Police Inspector/CM No. 869960024 Dhan Parkash Tyagi, who was posted in Delhi Milk Scheme on deputation, on repatriating by Delhi Milk Scheme on 01.06.2004 (FN), reported in Directorate General on the same day i.e. 01.06.2004 (FN) and on the same date appointed as Inspector (Accountant) in ITB Police ) in the pay scale of Rs. 6500-200-10500/- on the basis of permanent absorption. On relieving by the Dte. General ITB Police on

17.06.2004 (AN), the concerned S.O reported in this office on 18.06.2004(FN). His appointment date as Inspector (Accountant) shall be 01.06.2004. Therefore, he is included in the posted strength of this office from his date of reporting i.e. 18.06.2004 and from the same date he will be eligible to get all pay and allowances as prescribed for Delhi as per rules.

2. The above S.O. is posted to Account Section-01 in Central Record Office. The unavailed journey period for one day is added in his Earned Leave as per rules.

3. It is certified that no disciplinary/vigilance case is either pending or contemplated against him and present medical category is "AYE".

4. On appointment as Inspector (Accountant) Sh. Dhan Parkash Tyagi will sever all connections in his previous post of Inspector/CM.”

7. It can be seen from the above that the appointment letters state that on appointment as Inspector/Accountant, all connections in their previous post of Inspector/CM shall be severed.

8. In the subsequent Selection Committee proceedings held in October/November 2004, Respondent No. 4 was again not found fit for selection for the post of Inspector/Accountant. However, in the next year, he was found fit and was appointed to the post w.e.f. 1<sup>st</sup> March, 2005 i.e. after almost one year from the appointment of the Petitioners to the aforesaid post.

9. One Sh. D.C. Tiwari was also appointed as Inspector/Accountant and he desired to take benefit of his past seniority for the post of Inspector/CM and made a representation to the Respondents. The same was rejected vide letter

dated 3<sup>rd</sup> May, 2005 on the ground that the post of Inspector/CM and Inspector/Accountant were separate having distinct recruitment rules. The rejection letter states as under:-

“Please perusal your ION No. 3573 dated 31.3.2005 under which application of Inspector/Accountant D.C. Tiwari regarding his seniority in the post of Inspector/Accountant has been forwarded.

2. it is to inform in above reference that name of only those Inspectors/Accountant have included in the seniority list issued by the Directorate General vide memorandum No. 3145-50 dated 01.01.2005, who were working on the post of Inspector/Accountant on 01.01.2005 in ITB Police. Because Shri Tiwari was not posted on the post of Inspector/Accountant on this date, so his name has not included in this list.

3. It is also informed in above reference that, in ITB Police post of Inspector/CM and Inspector/Accountant are separate and the recruitment rules of both posts are different. Because, the appointment for the post of Inspector/Accountant is made on the basis of permanent absorption. Hence, according to rules the seniority in the post of Inspector/Accountant cannot fix on the basis of his seniority on the post of Inspector/CM. It is therefore requested to inform the same to Shri Tiwari, accordingly.

4. This has the approval of competent authority.”

10. A seniority list of the persons holding the post of Inspector/Accountant was circulated vide memorandum dated 12<sup>th</sup> January, 2006. The said memorandum placed Petitioner No. 1 at Sr. No. 5, Petitioner No. 2 at Sr. No. 6 and Respondent No. 4 was placed at Sr. No. 9. Later, on 15<sup>th</sup> January, 2008, another seniority list was published by Director General, ITBP where Petitioner No. 1 was placed at Sr. No. 3, Petitioner No. 2 was placed at Sr.No.

4 and Respondent No. 4 was placed at Sr.No. 6.

11. Respondents then vide memorandum dated 14<sup>th</sup> October, 2008, revised the seniority list issued on 12<sup>th</sup> January, 2006 and 15<sup>th</sup> January, 2008 and downgraded the seniority of the Petitioners vis-a-vis Respondent No.4-Sh. Yograj Sharma. As per this memorandum, the Petitioner No. 1 was placed at Sr. No. 4, Petitioner No. 2 was placed at Sr. No.5 and Respondent No. 4 was placed at Sr.No.1.

12. Aggrieved by the downgrading of their seniority, Petitioners made representation to the Respondents, however, the same was rejected by a non-speaking order dated 31<sup>st</sup> December, 2008. The subsequent representation dated 03<sup>rd</sup> February, 2009 was also rejected vide letter dated 21<sup>st</sup> May, 2009 which reads as under:-

“Please perusal your office ION No. 1-47014/Promotion/Adm/08-8669 dated 4.12.08 and ION No. 1-45024/Seniority/CRO/Adm/08-102 dated 05.01.09 under which applications submitted by No. 798030234 Inspector/Accountant (now JAC/ Account Officer) Inder Pal Singh Pundir and No. 850030239 Inspector/Accountant (now JAC/ Account Officer) Rajpal Malik have been forwarded. The application of Inspector/Accountant Parmod Kumar Kaushik dated 12.11.08 through Personal-1 and application of Inspector/Accountant Dhan Parkash Tyagi dated 03.02.09 was received directly to this Directorate General. The above said personnel submitted their objections in above said applications regarding amended seniority list of Inspector/Accountant issued by the Directorate General vide memorandum No. 1-15013/6/02-Pers-2-21159-60 dated 14.10.08.

2. It is to inform in this matter that the applications of above personnel were examined at length and as per the direction of Director General the case was sent to DOP & T through MHA for clarifications. As it has made clear in the DOP & T Diary No. 17003 (O)/JS(E)/09 dated 06.04.09 that both posts of Inspector/CM and Inspector/Accountant are 'Analogous' vide memorandum dated 07.03.1984 of DOP & T. Therefore the service rendered in the post of Inspector/CM shall be counted for the seniority for the post of Inspector/CM shall be counted for the seniority for the post of Inspector/Accountant. Accordingly, the amended seniority list of Inspector/Accountant issued by the Directorate General vide memorandum No. 1-15013/6/02-Pers-2-21159-60 dated 14.10.08 is proper. Hence applications submitted by the above personnel are hereby rejected.

3. It is therefore requested to inform all concerned Inspector/Accountant accordingly.”

13. It is also noticed that one Sh. Tara Dutt Papnoi, Inspector/CM was appointed as Inspector/Accountant vide order dated 26<sup>th</sup> June, 2009. It is stated that Sh. Tara Dutt Papnoi is senior to the Petitioners in the post of Inspector/CM but has been appointed as Inspector/Accountant after a period of five years of the appointment of the Petitioners and if the Respondents were to follow the principle applied in the case of Respondent No.4, Sh. Tara Dutt Papnoi would also be given seniority on the basis of his position in Inspector/CM despite the fact that the Petitioners have been working on the post of Inspector/Accountant since 2004. As a result they would become junior to Sh. Tara Dutt Papnoi as well who has been appointed in 2009 as Inspector/Accountant.

14. In the petition, it has also been averred that there was one post of Joint Assistant Commandant (Accounts Officer) which as per the Recruitment Rules, is to be filled up for the post of Inspector/Accountant by way of promotion applying the methods of “selection-cum-seniority”. The Petitioners submit that as per the pre-revised seniority list dated 15<sup>th</sup> January, 2008, they stood a chance for being promoted to the post of Joint Assistant Commandant. However, on account of illegal downgrading of their seniority, they have now been illegally deprived of this opportunity. It is also submitted that if the Respondents continue to apply the seniority position of Inspector/CM, Petitioners' seniority would continuously undergo a change, irrespective of their date of appointment as Inspector/Accountant.

15. Challenging the reversion of their seniority in the post of Inspector/Accountant, the Petitioners have filed the present petition. The short question that arises for consideration in the present petition is whether Respondents are justified in applying the seniority position in the post of Inspector/CM to the post of Inspector/Accountant. ITBP asserts that the revised seniority has been fixed by including the service rendered on regular basis in the equivalent grade in the parent department, held at the time of absorption. On this basis, seniority of Respondent No. 4 was fixed at Sr.No.1 by counting the past service rendered by him in the post of Inspector/CM w.e.f. the date since he was holding the post of Inspector/CM on regular basis. ITBP contends that since the Petitioners were promoted to the post of Inspector/CM w.e.f. 29<sup>th</sup> February, 2002 their seniority would be below Respondent No. 4. It is further urged that the question whether the post of

Inspector/Accountant and Inspector/CM is analogous or not, as contended by the Petitioners has also been clarified by DOPT vide letter dated 6<sup>th</sup> April, 2009 to the effect that the said two posts are analogous. The Respondents, further in their counter affidavit, have sought to justify their action by relying upon OM's dated 29<sup>th</sup> May, 1986 and 27<sup>th</sup> March, 2001. The said OM's, inter alia, provide as under:-

“New Delhi, the 29<sup>th</sup> May, 1986

OFFICE MEMORANDUM

Subject: **Seniority of persons absorbed after being on deputation**

The undersigned is directed to say that the existing instructions on seniority of transferees contained in para 7 of the Annexure to this Department's O.M. No. 9/11/55-RPS dated the 22<sup>nd</sup> December, 1959 (copy enclosed) mainly deal with cases where persons are straightway appointed on transfer. It is, however, observed that most of the cases of permanent absorption are those where the officers were taken on deputation/transfer contained in the relevant recruitment rules. The O.M is intended to fill this gap in the existing instructions.

2. Even in the type of cases mentioned above, that is, where an officer initially comes on deputation and is subsequently absorbed, the normal principle that the seniority should be counted from the date of such absorption, should mainly apply. Where, however, the officer has already been holding on the date of absorption in the same or equivalent grade on regular basis in his parent department, it would be equitable and appropriate that such regular service in the grade should also be taken into account in determining his seniority subject only to the condition that at the most it would be only from the date of deputation to the grade in which absorption is being made. It has also to be ensured that the fixation or seniority of a transferee in accordance

with the above principle will not affect any regular promotions made prior to the date of absorption. Accordingly, it has been decided to add the following sub-para (iv) to para 7 of general principles communicated vide O.M. dated 22<sup>nd</sup> December, 1959:

(iv) In the case of a person who is initially taken on deputation and absorbed later (i.e. where the relevant recruitment rules provide for “Transfer on deputation/Transfer”), his seniority in the grade in which he is absorbed will normally be counted from the date of absorption. If he has, however been holding already (on the date of absorption) the same or equivalent grade on regular basis in his parent department, such regular service in the grade shall also be taken into account in fixing his seniority, subject to the condition that he will be given seniority from the date he has been holding the post on deputation,

Or

The date from which he has been appointed on a regular basis to the same or equivalent grade in his parent department,

Whichever is later.

The fixation of seniority of a transferee in accordance with the above principle will not, however, affect any regular promotions to the next higher grade made prior to the date of such absorption. In other words, it will be operative only in filling up of vacancies in higher grade taking place after such absorption.

In cases in which transfers are not strictly in public interest, the transferred officers will be placed below all officers appointed regularly to the grade on the date of absorption.

All the Ministries/Departments are requested kindly to bring these instructions to the notice of all concerned in the

Ministries/Departments and Attached and Subordinate Offices under them for their guidance and to ensure their compliance.

These orders will not be applicable to transfers within Indian Audit and Accounts Department, which are governed by orders issued by the C. & A.G. from time to time.

Hindi version is attached.”

**And**

“New Delhi 110001  
March 27,2001

**OFFICE MEMORANDUM**

**Subject: Seniority of persons absorbed  
after being on deputation.**

The undersigned is directed to say that according to our O.M.No.20020/7/80-Estt(D) dated May 29, .1986 (copy enclosed) in the case of a person who is initially taken on deputation and absorbed later (i.e. where the relevant recruitment rules provide for "transfer on deputation/transfer"), his seniority in the grade in which he is absorbed will normally be counted from the date at absorption. If he has, however, been holding already (on the date of absorption) the same or equivalent grade or regular basis in his parent department, such regular service in the grade shall also be taken into account in fixing his seniority, subject to the condition that he will be given seniority from

the date he has been holding the post of deputation,  
or

the date from which he has been appointed on a  
regular basis to same or equivalent grade in his  
parent department,

*whichever is later.*

2. The Supreme Court has in its judgement dated December 14, 1999 in the case of *Shri S .I. Rooplal & Others Vs. Lt. Governor through Chief Secretary, Delhi, JT1999 (9) SC597* has held that the words "whichever is later" occurring in the Office Memorandum dated May 29, 1986 and mentioned above are violative of Articles 14 and 16 of the Constitution and, hence, those words have been quashed from that Memorandum. The implications of the above ruling of the Supreme Court have been examined and it has been decided to substitute the term "whichever is later" occurring in the Office Memorandum dated May 29, 1986 by the term "whichever is earlier".

3. It is also clarified that for the purpose of determining the 'equivalent grade in the' parent department mentioned in the Office Memorandum dated May 29, 1986 the criteria contained in this Department Office No. 14017/27/75-Estt (D)(pt) dated March 7, 1984 (copy enclosed), which lays down the criteria for determining analogous posts, may be followed.

4. These instructions shall take effect from the December 14, 1999 which is the date of the judgement of the Supreme Court referred to above.

5. In so far as personnel serving in Indian Audit and Accounts Departments are concerned, these instructions are issued in consultation with the Comptroller and Auditor General of India. However, these orders (in keeping with paragraph 4 of the Office Memorandum dated May 29, 1986 as referred to above) will not be applicable to transfers within the Indian Audit and Accounts Department which are governed by orders issued by the C&AG from time to time.

6. The above instructions may be brought to the notice of all concerned for information, guidance and necessary action."

16. Before dealing with the application of the above mentioned OM's it is apposite to refer to the Indo-Tibetan Border Police Force, Combatant

Ministerial Cadre (Non-Gazetted) Recruitment Rules 1999. The relevant part of the Rules reads as under:

| Name of the Post                                                | Number of Posts | Classification                                                                                              | Scale of Pay         | Whether by selection-cum-seniority or selection by merit | Whether benefit of added years of service admissible under rule 30 of the Central Civil Services (Pension) Rules, 1972 | Age limit for direct recruits.                                                                                                                              |
|-----------------------------------------------------------------|-----------------|-------------------------------------------------------------------------------------------------------------|----------------------|----------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------|
| (1)                                                             | (2)             | (3)                                                                                                         | (4)                  | (5)                                                      | (6)                                                                                                                    | (7)                                                                                                                                                         |
| 2. Inspector (Accountant)                                       | 10* (2000)      | General Central Service Group 'B' (Non-gazetted) (Combatant Ministerial)                                    | Rs. 6500-200-10500/- | <b><u>Selection by merit</u></b>                         | Not applicable.                                                                                                        | Not applicable.                                                                                                                                             |
| Education and other qualifications required for direct recruits |                 | Whether age and education qualification prescribed for direct recruits will apply in the case of promotees. |                      | 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 |
| (8)                                                             |                 | (9)                                                                                                         |                      | (10)                                                     |                                                                                                                        | (11)                                                                                                                                                        |
| Not Applicable.                                                 |                 | Not Applicable.                                                                                             |                      | Two Years                                                |                                                                                                                        | By absorption failing which by deputation                                                                                                                   |

**“Absorption:**

From amongst Inspector (Combatant Ministerial) of Indo-Tibetan Border Police Force, who have successfully undergone Cash and Accounts Course

conducted by Institute of Secretariat Training and Management or any other recognised institute and being in medical category SHAPE-I.

**Deputation:**

From amongst Sub-Inspector (Combatant Ministerial) in the pay scale of Rs. 5500-9000 having at least three years regular service in the grade and have undergone Cash and Accounts Course conducted by Institute of Secretariat Training and Management or any other recognised institute and subject to passing Departmental Test and being In medical category SHAPE-I.

(The period of deputation including the period of deputation in another' ex-cadre post held immediately preceding this appointment in same or some other Organisation or department of the Central Government shall ordinarily not exceed three years) The maximum age limit for appointment, by deputation shall be not exceeding 56 years as on the closing date of receipt of applications.”

17. It can be discerned by reading the aforesaid OM's and the Recruitment Rules, that the same are applicable in case of deputationists who are absorbed in the department. In fact, perusal of the Recruitment Rules show that absorption by way of deputation is only applicable to Sub-Inspector (CM). Moreover, the above mentioned OM's would not be pertinent to the facts of the present case, as the Petitioners have been absorbed as Inspector/Accountant **on selection by merit** as per the Recruitment Rules. The word "selection" has been used in the sense of selecting an officer for promotion on the basis of the criterion of selection by merit. The requirement for such a selection is that selection shall be made on the basis of assessment of performance and not seniority. The said mode lays emphasis on merit only. The selection of the eligible candidates under “selection by merit” is determined by assessing the candidates wherein merit is the governing factor

and not seniority.

18. A perusal of the Counter Affidavit filed by the Respondents shows that Respondents do not controvert the applicability of the above-mentioned Recruitment Rules.

19. In view of the aforesaid, it is clear that the downgrading of the settled seniority of the Petitioners is on a wrong premise. The Petitioner's seniority could not be refixed on the basis of the OM's dated 29<sup>th</sup> March, 1986 and 27<sup>th</sup> March, 2001. The same would then conflict the recruitment rules discussed above.

20. The seniority list dated 14<sup>th</sup> October, 2008 refixing the seniority is accordingly set aside and ITBP is directed to publish a fresh seniority list taking note of the observations made in this order.

21. The writ petitions are allowed with no order as to costs.

**SANJEEV NARULA, J**

**S.MURALIDHAR, J**

**JANUARY 07, 2019/ss**