

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Reserved on: 22nd February, 2023
Pronounced on: 22nd March, 2023

+ W.P.(C) 5975/2019

NAGENDRA SINGH SHEKHAWAT Petitioner

Through: Mr. Basab Sengupta and Mr. G.S.
Virk, Advocates.

versus

UNION OF INDIA AND ORS. Respondents

Through: Mr. Nirvikar Verma, Sr. Panel
Counsel for UOI.

CORAM:
HON'BLE MR. JUSTICE SURESH KUMAR KAIT
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J

1. A Civil Writ Petition under Article 226 of the Constitution of India, 1950 has been filed on behalf of the petitioner for quashing & setting aside the Order/ Communication No.I-15012/12/2018/Estt./1611 dated 07.12.2018 and to order for his notional promotion and fixation of the seniority in the post of Inspector (GD) on the basis of E-list drawn in September, 2006 and also to grant him seniority to the post of Inspector (GD) above respondent No.3 Sh. Sher Singh who was junior to the petitioner, having been promoted as Sub-Inspector in September, 2003 in the general category like the petitioner.

2. The petitioner joined the Indo Tibetan Border Police (ITBP) Force

as Sub-Inspector (GD) on 12.08.2002. He was the topper of his batch. He after successfully completing 54 weeks of Basic Training at ITBP Academy, Mussourie, was posted in Border Battalion in Uttarakhand, Arunachal Pradesh and Himachal Pradesh. After completion of his tenure, he was posted at Directorate General, ITBP, New Delhi. The petitioner secured first position in Intelligence course held at New Delhi in 2005. Considering his performance, he was selected by Directorate General as Instructor to impart training in subsequent courses in 2005 and 2006.

3. In the year 2004, during his posting at Forward Post, Koloriang, Arunachal Pradesh he developed pain in his right knee due to some injury and he was given medicines. He continued to perform his duties including patrolling in rugged mountainous terrain in hazardous climate conditions during deployment in Palin town and Itanagar for internal security duties. While undergoing Promotional Course at BTC (Basic Training Centre) Panchkula in August, 2005 he again suffered injury in right knee. The Court of Inquiry conducted held that the said injury had occurred due to risk of service. However, the petitioner successfully underwent promotional courses i.e. Platoon Commander (PC) Course w.e.f 18.07.2005 to 27.09.2005 at BTC-Panchkula and Subordinate Officer's (Tactics) Course at ITBPF Academy, Mussoori from 03.10.2005 to 10.12.2005. The successful completion of these which included written as well as physical activities, exhibited his physical fitness. He remained in Medical 'SHAPE-I' category.

4. The promotion from the post of Sub-Inspector (GD) to Inspector (GD) was governed by Standing Order No.2/2004 dated 17.08.2004. The

Departmental Promotion Committee (DPC) in terms of the Standing Order makes assessment/ evaluation on the basis of E-List test and those Sub-Inspectors who qualify the Test, are recommended on the approval list 'E' meant for promotion, to Inspector (GD).

5. The petitioner became eligible for promotion to the post of Inspector (GD) in the year 2005 on fulfilment of eligibility conditions as specified in Standing Order No.2/2004 dated 17.08.2004. He was called for E-List Test in February, 2006, but could not make the grade. In September, 2006 another E-List Test was held, but the petitioner was not nominated to appear in the said Test. When he enquired from the office of his Unit, he was verbally informed that he was not nominated due to force commitment/ exigencies of service and that one can appear in E-List Test only once a year and that his seniority on his promotion to the post of Inspector would be protected in terms of Standing Order No. 1/92 dated 22.7.1992 according to which a personnel not detailed to appear in promotional test due to unavoidable involvement in force commitments, such personnel would be allowed to claim seniority from the date on which his junior is promoted. It is claimed that the case of the petitioner was covered under Clause (e) of the said circular.

6. The petitioner has further asserted that he was not nominated in the subsequent E-List Test conducted in September, 2007 and June, 2008 and has been unjustly deprived of the opportunity/ not considered for promotion during this period. In September, 2008 he was nominated to appear in E-List Test, but he gave his unwillingness. However, the Test was not conducted and his unwillingness became irrelevant.

7. In September, 2008 the ITBP took a policy decision to discontinue

preparation of C, D and E List which was conveyed vide Fax message No. 1751 dated 08.09.2008.

8. The petitioner is aggrieved for not being nominated for E-List Test held in September, 2006, September, 2007 and June 2008 and his name not being considered for promotion. The DPC after the new policy in September, 2008 granted promotion to the petitioner w.e.f 14.11.2008. However, he was entitled to protection of his seniority in terms of Standing Order No. 1/92, since on his first consideration itself he was selected by the DPC for promotion.

9. It is asserted that despite a ligament injury in his right knee in the year 2006 he continued to perform his duties to the satisfaction of his superiors and was in SHAPE-I medical category till 30.04.2009. He was eligible for consideration for promotion since September, 2006, but was not nominated due to force commitments/ exigencies of service.

10. On 10.02.2016, a draft seniority list of Inspector (GD) as on 01.01.2016 was circulated by respondent No. 2 and representations were invited upto 31.05.2016. The petitioner was wrongly shown at S.No.206 without giving him protection in terms of Standing Order No.1/92. He has not been assigned his seniority for which he made a representation, but without appreciating the submissions, the representation was rejected vide communication dated 19.04.2016 stating that the petitioner had passed the test in September, 2006 (which was factually wrong) and that the claim of the petitioner was devoid of merit. The petitioner again made representation dated 01.07.2016 which was rejected vide communication dated 05.08.2016. His subsequent representations dated 18.10.2016 and 14.03.2017 praying for protection of seniority, were also rejected vide

Order dated 26.04.2017 without assigning any cogent reasons.

11. Aggrieved, the petitioner submitted a detailed and comprehensive representation dated 02.11.2018 to Director General, ITBP seeking protection of his seniority. However, the said representation also met the same fate of rejection vide unreasoned and non-speaking communication dated 07.12.2018.

12. Aggrieved the present writ petition has been filed seeking seniority to the post of Inspector (GD).

13. The petitioner has placed reliance on the decision of Apex Court in G.P. Doval & Others v. Chief Secretary, Govt. of U.P & Others (1984) 4 SCC 329, wherein it refused to throw out the petitions on the ground of delay. Reliance has also been placed on V.P. Srivastava and Others vs. State of M.P. & Others (1996) 7 SCC 759, wherein it was observed that since the final gradation list was prepared only on 23.12.1988, the appellant cannot be held to have approached the Tribunal in 1989 with a delay. Likewise, reliance has been placed on Baljit Singh Bahmania vs. UOI & Others W.P. (C) 8955/2011, wherein it was observed that the petitioner is entitled to challenge the final seniority list, even though he had not approached the Tribunal *viz-a-viz* the provisional seniority. Hence, the petitioner has sought that appropriate directions may be issued to grant him seniority to the post of Inspector (GD) above respondent No. 3 Sher Singh on the basis of E-List prepared in September, 2006 and he may be granted all the consequential benefits.

14. The **respondents in their written statement** have explained that in March, 2004 the petitioner felt pain in his right knee while playing Volleyball/ Cricket at Kloriang BOP (Arunachal Pradesh), for which he

took medicines and had no problem thereafter. In August, 2005 while undergoing PC Course, he fell from Horizontal rope and remained admitted in Unit Hospital at BTC. In April, 2006 when the petitioner was on leave, he got his X-Ray/MRI carried out of the right knee in which ligament tear of right knee was diagnosed. He was referred to Orthospecialist on 04.09.2006 and was advised for surgery of ACL reconstruction and for surgery of right knee on 06.09.2006 by the classified Specialist. The surgery was carried out on 04.11.2006 and the petitioner remained under treatment at Unit Hospital of 2nd Battalion ITBP, GMC Chandigarh and Composite Hospital, Chandigarh till 2010.

15. The petitioner's name appeared in approved list Test 'E' of GD Cadre in March, 2006, but he failed in approved list test. The petitioner as per the circulars, was not eligible to appear in 'E' List Test conducted in September, 2006 (w.e.f 04.09.2006 to 07.09.2006) due to ligament tear of right knee being under treatment in the Unit Hospital.

16. On 02.09.2008 the petitioner submitted an application that he may not be nominated for 'E' List test for GD cadre for the year 2008 because of post surgery problem of his right knee in the past year. Thereafter, ITBP took a policy decision to discontinue the List Tests viz. 'C', 'D' & 'E' of all cadres in September, 2008. Thereafter, the petitioner was approved for promotion to the rank of Inspector (GD) vide Gen. Order No.24035-24120 dated 14.11.2008.

17. The respondents have explained that immediately after surgery of right knee on 04.11.2006 the medical category of petitioner was to be classified, but the same could not be done. He was placed in Low Medical Category A3 (T-48) on 30.04.2009 and A2L (T-24) on 27.07.2010 i.e.

after 3 and 4 years respectively, of surgery. It is asserted that since the petitioner failed in 'E' List Test in first attempt, he was not covered under the provision of Standing Order No.01/92 for seniority protection. **On merits**, it is asserted that for the aforesaid reasons, the petitioner is not entitled to the seniority as claimed by him and the petition is liable to be dismissed.

18. Written synopsis have been filed on behalf of both the parties.

19. **Submissions heard.**

20. Admittedly, the petitioner joined ITBP as Sub Inspector on 12.08.2002. He underwent Platoon Commander (PC) Course at BTC (Basic Training Centre) Panchkula w.e.f. 18.07.2005 to 27.09.2005 and Subordinate Officer's (Tactics) Course at ITBPF Academy, Mussorri from 03.10.2005 to 10.12.2005. His promotion from the post of Sub Inspector (GD) to Inspector (GD) was governed by Standing Order No.02/2004. Under the said Standing Order, the Departmental Promotion Committee is to make assessment/evaluation of suitability on the basis of test known as E-List Test. The names of the Sub-Inspectors who qualify the test are recommended/ brought on the approval list i.e. approved List E for promotion to Inspector (GD). The said approved list is drawn from the qualified successful candidates on the basis of the inter-se seniority in the feeder grade/ rank of Sub-Inspector (GD).

21. The petitioner became qualified for promotion to the post of Inspector in the year 2005 on fulfilment of the eligibility conditions laid down in terms of the Standing Order 02/2004. He took the 'E' List Test for promotion in February, 2006, but could not qualify. The petitioner, however, was not nominated to appear in the 'E' List Test in September,

2006. The petitioner himself has stated that he could not take the Test as it could be taken only once a year.

22. The petitioner had suffered knee pain in March, 2004 for which he had taken treatment and thereafter had fallen from Horizontal rope in 2005 and had remained admitted in the Unit Hospital.

23. As per the Medical Certificate received on 06.09.2006, it was certified as under :

“A case of Medial meniscus tear (rt) c with Ach injury. Requires arthroscopic walvatio and further management accordingly.

On account of prolonged waiting period for arthroscopic surgery he may be referred to entitled hospital for management.

PGI – Dr. MS Dhillon

GMC Sec.32 – Dr. Ravi Gupta”

24. Because of his medical condition of having suffered ligament tear of right knee and his subsequent hospitalization and surgery on 06.09.2006 clearly indicates that the petitioner was not fit to appear in the ‘E’ List Test. The petitioner himself submitted a letter dated 02.09.2008 that on account of his post surgery problems due to surgery of his right knee in the past year, he may not be nominated for ‘E’ List Test of GD cadre for the year 2008.

25. It is not refuted by the petitioner that after unsuccessful attempt in February, 2006, he could not appear in ‘E’ List Test in September, 2006, 2007 and in the year 2008, he himself sought exemption vide letter dated 02.09.2008.

26. The petitioner, however, has based his claim for promotion and his

seniority from the date on which his juniors are promoted, on the Standing Order 01/92 dated 22.07.1992 which dealt with protection of seniority of combined personnel of the force.

27. The relevant part of the Standing Order 01/92 dated 22.07.1992 reads as under :

*“2. After a careful examination of the matter, it has been decided that seniority of such personnel who are otherwise eligible but could not be detailed on the requisite promotional course or appear in the promotion test, due to their un-avoidable involvement in the under mentioned Force commitments will be protected, **subject to the condition that they qualify in the concerned promotional course/ promotion test in the first attempt.** They will be allowed to claim their seniority from the dates on which their juniors are promoted. However, financial benefits will accrue to them only from the dates of taking over charge of the new post:-*

(a) Force level/ international mountaineering expeditions including detailment as L.O for Foreign Mountaineering Expeditions.

(b) Un-avoidable/un-foreseen/operational mass scale deployment of the Force including during General Elections.

(c) West Zone Police Tournaments, All India Police Games, All India Police duty Meet, national/ International Sports Meets.

(d) Postings/ deployment at Indian Missions abroad.

*(e) **Any other peculiar circumstances for which the matter will be decided on merits of the individual case at the Directorate General.”***

28. The entitlement for protection of seniority in terms of Standing Order 01/92 dated 22.07.1992 envisages two conditions; one that the personnel *qualifies in the concerned promotional course/ promotion test in the first attempt, and* second that the personnel is unable to take the Test *due to their un-avoidable involvement in the Force commitments* as contained in Clause (a) to (e) specified therein.

29. The petitioner admittedly, had appeared in the E-List Test in February, 2006, but was unable to qualify the same. The protection of seniority could have been maintained only if the petitioner had been able to clear the Test in first attempt, which he was admittedly not able to do.

30. A draft Seniority List was circulated of Inspector (GD) in ITBP on 10.02.2016, wherein the petitioner was placed below respondent No.3 who was his junior in the Batch. The representations made by the petitioner have been considered and decided by the respondent vide Order dated 29.11.2016. It was held that the petitioner had submitted his unwillingness to appear in 'E' List Test of GD cadre in 2008 on account of his knee operation which took place in 2007 due to post surgery complications. According to available record, he being earlier operated in 2006 and he having considered himself unfit to appear in E-List Test to be held in the year 2008, he was found to be unfit for E-List Test. Moreover, on being referred to for medical categorization on 21.06.2008 and on being asked on 01.07.2008 for getting his medical categorization reviewed within one month, the official did not get himself reviewed in time which prima facie shows negligence on the part of the subordinate Officer. Thus, after reviewing the entire case, the Competent Authority sought clarification from the petitioner and finally vide its communication dated

14.03.2017 held that the petitioner did not appear in E-List Test in September, 2006, 2007 and 2008 and his seniority was accordingly fixed below No. 987040147 Ashutosh Dixit who was declared qualified in September, 2006 and above No. 020240015 Insp/GD Rajan Kullu.

31. The pre-requisite for being promoted to Inspector GD as per the Standing Order 2/2004 was clearing of E-List Test in the first attempt, which admittedly the petitioner was not able to qualify in March, 2006 and could not appear in September, 2008 on account of his medical conditions. The first condition for seeking protection of seniority itself is not met.

32. Further, it is contended on behalf of the petitioner that his case was covered under Clause (e) which provided for promotion in *peculiar circumstances for which the matter was to be decided on merits by the Directorate General*. The comprehensive reading of the clauses (a) to (e) of paragraph 2 of Standing Order No. 01/92 makes it abundantly evident that the exigencies that had been visualized are of the postings of the personnel on account of service exigencies. Clause 'e' which states "*Any other peculiar circumstances for which the matter will be decided on merits of the individual case at the Directorate General*" has to be read *ejusdem generis* i.e. it has to be interpreted in the context of the previous clauses. The *peculiar circumstances* which may prevent the personnel from appearing in the requisite test is his inability on account of his deployment/posting on account of service requirements. The inability to appear in the test on medical ground would not be covered as **peculiar circumstances** as which provided in sub-clause (e) of the Standing Order. The Standing Order No.1/92 which protects the seniority of combatised

personnel of the Force, does not come to his rescue as he has not been able to give any *peculiar circumstances* justifying his protection of seniority.

33. Subsequently, pursuant to a policy decision to discontinue preparation and conduct of E-List Test in September, 2008 ITBP, the Standing Order No.2/2004 has been withdrawn and consequently the petitioner has been promoted to the post of Inspector w.e.f. 14.11.2008, after due consideration by DPC. His seniority has been fixed according to the Standing Orders, below No. 987040147 Ashutosh Dixit, who had admittedly cleared the E-List Test prior to the petitioner.

34. In view of the above, we do not find that the petitioner has been able to make out a case for re-fixation of seniority above respondent No. 3 and the petition is hereby dismissed.

(NEENA BANSAL KRISHNA)
JUDGE

(SURESH KUMAR KAIT)
JUDGE

MARCH 22, 2023
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