



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

% *Judgment Reserved on: 22.02.2024*
Judgment Pronounced on: 16.04.2024

+ **W.P.(C) 11013/2021**

VIJAY YADAV & ORS

..... Petitioners

Through: Dr. S.S. Hooda, Mr. Aayushman
Aeron and Ms. Rashmi Rawat,
Advs.

Versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. Ripu Daman Bhardwaj, CGSC
with Mr. Kushagra Kumar & Mr.
Abhinav Bhardwaj, Advs. for UOI

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

HON'BLE MR. JUSTICE SAURABH BANERJEE

J U D G M E N T

SAURABH BANERJEE, J.

FACTUAL BACKGROUND:

1. Succinctly put, all the three petitioners before us joined Border Security Force¹ as Assistant Commandant (DE) on 05.10.1987, 17.02.1993 and 26.12.1990 respectively. Of the three petitioners, the petitioner no.1 was first absorbed in the Law Cadre as Law Officer Grade-II/DC on 14.08.1997 and was promoted against the vacancy of

¹Hereinafter referred as 'BSF'



Additional Chief Law Officer²/DIG w.e.f. 10.10.2013. Thereafter, he was posted as Addl. CLO/DIG, FHQ vide order dated 14.05.2020 and directed to also look after the duties of CLO till further orders without any extra financial benefits. During the pendency of the present petition, the petitioner no.1 superannuated on 30.09.2021.

2. The petitioner no.2 herein was promoted to the rank of Deputy Commandant w.e.f. 07.10.1998 and then appointed as LO Grade-II/DC on deputation basis w.e.f. 10.11.2003. Subsequently, he was absorbed in the Law Cadre as Law Officer Grade-II/ Deputy Commandant w.e.f. 20.12.2004 and was further promoted to the rank of Law Officer Grade-I w.e.f. 28.05.2008. He was then posted to the Head Quarter Special Director General (Western Command) w.e.f. 10.10.2018 against the vacancy of Addl. CLO.

3. Likewise, the petitioner no.3 herein was promoted to the rank of Deputy Commandant w.e.f. 17.10.1997, whereafter he was appointed as LO Grade-II/DC on deputation basis w.e.f. 05.09.2005 and absorbed in the Law Cadre as Law Officer Grade-I w.e.f. 22.09.2008. He was then posted to the Head Quarter Special Director General (Eastern Command) w.e.f. 20.07.2020 against the vacancy of Addl. CLO.

4. After the proposal made in 2009 calling for upgradation of two posts of LO Grade-I/Commandant to Additional CLO/DIG and one post of CLO/DIG to CLO/IG, the Ministry of Home Affairs³ vide letters dated 15.03.2013 and 28.06.2013 sanctioned the said upgradation respectively

² Hereinafter referred as 'Addl. CLO'

³ Hereinafter referred as 'MHA'



in the Legal Setup of BSF, albeit without the Recruitment Rules⁴ for the said posts being notified.

5. Though the two upgraded posts of Addl. CLO/DIG were filled by the petitioner no.1 herein and by one Mr. Deepak Chaturvedi, who were promoted to the rank of Addl. CLO/DIG w.e.f. from 10.10.2013, however, the post of CLO/IG remained vacant. So much so, even though the DG, BSF moved a proposal for holding of Departmental Promotion Committee⁵ for the upgraded post of CLO/IG on 08.07.2013 but the said proposal was returned by the MHA on 21.08.2013, stating that the notification of RRs was essential to convene DPC and that the RRs be notified before holding any DPC. Thereafter, though the draft RRs for the upgraded post of CLO/IG were also submitted to the MHA on 01.10.2013, however, the same were not approved and queries and amendments were raised due to which the RRs were not notified. The respondents again sent proposals for convening DPC for promotion to the rank of CLO/IG in 2017 as also in 2019, and 2020, however the same were all rejected by the MHA for want of RRs.

6. Aggrieved thereby, the petitioners had filed the present writ petition under Article 226 of The Constitution of India seeking directions to the respondents to consider the petitioner no.1 for promotion to the rank of CLO/IG with all consequential benefits w.e.f. 01.05.2020, and to consider the petitioner nos.2 and 3 for promotion to the post of Addl. CLO/DIG alongwith all consequential benefits w.e.f. 06.09.2018 and

⁴Hereinafter referred as 'RRs'

⁵Hereinafter referred as 'DPC'



01.04.2020 respectively and to direct the respondents to notify the RRs for the posts of CLO/IG and Addl. CLO/DIG in BSF as soon as possible.

SUBMISSIONS OF PETITIONERS:

7. Learned counsel for the petitioners submitted that even though the post of CLO/ DIG was upgraded to CLO/ IG way back in 2013, however, due to the failure of the respondents to notify the RRs, the said post has remained vacant till date. So much so, the personnel including the petitioner no.1, who would have been eligible for the said post, have since superannuated without such promotion. He further submitted that even the petitioner nos. 2 and 3, who should have been promoted to the upgraded post of Addl. CLO/DIG long back, have not been promoted due to the lack of RRs. As regards the petitioner no.1, the learned counsel further sought parity with one H.G. Garg, the then CLO/DIG, who was promoted *in situ* to the post of CLO/IG on 26.05.2010 when no RRs existed, keeping in view the functional requirements of the BSF.

8. Learned counsel further submitted that the failure of the respondents to notify the RRs is in complete violation of the instructions issued by the DoP&T vide O.M. No.AB14017/43/93-Estt(RR) dated 16.08.1993 which requires that once a post has been created/upgraded, the RRs qua the said posts should be finalised within one month and the total time taken for the finalization of RRs should in no case exceed *three months*. He thus submitted that due to the absence of RRs and despite being eligible and having requisite service, the petitioners have been deprived promotion.

9. Learned counsel also submitted that even though the draft RRs were finally approved by the MHA in May, 2018, the BSF instead



redrafted the same and again sent them for approval, thus deliberately delaying the notification of the RRs. He also submitted that in any event, once the draft RRs had been approved, the petitioners ought to have been granted promotion on the basis of the draft RRs, as according to the eligibility criteria therein, the petitioners were entitled to promotion. Relying upon *Vimal Kumari v. State of Haryana* 1998 4 SCC 114, learned counsel submitted that since the draft RRs were available, the petitioners ought to be granted promotion on its basis as there is a logical assumption that the said RRs shall be notified soon.

10. Learned counsel then submitted that vide order dated 14.05.2020, the petitioner no.1, while being posted as Addl. CLO/ DIG was also directed to look after the duties of CLO till further orders, and hence there was a legitimate expectation that the petitioner no.1 shall be promoted to the post of CLO/IG. He also submitted that, not only have the respondents exponentially delayed the notification of the RRs, but they also did not adopt any alternate method wherein the petitioner no.1 could have been promoted on the basis of the policy contained in para 3.14(vi) of DoP&T O.M. No.AB 14017/48/2010-Estt (RR) dated 31.10.2012 and Regulations 2 and 3 of UPSC (Exemption from Consultation) Regulations, 1958, wherein he could have been promoted as a onetime measure in the absence of RRs.

11. Lastly, relying upon *P.N. Premachandran v. State of Kerela* (2004) 1 SCC 245, learned counsel submitted that the officers such as the petitioners herein cannot be made to suffer for the administrative delay caused by the respondents in notifying the RRs and hence the petitioners cannot be deprived of their right to promotion due to the failure of the



respondents to notify the RRs in time. As such, as per the learned counsel, the petitioners ought to be granted retrospective promotion with all consequential benefits from the date they became eligible for the promotional posts in question.

SUBMISSIONS OF RESPONDENTS:

12. *Per Contra*, learned CGSC for the respondents submitted that the respondents have not deliberately delayed the notification of the RRs as the same had been immediately drafted and sent to the MHA for approval after the sanctioning of the posts, but due to the queries and amendments received thereto, the same could not be finalised. He also submitted that the BSF had even proposed to convene the DPC on several occasions, but the proposal was rejected by the MHA for want of RRs and hence the respondents cannot be held responsible for the delay in notification of the RRs.

13. Learned CGSC then submitted that the petitioners cannot claim retrospective promotion as the promotions have to be made in accordance with para 6.4.4 of the OM dated 10.04.1989 which states that “*While promotions will be made in the order of the consolidated select list, such promotions will have only prospective effect even in cases where the vacancies relate to earlier years(s)*”. Thus the petitioners cannot claim retrospective promotion from the date when they became eligible.

14. Learned counsel also submitted that the reliance placed by the petitioner no.1 on order dated 14.05.2020 is incorrect in as much as there was no formal order for promoting the petitioner no.1 to the post of CLO/IG and that the petitioner no.1 was directed to look after the duties of CLO without additional benefits, only for the functional needs of the



BSF, and hence the same cannot raise a legitimate expectation of promotion.

15. Learned CGSC also submitted that the petitioner no.1 cannot claim parity with Mr. H.G. Garg, as he had been placed in the post of CLO/IG as a measure personal to him by the MHA, three years prior to even sanctioning of the post of CLO/IG and that too, subject to the condition that one post of Law Officer Grade-I(Commandant) be kept in abeyance as matching saving for the said upgradation and that after the superannuation of H.G. Garg on 31.01.2011, the post of CLO/IG ceased to exist.

16. Learned CGSC lastly submitted that promotion could not be granted to the petitioners on the basis of draft RRs as though the draft RRs were finally approved by the MHA on 29.04.2020 and were further uploaded on DoP&T website on 22.05.2020, however after the uploading of the draft RRs on RRFAMS, DoP&T raised queries/ suggestions for carrying on necessary amendments due to which the RRs could not be finally notified.

ANALYSIS AND REASONINGS:

17. We have heard the learned counsel for the parties and have also gone through the pleadings coupled with the documents on record alongwith the judgements cited by them before us. The aforesaid have left us to primarily decide the fate of the three petitioners herein qua their promotion to the post(s) of CLO/ Addl. CLO in the BSF when there were actually no RRs in existence for the said post(s) of CLO/ Addl. CLO therein.



18. Before proceeding to decide the merits involved, it is imperative to note that, finally, during the pendency of the present petition, not only have the RRs been actually notified, but, a DPC thereafter was also scheduled to be convened on 26.07.2023 to consider the promotions to the post of Addl. CLO/DIG. As expected, since the petitioners no. 2 and 3 were still in service, they were also to be considered in the said DPC. In fact, it is in view thereof when the present petition was listed on 20.07.2023, learned counsel for the petitioners submitted that even though the RRs had been notified, the issue with regard to retrospective promotion w.e.f. the date the petitioners became eligible was still alive and that even though the petitioner no.1 had superannuated, the issue of him being entitled to notional benefits in case he was promoted from the date of eligibility was also still alive.

19. *Admittedly*, the whole genesis of the dispute involved herein rests on the RRs for the post(s) of CLO/ Addl. CLO in the BSF, which were notified as late as in the year 2023 during the pendency of the present petition and never existed prior thereto at any point of time. Under such existing circumstances, there can be no dispute that it was next to impossible for the respondents to consider and/ or promote anyone like and/ or including the petitioners to the post(s) of CLO/ Addl. CLO in the BSF. In fact, even though the post(s) of CLO/ Addl. CLO were very much existing but as they were promotional posts in the BSF, and as there were no RRs for the said posts, the respondents were facing, with no means for overcoming, the daunting task of promoting anyone like and/ or including the petitioners to the post(s) of CLO/ Addl. CLO. Moreover, it was a matter of fact then that there was no definite structure in place anywhere



qua the specifications/ requirements needed regarding qualifications for the said post(s) of CLO/ Addl. CLO in the BSF. It is also a matter of fact that as per the then existing situation, there was no defined/ specific manner of selecting any officer(s) for the said post(s) of CLO/ Addl. CLO in the BSF as there was no known procedure thereof.

20. In the absence of RRs defining the different eligibility criteria, classification, pay matrix, and the procedure for convening the DPC for the respective posts, the hands of the respondents were tied, *more so*, as they could not take any solitary decision/ step on their own accord. Under such circumstances, there was no alternate mode/ method available with the respondents to promote any of the petitioners to the post(s) of CLO/ Addl. CLO in the BSF.

21. In fact, even though there has been a delay in framing the RRs to the post(s) of CLO/ Addl. CLO in the BSF, however, when they were finally approved by the MHA in May, 2018, the BSF redrafted the same and again sent them from its end for approval at the earliest to the MHA and even otherwise the draft RRs went back and forth multiple times between the BSF and the MHA between the said period. Hence, it cannot be said that the BSF and/ or the MHA were, in any way lackadaisical in their approach towards finalizing the RRs or that there was some *mala fide* or bias towards any of the petitioners as both the BSF and the MHA were acting promptly but it was due to the suggestions and amendments made thereunder, that the RRs were notified only in 2023. Thus, the BSF and MHA, independently and jointly, were in fact thoroughly deliberating the RRs, expending sufficient time and effort in coming up with the final



RRs. It cannot be thus said that the said delay was unexplained or unjustified. As such, the delay cannot be attributable to either of them.

22. It is, thus, that under the then existing circumstances the respondents could not and in fact, were unable to draw any inference and/or benefit of the draft RRs or grant promotion to the petitioners to the post(s) of CLO/ Addl. CLO in the BSF. For that, reliance upon **Vimal Kumari (supra)** by the learned counsel for the petitioners is of no assistance.

23. Simply put, in the absence of RRs, there was no chance of any DPC being held, which resulted in there being no chance of granting promotion to any of the petitioners to the post(s) of CLO/ Addl. CLO in the BSF. Moreover, since there was no mode of conducting the DPC, the respondents could in no manner issue any formal order of appointment to any of the petitioners herein.

CONCLUSION:

24. On the basis of the aforesaid analysis and reasons, more particularly, in the absence of RRs to the post(s) of CLO/ Addl. CLO in the BSF under the peculiar circumstances as were then existing, none of the petitioners could have even been promoted as a onetime measure as well as what was stipulated under the policy contained in para 3.14(vi) of DoP&T O.M. No.AB 14017/48/2010-Estt (RR) dated 31.10.2012, is that *“The Ministries/ Department are advised that if there are overriding compulsions for filling any Group A or Group B post in the absence of Recruitment Rules, then they may make reference to UPSC for determination of method of recruitment as a onetime measure for filling up of a post on regular basis”*. This one time measure was thus not



possible as there was/ were no such compulsion(s) in case of any of the petitioners herein. In any event, it is not the case of the petitioners herein that there was/ were any such compulsion anywhere.

25. Therefore, though the petitioner no.1, while being posted as Addl. CLO/DIG in the BSF was directed to look after the duties of CLO, however, for the aforesaid reasons and analysis he could not have been promoted to the said post of CLO in the BSF in any manner whatsoever. Even otherwise, as the said direction was only '*till further orders*' it was merely a stop-gap arrangement and there was no formal order ever issued promoting him to the post of CLO/IG as such at any stage later on. The petitioner no.1 was, at best, albeit performing the duties of a CLO, but, was certainly not holding the said post of CLO in the BSF. The aforesaid certainly does not create a right of promotion to the said petitioner no.1. The petitioner no.1 cannot also claim parity with Mr. H.G. Garg as the said personnel had been promoted as an *in situ* promotion way back in 2010, even prior to the sanctioning of the post of CLO/IG in the BSF, and hence no benefit of the same can accrue to the petitioner no.1 herein.

26. With respect to the petitioners no.2 and 3, for the aforesaid analysis and reasoning by us hereinabove, we are unable to agree with the submissions of the learned counsel for the petitioners and thus cannot grant the reliefs as prayed for by them.

27. Before parting, we may also note that we had, in the matter of ***K J S Bains v. Union of India and Ors.*** 2024 SCC OnLine Del 1919, involving the similar issue, already held that any promotion to any post has to be in accordance with the RRs and that no promotion can take place in the absence of such Rules.



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28. Accordingly, finding no merit in the petition, the same is dismissed.
29. No order as to costs.

SAURABH BANERJEE, J.

V. KAMESWAR RAO, J.

APRIL 16, 2024/rr