



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

% *Date of decision: January 24, 2024*

+ W.P.(C) 41/2022

(14) ASHOK KUMAR SAH Petitioner

Through: Mr. Nikhil Bhardwaj, Advocate

Versus

UNION OF INDIA AND ORS

..... Respondents

Through: Mr. Niraj Kumar, Sr. Central Govt.
Counsel for UOI.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

HON'BLE MR. JUSTICE SAURABH BANERJEE

J U D G M E N T (O R A L)

SAURABH BANERJEE, J.

1. As per petitioner, he joined Sashastra Seema Bal (**SSB**) on 01.02.2006 on the post of Constable/GD, and then was later deputed with the Ministry of External Affairs (**MEA**) initially from 02.07.2014 to 16.01.2017 at Dhaka, Bangladesh and then subsequently from 17.01.2017 to 23.11.2018 this time at Jakarta, Indonesia. While on deputation with the MEA, the SSB detailed the petitioner for 'Pre-Promotional Course' (**PP Course**) on as many as nine different occasions vide letters dated 24.07.2015, 29.09.2016, 04.10.2016, 11.11.2016, 18.11.2016, 28.02.2017, 17.03.2017 and 27.07.2017.
2. In response, the petitioner on 19.08.2015, 23.11.2016, 01.12.2016, 22.03.2017, 06.04.2017 and on 22.05.2017 conveyed his willingness



through proper channels to join the said PP Course. Though each of the aforesaid were duly received by the respondent no.4, the petitioner could not be released from his posting due to exigency of work as per the letter(s) of the MEA dated 16.03.2017 and 11.04.2022.

3. Resultantly, it was only after completion of his deputation that he joined 32 Battalion, Muzaffarpur, Bihar on 26.11.2018 and was then detailed on 23.04.2019 for PP Course to the post of Head Constable (*HC*). After completing his course, he was posted as HC in the same Battalion in the year 2020.

4. Then, on 29.07.2019, the petitioner submitted an application to the DIG (Pers), FHQ, SSB, New Delhi seeking retrospective promotion from 20.06.2017, when his juniors were promoted to the post of the HC. Facing rejection vide letter dated 26.11.2019, as a follow up, the petitioner then sent various representations on 09.12.2019, 30.08.2020, 13.09.2020, 16.09.2020, 23.11.2020, 02.06.2021 and 23.06.2021. However, none of them were responded by the respondents. This resulted in the petitioner sending a Legal Notice dated 08.09.2021 to the respondent no.2 which the respondents, vide reply dated 13.10.2021 denied the reliefs.

5. Hence, the petitioner has filed the present petition under Articles 226 and 227 of the Constitution of India seeking a writ of mandamus directing the respondents to grant retrospective promotion to the post of Head Constable with effect from 20.06.2017, when his juniors were promoted as also for quashing order(s) dated 26.11.2019 and 13.10.2021 vide which the request of the petitioner for retrospective promotion was rejected.



6. The learned counsel for the petitioner canvasses that the petitioner was not relieved from his posting/ duty and hence could not join the PP Course. He submits that thus the same cannot be attributable to the petitioner and in any event it is the fault of the respondents for not being able to produce a replacement to the post of petitioner which is accepted by the MEA vide their letter dated 11.04.2022, therefore, retrospective promotion should be granted to him. To substantiate his case, learned counsel for the petitioner places reliance upon ***Govt. of NCT of Delhi & Ors. vs. Sh. Rakesh Beniwal & Ors.*** 2014:DHC:3658-DB, wherein it was held that when delay in appointment is not attributable to officer like the petitioner herein, he should not suffer for delays of the institutions like the respondents herein and respondents cannot take advantage of their own delays.

7. In rebuttal, learned counsel for the respondents submits that the petitioner was only declared 'fit' in year 2020 against the vacancy year 2020 and was then promoted to the post of HC on 14.02.2020 accordingly and that in any event the PP Course is mandatory for the said promotion. He also submits that it was only once that the willingness was received from the MEA for the said promotional course and it was only on that occasion that the MEA had shown its inability to relieve the petitioner for the said PP Course vide communication dated 16.03.2017, moreover, on the said occasion, the petitioner himself had sought extension of his inter-posting leave due to extra ordinary family circumstances.

8. Furthermore, relying upon ***P.S. Sadasivasamy Vs. The State of Tamil Nadu*** 1975 SCC (1) 152 wherein the Hon'ble Supreme Court has



held that in case of selection, appointment, seniority and promotion, one must approach at the earliest within a reasonable period of six months to one year, learned counsel for the respondents submits that the petitioner did not submit any such representation when his juniors were being promoted to the rank of HC.

9. Learned counsel for the petitioner in rejoinder submits that immediately after clearing the PP Course on 23.04.2019, the petitioner on 29.07.2019 made his first representation to the respondents with regard to notional seniority from 2017.

10. This Court has heard the learned counsel for the parties and perused the documents on record.

11. Facts reveal that it was the petitioner, who on as many as six occasions i.e. on 19.08.2015, 23.11.2016, 01.12.2016, 22.03.2017, 06.04.2017 and on 22.05.2017 duly received and conveyed his willingness through proper channels to join the PP Course. However, despite this it was only because the petitioner could not be relieved from his then posting as he was discharging duties while on deputation with the MEA, he could not proceed for his PP Course. In effect, the same was due to reasons beyond the control of the petitioner and it was only due to exigency of work which was also duly expressed/ recognized by the MEA in the letter(s) dated 16.03.2017, 26.09.2019 and 11.04.2022. Further, it was the respondents who were unable to provide an alternate suitable replacement to the post of the petitioner.

12. For the said reasons, the respondents can neither plead nor claim that the petitioner was '*unfit*' and that he was only declared '*fit*' subsequently in 2020. Particularly, whence there were no complaints,



much less of the petitioner being absent from duty or of any other kind(s) during that period while he was discharging his duties on deputation with the MEA. In fact, the petitioner ought not be punished for his diligence.

13. It is also an admitted fact that the petitioner was diligently discharging his duties while on deputation with the MEA initially from 02.07.2014 to 16.01.2017 at Dhaka, Bangladesh and then subsequently from 17.01.2017 to 23.11.2018 this time at Jakarta, Indonesia. So there was an intermittent prolong period of almost two years when he was not able to proceed for the PP Course. Once again, the petitioner can neither be held liable nor punished for the same.

14. Under such circumstances, *admittedly*, it is unfortunate that the juniors of the petitioner were promoted to the post of HC on 20.06.2017 and the petitioner after completing his term of deputation and after joining 32 Battalion, Muzaffarpur, Bihar on 26.11.2018 and being detailed for PP Course to the post of HC on 23.04.2019, could only be posted as such in the same Battalion later on in the year 2020.

15. Factoring all the aforesaid, the undisputed facts which emerge are that despite willingness of the petitioner, he was unable to complete the PP Course as he was on deputation with the MEA for a prolonged period of almost two years and that he was indeed able to complete the requisite PP Course to the post of HC subsequently at the very first given option, *albeit* after his own juniors had been granted promotion and that he is functioning as a HC as on date, in the considered opinion of this Court the petitioner has been able to make out a case for grant of retrospective promotion to the post of Head Constable with effect from 20.06.2017 i.e. the date when his juniors were promoted to the post of Head Constable.



16. Under the factual matrix involved, this Court is well supported by the decision rendered by a Co-ordinate bench of this Court in **Govt. of NCT of Delhi & Ors. (supra)** wherein it has been held as under:-

“24. Whilst the law dictates that salary is to be paid for work done, a parallel cannot be drawn from the principle of “no work, no pay” to apply to the circumstances of the present dispute. The Tribunal appreciated that the applicants should not suffer at the cost of bureaucratic delays of the GNCTD and its litigative proclivities. The respondents herein were appointed many years after their other batch mates had been appointed. The maxim commodum ex injuria sua nemini habere debet i.e. no person ought to take advantage from his own wrong applies squarely to the petitioners here. The Supreme Court in Kusheshwar Prasad Singh v. State of Bihar & Ors. (2007) 11 SCC 447 held,

“13. it is settled principle of law that a man cannot be permitted to take undue and unfair advantage of his own wrong to gain favourable interpretation of law. It is sound principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned. To put it differently, ‘a wrong doer ought not to be permitted to make a profit out of his own wrong’.”

25. The maxim has been interpreted by the Apex Court in Mrutunjay Pani & Anr. v. Narmada Bala Sasmal & Anr. [1962] 1 SCR 290 wherein it was held that where an obligation is cast on a party and he commits a breach of such obligation, he cannot be permitted to take advantage of such situation. Further in Union of India & Ors. v. Major General Madan Lal Yadav (Retd.) [1996] 3 SCR 785 it was observed,

“In Broom's Legal Maxims (10th Edn.) p. 191 wherein it was stated; ...it is a maxim of law,



recognised and established, that no man shall take advantage of his own wrong; and this maxim, which is based on elementary principles, is fully recognised in Courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure.”

17. For the afore-going discussions and reasons therewith coupled with the past history involved as also the existing factual position as on today, the reliance on ***P.S. Sadasivasamy (supra)*** placed by the learned counsel for the respondents is misplaced as it is not applicable to the facts involved herein.

18. Accordingly, the present petition is allowed and the orders dated 26.11.2019 and 13.10.2021 are quashed. Resultantly, the petitioner is granted retrospective promotion to the post of Head Constable w.e.f. 20.06.2017 i.e. the date when his juniors were promoted to the post of Head Constable, for which necessary orders shall be issued by the respondents in accordance with law. No order as to costs.

SAURABH BANERJEE, J

V. KAMESWAR RAO, J

JANUARY 24, 2024/So..