

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

% **Date of decision: 24th September, 2020.**

+ **W.P.(C) 2591/2020 & CM No.9053/2020 (for ad-interim directions)**

PAVNESH KUMAR

..... Petitioner

Through: Mr. Alakh Alok Srivastava, Adv.

Versus

UNION OF INDIA & ORS

..... Respondents

Through: Ms. Shubhra Parashar, Mr. Virender Pratap Singh Charak, Mr. Pushpender Pratap Singh and Mr. Kapil Gaur, Advs. with Mr. Vinod Kumar, Deputy Commandant (Law Officer) and Deputy Commandant Dr. Pradeep Kumar, Senior Medical Officer, BSF.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

HON'BLE MS. JUSTICE ASHA MENON

[VIA VIDEO CONFERENCING]

RAJIV SAHAI ENDLAW, J.

1. The petitioner, a Constable (General Duty (GD)) in the respondents Border Security Force (BSF), having successfully qualified the written test, Physical Standards Test (PST) and the Physical Efficiency Test (PET) components of the Limited Departmental Competitive Examination (LDCE) for the post of Sub-Inspector (SI) (GD), has filed this petition impugning the opinion of the Medical Board and Review Medical Board, finding the petitioner unfit for the post of SI (GD).

2. It is the case of the petitioner, (i) that the petitioner is a 30 years old, who joined BSF on 4th April, 2012 and since then i.e. for the last about 8 years, is serving as a Constable (GD); (ii) that in the year 2018-2019, the petitioner submitted his application for selection for the post of SI (GD) through LDCE-2018 and qualified the written examination, verification of documents, PST and PET components of the LDCE; (iii) that the petitioner, on 16th December, 2019, in his annual medical examination as a Constable (GD) in BSF, was declared in medical category Psychological, Hearing, Appendages, Physical Capacity and Eye Sight (SHAPE)-I; (iv) that the petitioner, on 23rd December, 2019, as part of LDCE-2018 appeared before the Medical Board but was declared "unfit", due to (a) Right Side Varicocele; (b) Varicose Veins Left Calf; and, (c) Tachycardia Pulse Rate 110/Min (Normal Range 60-100/Min); (v) that the petitioner got himself medically examined at UHM District Hospital, Kanpur and as per the advice of the said Hospital, on 28th December, 2019 underwent a minor surgery and was, vide Medical Certificate dated 29th December, 2019 issued by the said UHM District Hospital, Kanpur, declared medically fit; (vi) that thereafter the petitioner applied for review medical examination, which was carried out on 27th February, 2020 and in which, the petitioner was again found medically unfit, this time owing to (a) being a operated case of varicose veins left lower limb (date of operation dated 28th December, 2019); and, (b) post operative right side varicocele (less than 6 months); (vii) that though the petitioner represented against the findings of the Review Medical Board but did not hear anything further; and, (viii) that the findings dated 23rd December, 2019 of the Medical Board and the findings dated 27th February, 2020 of the Review Medical Board are contrary to the findings dated 16th

December, 2019 of the annual medical checkup of the petitioner. Reliefs, of setting aside of the findings of the Review Medical Board and in the alternative, of treating the petitioner as medically fit, immediately after lapse of six months of 28th December, 2019, when the petitioner underwent surgery, are sought.

3. The petition came up before this Court first on 6th March, 2020, when notice thereof was ordered to be issued. The petition thereafter remained to be listed owing to the prevalent pandemic. The petitioner applied for early hearing and the application therefor came up before this Court on 30th July, 2020 and was allowed and the petition, considering the nature of the relief claimed therein, was taken up for hearing forthwith.

4. The respondents BSF have filed the counter affidavit, pleading (a) that the annual medical examination is done in BSF, every year, for all BSF personnel, in accordance with the BSF Medical Manual, 3rd Edition; as per Chapter 2 pages 122 to 124 thereof; varicose veins/varicocele checking is not done during annual medical examination; (b) however as per Chapter 3 page 263 of the said Manual, detailed medical examination during recruitment requires that varicose veins/varicocele be checked; (c) that the Review Medical Board examined the petitioner as per the instructions contained in the Revised Uniform Guidelines for Medical Examination for recruitment of GOs and NGOs in Central Armed Police Forces (CAPFs) and Assam Rifles (AR) – 2015 (Recruitment Guidelines 2015); (d) that the annual medical examination categorization is based on functional capacity of the individual as a whole, for BSF duties, with a view to ensure that low medical category awarded to a person for minor physical defects of a

particular organ or system do not, by itself, restrict his employment; the classification done enables the administrative authorities concerned to assign appropriate appointments to personnel, depending upon their employment capacity; the annual medical examination is carried out in a routine manner, once in a calendar year, wherein generally, major elements are assessed on SHAPE practice; (e) that however during the recruitment for the post of SI(GD) through LDCE, medical examination of candidates is carried out as per the Recruitment Guidelines 2015; (f) that the post of SI (GD), which was applied for by the petitioner, was a fresh recruitment and detailed medical examination is carried out, considering the aspects of basic recruitment training as well as future duties of SI in BSF; (g) that as per the Recruitment Guidelines 2015, during the examination of heart and vascular system, the pulse should be examined at rest and the candidate is made to hop 25 times and pulse rate is again recorded immediately after hopping and 2 minutes after hopping; in normal conditions, the pulse rate will increase after hopping and normalize after 2 minutes; failure of pulse rate to rise with exercise will indicate disease of conduction system, like sick sinus syndrome; similarly, resting pulse persistently over 100 should be kept under observation for some time and re-examined subsequently next morning; candidate with persistent tachycardia (more than 100 pulse rate per minute) will be declared disqualified; (h) that as per the Recruitment Guidelines 2015, a candidate cannot be recruited within six months of varicocele surgery; and, (i) that the disability/disease of the petitioner is also enabling to be produced before the Medical Examination Board to assess medical fitness of the petitioner in SHAPE factor.

5. Though the petitioner has filed a rejoinder to the counter affidavit but only pleading (i) that the respondents BSF are incorrectly treating that the post of SI(GD) which was applied for by the petitioner, was a fresh recruitment; (ii) that the respondents BSF are applying different medical standards for promotion to the same post of SI(GD), through general promotion and through LDCE and which is not permissible in law; reliance is placed on *Man Singh Vs. Union of India* 2012 SCC OnLine Del 6360 (DB) and *Ajay Pandey Vs. Union of India* MANU/DE/1721/2014 (DB) to contend that the Recruitment Rules and Guidelines for appointments which would apply to appointments through LDCE, would have to be those which are applicable to appointment by promotion; that appointment through LDCE falls in the category of appointment by promotion, being in a manner of speaking, accelerated promotion; (iii) that the respondents BSF themselves have stated that varicose veins and varicocele is not checked at the time of annual medical examination, meaning that it is not checked at the time of regular promotion and that it is only checked at the time of recruitment; thus at the time of promotion through LDCE, varicose veins and varicocele cannot be ground for denying appointment; and, (iv) that in any case now six months since the surgery of the petitioner have lapsed and the petitioner, as per the respondents BSF also is now medically fit for promotion.

6. The counsel for the petitioner, during the hearing on 17th September, 2020 also, in the vein of the stand taken in the rejoinder, did not controvert the findings of the Review Medical Board. He however argued that the respondents BSF are erroneously treating promotion of the petitioner from Constable (GD) to SI (GD) in the BSF, as his fresh appointment /

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recruitment. It was contended that the respondents BSF are illegally applying different criteria, for regular promotion i.e. promotion in the due course and promotion through LDCE and which is not permissible.

7. In accordance with our direction in the earlier orders, Deputy Commandant Dr. Pradeep Kumar, Senior Medical Officer of the respondents BSF was also present during the hearing on 17th September, 2020 and on enquiry explained 'varicocele' as "restriction of vein in scrotum, leading to collection of blood in and swelling of the scrotum, manifesting in difficulty in walking, running etc." and 'varicose veins' as "malfunctioning of valves of veins between deep and superficial veins, affecting flow of blood from the lower limbs to the heart and resulting in collection of blood in foot, causing swelling, and leading to ulcer". He also drew our attention to Annexure R-6 to the counter affidavit, being the Recruitment Guidelines 2015 and particularly to Clause 6 titled "General Grounds for Rejection" thereof, in which at Serial No.28, it is mentioned "undescended testis, atrophic testis, marked varicocele, testicular swellings" and at Serial No.29, it is mentioned "Varicose veins". Attention was also invited to Clause 11 titled "Miscellaneous Conditions" and whereunder, under the heading "Post-operative cases (Duration for fitness)", at Serial No.(d), with respect to varicocele surgeries, six months is mentioned.

8. On enquiry with respect to the age profile of Constables (GD) who are promoted in due course to the post of SI (GD), all present were *ad idem* that the same may take about 20 years or more and involves promotion, first to Head Constable, then to Assistant Sub-Inspector and thereafter to Sub-Inspector.

9. On further enquiry, it was informed that the upper age limit for Constables (GD) to appear in LDCE for the post of SI(GD) is 32 years, for General Category candidates (the petitioner belongs to the said category) and 37 years for the Scheduled Castes/Scheduled Tribes candidates.

10. The counsel for the respondents BSF on 17th September, 2020 also drew our attention to the Admit Card/call letter for the examination, issued to the petitioner, to contend that the same contains a condition that the petitioner will appear in the medical examination. It was argued that the petitioner cannot now contend that LDCE cannot be treated as a fresh recruitment.

11. The counsel for the petitioner, on 17th September, 2020, contended that the question, whether appointment vide LDCE is promotion or fresh recruitment, is no longer *res integra*. Attention was invited to **Man Singh** supra, which was a case of LDCE in Central Industrial Security Force (CISF), for the post of Assistant Commandant therein. The petitioner therein namely Man Singh, was a Sub-Inspector (Executive), already serving in CISF, who had participated in LDCE and was not appointed owing to being found medically unfit. Two legal questions were framed by the Division Bench of this Court, for adjudication. Firstly, whether appointment through LDCE tantamounts to appointment by promotion or is an appointment by direct recruitment and secondly, whether two medical standards for eligibility of candidates could be prescribed, one for those to be selected through LDCE and the second for those who are promoted to the same rank from the feeder cadre thereof. Both the said questions were answered in favour of the petitioner therein i.e. by holding that appointment

through LDCE was a promotion and not direct recruitment and that there could be no two different standards for medical examination for promotion, one through LDCE and the other in the regular/due course. The counsel for the petitioner also stated that there were few other judgments also holding so and he would forward to us, copies thereof.

12. We, on 17th September, 2020, however were of the view that the same medical standards could not be applied for promotion/recruitment, at the age of 32 years and at the age of 45-50 years or more, even if to the same rank. It was felt that the tasks which a person can do at 32 years cannot be done/expected by/of the same person at the age of 50 years or more and irrespective of whether LDCE was a fresh recruitment or promotion. However, having gone through the judgments referred to by the counsel for the petitioner, asking the counsel for the petitioner to forward the said judgments and asking the counsel for the respondents BSF to forward to us the Recruitment Rules and verbally opining in open Court that after going through the judgments and the Rules, we may be referring the matter to a Larger Bench, we on 17th September, 2020 intended to pass orders, instead of in open Court, in Chamber (at the residence!).

13. The counsel for the petitioner, in addition to *Man Singh* and *Ajay Pandey* supra, forwarded to us (A) *Satvir Singh Vs. Union of India* 2015 SCC OnLine Del 7272 (DB), (B) *Const. Karan Tamang Vs. Union of India* 2018 SCC OnLine Del 11436 (DB), (C) *Braham Prakash Vs. Union of India* 2018 SCC OnLine Del 11924 (DB) and (D) *Manoj Kumar Gupta Vs. Union of India* 2019 SCC OnLine Del 7564 (DB).

14. The counsel for the respondents BSF however instead of forwarding the Recruitment Rules, forwarded only the advertisement published for LDCE-2018.

15. A perusal of *Man Singh* supra showed this Court to have therein held LDCE to be promotion and not direct recruitment, merely on the basis of the notings dated 18th November, 2011 and 22nd November, 2011 of the Under Secretaries in the Department of Personnel and Training (DoPT) and the Ministry of Home Affairs (Personnel), to the effect that the RR Branch of the DoPT had clarified that the LDCE is a mode of promotion and because the correctness and authenticity of said notings was not disputed by the respondents in that case. It was held, that the respondents having themselves taken the position that appointment through the LDCE is a mode of promotion, it had to be held that Recruitment Rules or Guidelines for appointment which would apply to appointments through the LDCE, would have to be those which are applicable to appointment by promotions. With respect to the second question i.e. whether there could be two different medical standards for promotion, one through LDCE and the other in the regular/due course, it was reasoned, (i) that the petitioner therein namely Man Singh, in the annual medical examination had been categorised as SHAPE-I and had never been found medically unfit; (ii) that there can be no rationale or justification in describing different medical standards for the same post in the same organization; (iii) that LDCE enables CAPFs personnel to fast track promotion to a higher position and, therefore, through the LDCE, a personnel is appointed to a higher rank at a younger age; if the person is to wait for a promotion in due course, he would be older in age; however this could not be a justification for providing more stringent

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standards for younger persons and setting less stringent standards when the person is to be appointed on promotion in due course, and therefore, older in age; (iv) that it was not disputed that Assistant Commandants, for which post LDCE in that case was held, whether appointed by direct recruitment or promoted in due course or through LDCE, perform identical functions; and, (v) that there was thus no basis/reason for drawing distinction between the fitness required for the person who had been appointed as Assistant Commandant through LDCE and the person who had been appointed as Assistant Commandant by promotion in due course.

16. As far as other judgments referred to by the counsel for the petitioner are concerned, they merely rely on *Man Singh* supra, although the latter two dealt with another CAPF i.e. the Central Reserve Police Force (CRPF).

17. We also found the advertisement inviting applications from Constables (GD) in BSF, for selection to the post of SI (GD) in BSF through LDCE, (i) in Clause 2 titled "Eligibility Conditions" and in sub-clause (a) thereof to be providing, that only those who had completed four years of service including basic training, were eligible and in sub-clause (b) thereof providing, that the upper age limit for appearing in the LDCE was 32 years, and in sub-clause (e) thereof providing, that the medical category should be SHAPE-I and that applications of candidates having low medical category would not be entertained; (ii) in Clause 3 providing, that in all, three chances were given for appearing in the LDCE; (iii) in Clause 5 titled "Scheme of Examination", besides prescribing checking of service records, written examination (OMR based), Physical Measurements and Physical Efficiency Tests, also providing that "detailed medical examination of those candidates

who come out successful in the written examination and PET will be conducted as per existing guidelines, with each candidate being declared either 'Fit' or 'Unfit' and none being categorized "temporarily unfit"; (iv) in Clause 8 titled "Guidelines for filling up the application form", in sub-clause (e)(vi) requiring "an undertaking from candidate that he is willing to resign from present post in case he is selected for applied post as per proforma attached"; (v) in Clause 11 titled "General Instructions", in sub-clause (xi) providing "it is also intimated that success in the examination will not confer any right to appointment unless Competent Authority is satisfied that the candidate is suitable in all respects for appointment to the post"; (vi) against "Physical Measurements" providing "as applicable to SI direct entry candidates" and "No relaxation will be given in case a candidate has been appointed in lower rank with relax standard"; and, (vii) the proforma of the undertaking aforesaid requiring the candidate to undertake "...that I am willing to resign from present post i.e. Constable (GD) in case of my selection to the post of Sub-Inspector (GD) in BSF through Limited Departmental Competitive Examination".

18. All the aforesaid Clauses in the advertisement inviting applications for LDCE and in pursuance to which the petitioner had applied were found to be counter-indicative to appointment as SI(GD) through LDCE being a promotion and not a direct recruitment. It was felt that if it was a promotion, even if accelerated, there would have been no need to submit a resignation from service of BSF as a Constable (GD). It was also felt that while SHAPE-I medical category was an eligibility condition for participating in LDCE, being found medically fit as per guidelines applicable to fresh recruitment, was in the scheme of LDCE, just like the

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written examination, Physical Measurements Test and Physical Efficiency Test, all of which also were not requirements to be undergone for promotion in due course. This became further evident from the standards of Physical Measurements being expressly stated as that of direct recruits to the post of SI(GD), with no latitude being given for the standards, even if lower for the post of Constable (GD). The advertisement having expressly ruled out "temporarily unfit", it was felt that merely because six months have elapsed since the surgery of the petitioner, during the pendency of this petition, did not entitle the petitioner to a direction for fresh medical examination to see whether he is now fit.

19. It was also felt that the petitioner having participated in the LDCE subject to the aforesaid conditions, cannot after remaining unsuccessful, challenge the conditions (the need to burden this judgment with the judgments holding so is not felt). It was yet further felt that allowing the petitioner to at this stage challenge the conditions subject to which he had participated in the LDCE would prejudice others similarly placed as the petitioner and who did not participate knowing that they would not be able to fulfill the said conditions and the petitioner could not be allowed to so benefit.

20. We, on 17th September, 2020, were also of the view,

(A) In none of the judgments which had been referred to by the counsel for the petitioner, was there any adjudication of the question, whether appointment through LDCE is a promotion or a fresh recruitment. In *Man Singh* supra, the said question was decided on the basis of admissions imputed to the respondents therein as

contained in the notings of the Under Secretaries of the Ministry. All the subsequent judgments merely followed *Man Singh* supra.

(B) The question, whether appointment through LDCE is a promotion or fresh recruitment, is a question of law and the answer thereto, even if returned on the basis of admission, does not constitute a binding precedent. An Under Secretary to the Government of India is not in a position or authority to make any such admission and even if has made such an admission and Union of India before the Court has not contended otherwise, the same would still not bind the Court in a subsequent case, when the same question arises for consideration.

(C) In *Uptron India Limited Vs. Shammi Bhan* (1998) 6 SCC 538 it was held that a wrong concession on a question of law, made by a counsel is not binding on his client; such concession cannot constitute a just ground for a binding precedent. In *The Central Council for Research in Ayurveda and Siddha Vs. K. Santhakumari* (2001) 5 SCC 60 it was held that the appellants, in the High Court had failed to point out that the promotion was in respect of a selection post and the principle to be applied was merit-cum-seniority and owing thereto the High Court had granted relief to the respondent; merely because the counsel had made an admission or concession, inadvertently or under a mistaken impression of law, did not bind the client and could not enure to the benefit of any party. In *Union of India Vs. Mohanlal Likumal Punjabi* (2004) 3 SCC 628 it was again held that wrong concession made by a counsel cannot bind the parties when statutory provisions clearly provided otherwise and that Courts are not to act on

the basis of concession but on the basis of the applicable provisions. Wrong concession on a pure question of law, was held in *Union of India Vs. S.C. Parashar* (2006) 3 SCC 167 also, to not bind a party. Reference in this regard can also be made to *National Highways Authority of India Vs. Prakash Atlanta* 216 (2015) DLT 326 (DB), *Samsung Electronics Company Limited Vs. Kapil Wadhwa* MANU/DE/0571/2012 and *SRF Foundation Vs. Ram Education Trust* 220 (2015) DLT 344.

(D) The sheer difference in age, in the two modes of appointment, even though to the same rank, one by LDCE and the other in the due course, in our view is sufficient for the two to be treated differently and to be not placed at par. Through LDCE, Constables, even though already working in BSF, can aspire to be an SI, much before 32 years of age and which rank they would otherwise in the due course attain, in all probability, not before 50 years of age, if not more.

(E) There is a sea of difference between an SI in his 30s and an SI in his 50s. Though on paper, their job profile may be same but experience of life shows the duties allocated to the two, out of the same job profile, to be entirely different. Normal wear and tear of human body with age takes a toll on physical strength and efficiency and it cannot possibly be disputed that the tasks which a person in his 30s is able to perform are not ordinarily performable by the same person in his 50s.

(F) Merely because the rank of SI can also be reached by Constables in due course is no reason to treat those directly recruited

or through LDCE and those who have reached the said rank in due course, similarly. Rather, those who from being a Constable become SI through LDCE and their contemporary Constables who become SI in due course, are not likely to exist at the post of SI, at the same time. While those recruited through LDCE as SIs, by the time their contemporaries attain the said rank by promotion in due course, would be at higher ranks, the Constables attaining the said rank by promotion in due course, would be nearing superannuation and will work along with freshly recruited SIs, whether directly or through LDCE.

(G) LDCE is a means of providing an opportunity to those, who owing to compulsions of life have been forced to commence working life at a comparatively young age, of fulfilling their dreams and aspirations. Such persons are not condemned to live the entire life of drudgery, by being not in a position to resign from service already in hand, to fulfill their dreams. LDCE offers them an opportunity to, while holding on to their job in hand, if better than their peers, fulfill their dreams without risking their jobs. It is only after they are successful that they are required to resign from their jobs in hand.

(H) The aforesaid is clearly demonstrated from the facts of the present case. The petitioner, though claiming to be 30 years of age, has already served BSF for 8 years. He must have joined at the age of 22 years and but for LDCE would be nearing his age of superannuation by the time he would attain the rank of SI. Via LDCE,

he can achieve higher ranks which a regular promotee / promotee in due course can never dream of reaching.

(I) The advertisement inviting applications for LDCE and reflecting the scheme of LDCE also shows the same to be in the nature of a competition, giving Constables below 32 years of age, who are not only better educated but also better in physical strength and physical efficiency, a chance to jump over their contemporaries. When LDCE is a competition, of better educated, in a written examination, of Physical Measurements and of Physical Efficiency, there is no reason why the competition should not extend to medical fitness also, just like the competition in direct recruitment is. The respondents BSF cannot be compelled to have SIs, though young in age but having physical measurements and physical efficiency of a 50 year old and medically unfit, particularly when others who, though in the written examination and in the Physical Standards Test and Physical Efficiency Test may have scored less than the petitioner, are medically fit. It cannot be lost sight of that medical unfitness ultimately leads to loss in efficiency and which loss in efficiency ultimately effects the performance of duties in a force like the respondents BSF. Supreme Court in ***Central Provident Fund Commissioner Vs. Ravindran*** MANU/SC/1075/1993 held that the basic idea of LDCE is to strengthen the upper cadre by induction of young meritorious persons.

(J) The Courts often lament about the falling standards, including of the personnel of the Forces like the respondents BSF. The Courts

cannot, on the one hand raise such issues and on the other hand, compel the Forces to fill up their ranks with medically unfit candidates who in the long run will prove to be inefficient.

(K) A Division Bench of this Court in ***Employees Provident Fund Organization Vs. Rakesh Ranjan*** MANU/DE/1580/2013 held that promotion through LDCE quota is different from a normal promotion which is based on Annual Confidential Reports, seniority and the employee concerned coming in a zone of consideration. In the LDCE, an employee meeting eligibility pursuant to a circular, applies for being considered for promotion based on examination; there is no concept of seniority; an employee securing merit, is promoted; through this channel, the promotion is accelerated with regard to those employees, who because of low seniority, may not be eligible for normal promotion but can seek advancement based on their performance in the examination. Supreme Court also in ***Maharashtra Forest Guards and Foresters Union Vs. State of Maharashtra*** (2018) 1 SCC 149 held that LDCE is meant for selection for promotion irrespective of seniority but subject to minimum, in that case five years, of service.

21. Notwithstanding the aforesaid it was however felt that in view of earlier dicta aforesaid of Co-ordinate Benches, judicial decorum required us to refer the matter for consideration to a Larger Bench.

22. Our research however yielded ***Sunil Kumar Singh Vs. Union of India*** MANU/DE/0428/2017 (DB). The said petition was filed by 95 persons who had joined BSF as Sub-Inspector and through LDCE were

appointed Assistant Commandants. They were 35 to 40 years of age and were aggrieved by the direction mandatorily requiring all Assistant Commandants appointed through LDCE to undergo the Young Officers Commando Course. It was their contention that there was no such requirement for Sub-Inspectors promoted in due course to the post of Assistant Commandants and since LDCE was also a promotion, they could not be equated with direct recruits, in view of settled law. Discrimination between those promoted through LDCE and those promoted in due course was averred and reliance was placed on *Ajay Pandey* supra holding that there was no logic in prescribing different medical standards for those recruited by LDCE and those promoted in due course. It was also argued for the petitioners that those appointed as Assistant Commandants in due course and those appointed as Assistant Commandants through LDCE, perform the same functions and duties and compelling Assistant Commandants through LDCE to do the Young Officers Commando Course will affect their health in the long run. Per contra, it was the case of the respondent BSF that LDCE Officers were required to do the Young Officers Commando Course to enable them to also command Company in sensitive areas, like direct recruits. The petition was dismissed, recording/reasoning (a) a promotee becomes Assistant Commandant at a very advanced age as compared to the Assistant Commandants (LDCE) and there was no discrimination in not requiring the promotees in due course, who were no longer young, to do the Young Officers Commando Course; (b) that the issue which arose for consideration in *Ajay Pandey* supra was totally different and the said judgment has no applicability; (c) the LDCE appointees and the promotees in due course were not being asked to

compete and there was no discrimination; (d) the purpose was for achieving efficiency in the Force; (e) the Young Officers Commando Course was presumptive of a better physical health, to take on more onerous duties and the classification being reasonable, could not be said to be arbitrary; (f) those persons appointed through LDCE and those promoted in due course were integrated into a common class of Assistant Commandants, they could, for the purpose of promotion to the rank of Deputy Commandants, be classified on the basis of a promotional course, as there was an objective sought to be achieved; and, (g) the Rule requiring Assistant Commandants (LDCE) to undergo the Young Officers Commando Course to the exclusion of the Assistant Commandants (Promotees in due course), did not violate Articles 14 and 16 of the Constitution of India.

23. However, since all this was not discussed during the hearing on 17th September, 2020, we directed the matter to be re-listed on 23rd September, 2020 and informed the counsels of the aforesaid. The counsel for the petitioner contended that the requirement of resignation on being successful in LDCE was noticed in the judgments cited by him also and was held to be merely a technical requirement, not coming in the way of holding LDCE to be a promotion. He also contended that while the controversy in the subject case is the same as in *Ajay Pandey* supra, that in *Sunil Kumar Singh* supra, is different. The counsel for the respondents BSF was however still not ready with the Recruitment Rules applicable.

24. Being of the view that the Recruitment Rules may throw some light, we adjourned the matter to today, directing the counsel for the respondents BSF to forward to us the Recruitment Rules.

25. The counsel for the respondents BSF has forwarded to us the Border Security Force, General Duty Cadre (Non-Gazetted) Recruitment Rules-2015. The same provides for the post of Sub-Inspector to be filled up, 33% by direct recruitment, 50% by promotion, failing which by deputation and 17% by LDCE, failing which by promotion. It would thus be seen that LDCE is treated as a third mode, besides promotion and direct recruitment and is part of neither. Mention in this respect may be made of the report of March, 2008 of the Sixth Central Pay Commission, which in Chapter 6.1 titled "Appointment & Promotion Policy", in Clause 6.1.17 recommended that 10% of the vacancies earlier being filled by direct recruitment, for all posts in Group B and C, be filled up by LDCE, with all employees possessing minimum qualifications prescribed for direct recruitment being eligible for this examination, irrespective of their present grade and the period of incumbency therein. This was recommended to be over and above any existing scheme of LDCE for filling up posts in various grades. The same also indicates LDCE to have been intended to be treated as direct recruitment. However, Deputy Commandant (Law Officer), Vinod Kumar of the respondents BSF, present during the hearing, on enquiry, states that under the Recruitment Rules of 1994, 66.6% of the posts of SI were filled up by promotion and only 33.3% by direct recruitment. It appears that pursuant to the report of the Sixth Central Pay Commission, while making 50% posts available for direct recruitment, instead of 33.3% earlier, 17% were permitted to be filled through LDCE, treating the same as direct recruitment. The same again shows LDCE to have been treated at par with direct recruitment and not with promotion.

26. During the hearing today, on enquiry, we have also been informed that while for promotion from the post of Constable, via the post of Head Constable and Assistant Sub-Inspector, to the post of SI, the minimum educational qualification of Xth Class pass is the eligibility, the eligibility qualification for LDCE is a Graduate.

27. On enquiry, it is also informed that inspite of the candidates selected through LDCE being required to submit resignation, the earlier tenure of service as a Constable is counted for computation of pension.

28. On enquiry, Deputy Commandant (Law Officer), Vinod Kumar also informs that though on paper there is no difference in duties and functions to be performed by SIs who are directly recruited and SIs appointed through LDCE and SIs promoted in due course but while assigning functions/duties, the age and efficiency is always taken into consideration. It is informed that the promotees who are invariably over 50 years of age are not given sensitive postings.

29. Our attention has also been invited to Rule 8 of the Rules aforesaid pertaining to seniority and it is informed that seniority of SIs directly recruited and appointed through LDCE is computed from the date of commencement of training and of promotees, from the date of promotion.

30. On going through the Rules, we find the scheme of LDCE to be more akin to the scheme of direct recruitment except to the effect that LDCE is open only for serving personnel and not to outsiders.

31. The Deputy Commandant (Law Officer), Vinod Kumar and Deputy Commandant Dr. Pradeep Kumar, Senior Medical Officer of the respondents BSF also inform that the petitioner is not permitted under the
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Recruitment Rules-2015 to be recruited because of varicose veins, of which, notwithstanding the surgery, the real cause remains and the problem re-occurs.

32. Though the counsel for the petitioner has contended that ***Sunil Kumar Singh*** supra does not notice ***Man Singh*** supra but we are unable to agree. ***Sunil Kumar Singh*** supra has considered ***Ajay Pandey*** supra and which in turn notices ***Man Singh*** supra.

33. The counsel for the petitioner also informs us that this was the last chance available to the petitioner for LDCE and recruitment process has not closed as yet. He seeks a sympathetic view contending that all the earlier judgments are in his favour.

34. Per contra, the counsel for the respondents BSF has contended that the petitioner in the petition has not even taken the said grounds and in the rejoinder to the counter affidavit filed has expanded the scope of the petition.

35. Having considered the controversy, we are of the opinion that once ***Sunil Kumar Singh*** supra also of a Co-ordinate Bench, notwithstanding ***Ajay Pandey*** supra, has held that considering the purpose and reason behind requiring Assistant Commandants (LDCE) to do Young Officers Commando Course, notwithstanding the promotees Assistant Commandants to not do the said course, was not discriminatory, we need not refer the matter to a Larger Bench, as was earlier contemplated. It is also felt that the petitioner, in the meanwhile, would in any case have missed the bus and it is better for the petitioner also that the petition is disposed of, enabling the petitioner to take his remedies thereagainst, rather than being kept pending.

36. Accordingly, the petition is dismissed.

RAJIV SAHAI ENDLAW, J.

ASHA MENON, J.

SEPTEMBER 24, 2020

‘bs’

