

B.S. Naruka and ors. Vs. Union of India (Uoi) and ors.

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Court : Delhi

Decided On : Sep-27-2002

Reported in : 2003(67)DRJ618

Judge : S.B. Sinha, C.J. and; A.K. Sikri, J.

Acts : Service Law; Border Security Force Rules, 1969 - Rules 115(3), 122, 123, 124, 128 and 136(6)

Appeal No. : CWP Nos. 1673/92 and 1879, 1880, 1881, 1882, 2490, 2491, 2492, 2493, 2922, 3093 and 4871 of 1995

Appellant : B.S. Naruka and ors.

Respondent : Union of India (Uoi) and ors.

Advocate for Def. : Keshav Dayal, Sr. Adv. and ; Jyoti Singh, Adv. for UOI, ; K

Advocate for Pet/Ap. : G.D. Gupta, Sr. Adv.,; Pankaj Kumar,; Geetanjali Mohan,

Judgement :

ORDER

OF SENIORITY.

Provided that in case where the Board considers the performance, merit and record of service of an officer of outstanding merit, the board may place his name above his seniors.

(6) A gradation list of Sis (PI Comdrs.) approved for inclusion in list 'E' shall be maintained at the HQrs. of the BSF.'

Border Security Force Act, however, was passed by the Parliament in 1968.

Section 141 of the Border Security Force Act, 1968 (in short the 'BSF Act, 1968) provides :

'141. Power to make rules :

(1) The Central Government may, by notification, make rules for the purpose of carrying into effect the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for,-

(a) the constitution, governance, command and discipline of the Force;

(b) the enrolment of persons of the Force and the recruitment of other members of the Force ;

(c) the conditions of service (including deductions from pay and allowances) of members of the Force ;

(d) the rank, precedence, powers of command and authority of the officers, subordinate officers, under-officers and other persons subject to this Act;

(e) the removal, retirement, release or discharge from the service of persons subject to this Act;

(f) the purposes and other matters required to be prescribed under Section 13;

(g) the convening, constitution, adjustment, dissolution and sittings of Security Force Courts, the procedure to be observed in trials by such courts, persons by whom an accused may be defended in such trials and the appearance of such persons thereat;

(h) the confirmation revision and annulment of and petitions against, the findings and sentences of Security Force Courts;

(i) the forms or orders to be made under the provisions of this Act relating to Security Force Courts and the awards and infliction of death, imprisonment and detention;

(j) the carrying into effect of sentences of Security Force Courts; (k) any matter necessary for the purpose of carrying this Act into execution, as far as it relates to the investigation, arrest, custody, trial and punishment of offences triable of punishable under this Act; (l) the ceremonials to be observed and marks of respect to be paid in the Force;

(m) the convening of the constitution, procedure and practice of, Courts of Inquiry, the summoning of witnesses before them and the administration of oaths by such Courts;

(n) the recruitment and conditions of service of the Chief Law Officer and the Law Officers ; (o) any other matter which is to be, or may be prescribed or in respect of which this Act makes no provision or makes insufficient provision and provision is, in the opinion of the Central Government, necessary for the proper implementation of this Act.

(3) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions and if, before the expiry of the sessions in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be ; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

4. Section 142 provides that the Border Security Force in existence at the commencement thereof would be deemed to be the Force constituted under the

Act and the members of the said Force would be deemed to have been appointed or enrolled as such there under.

5. Pursuant to or in furtherance of power conferred upon it under Sub-section 2(b) of Section 141 of the BSF Act, 1968, the Central Government make BSF (Subordinate Officers and Under Officers) Promotion and Seniority Rules, 1975, (in short Promotion and Seniority Rules, 1975') Rules Known as BSF (Asstt. Commandants) Recruitment Rules, 1985. Prior thereto in terms of Rule 182 of the Border Security Force Rules, 1969 (in short 'BSF Rules, 1969') all rules and orders which were applicable to the Force were continued to be applicable unless such rule or order was repugnant to the BSF Rules and until the same were abrogated or modified.

6. Section 5 of the BSF Act provides for grant of command, control and superintendence of the Force upon the Director-General. The Director-General is to be assisted by inspectors-General and Deputy Inspectors-General. The border States in which the BSF was deployed used to be called as 'frontiers' headed by Inspectors-General. The 'frontier' was divided into 'Sectors' to be commanded by Deputy Inspectors-General. Those Sectors admittedly were earlier called and known as 'States'. Each Sector (State) was comprised of couple of Battalions commanded by Officers to the rank of Commandant. Since 1966 direct recruitment of Constables, Sub-Inspectors and Assistant Commandant (Deputy Superintendent of Police) was started in the force. Upon their selection they were posted in various frontiers/States (sectors) of the force by B.S.F. Head Quarter. According to the petitioners, their inter-frontier transfers were also controlled by the Head Quarter. Till 1975, so far as the matter relating to promotion of Sub-Inspectors of the rank of Inspector is concerned, promotion of Sub-Inspectors through various sources, including direct recruitment used to be governed by reasons of the rules, which came into force by Notification dated 8th November 1967, as noticed hereinbefore.

7. The bone of contention of the promotee Sub-Inspectors is that having regard to Sub-rule (6) of Rule 136 of the Rules of 1967, the list of all the Sub-inspectors of the force selected by various Selection Boards for promotion as Inspector was

required to be centrally maintained at the Head Quarters. It had been contended that even the initial common seniority list used to be maintained on that basis. Such a provision was made allegedly on the ground that the initial selection of Sub-Inspectors and their postings/transfers from one frontier to another was required to be controlled and regulated by the Delhi Head Quarter at All India Level. The central seniority was also maintained by the BSF Head Quarter at Delhi. Selection of Assistant Commandants (Dy. S.P.) was also used to be made on all India basis and their seniority list since inception was also maintained centrally at Delhi and furthermore their promotions used to be regulated having regard to the central seniority list only. The petitioners inter alias submitted that seniority lists were being wrongly maintained at the level of frontiers/States and promotion to the post of Sub-Inspector was, thus, being wrongly granted; as a result whereof, according to the petitioners, having regard to the availability of posts they were being promoted to the detriment of others' interest.

8. Petitioners in support of their contention have given the following example :

'For example, in frontier 'A' there were 10 vacancies and D.E. S.ts. of 1967 batch were, not posted there. So in that frontier S.Is. of junior batch came to be promoted against the ten vacancies.

In frontier, 'B' there were only three vacancies, but ten S.Is. of 1967 seniority were available, out of them only three were promoted. Resultantly, on inter-frontier Transfers, Senior S.Is. of 'B' frontier had to serve under such Inspectors of 'A' frontier as were junior to them as S.Is.

This is how the onset of distortions in the matter of promotion of D.E./S.Is of the force, to higher ranks, started.'

9. Such distortions allegedly multiplied by grant of further promotions of Sub-Inspectors to higher ranks with the passage of time.

10. By reason of Promotion and Seniority Rules 1975, however, such mistake was sought to be rectified having regard to a large number of representations made by the affected Sub-Inspectors.

11. Rule 13(2) thereof is as follows :

'13 Maintenance of Promotion Lists :-

(1).....,

(2) Consolidated gradation lists of Head-Constables approved for inclusion in list 'D' and of Sub-Inspectors (Platoon Commanders) approved for inclusion in list 'E' shall be maintained at the Directorate; General, Border Security Force.'

12. Admittedly from 1975 onwards there does not exist any dispute. The dispute is confined to 1970-75. The contention of the petitioners, however, is that even in 1975 some seniors were superseded by their juniors.

13. One Babu Joseph, who was one of such Inspectors, appointed as Sub-Inspector in the year 1967 filed a writ petition being W.P. No. 257/80 entitled Babu Joseph v. Union of India and Ors. before the Gwalior Bench of the Madhya Pradesh High Court questioning his supersession by the juniors in the rank of Inspectors as well as Assistant Commandant inter alias on the ground that promotion to the post of Inspectors from the post of Sub-Inspectors were required to be centrally regulated on the basis of Central Seniority List as mandated in the Rules.

14. A Division Bench of the Gwalior High Court by a judgment and order dated 8th February 1990 noticed :

'10! Inter-se seniority of persons belonging to the same rank' and obviously that purpose is served by Rules 7 and 8. The provision requiring a common gradation list to be prepared as per New Rule 13(2), corresponding to old Rule 136(6), is also significant. When that list is prepared, to arrange therein names of persons the order of 'seniority' has to be followed Evidently, use of the word 'seniority' therein can only have reference to old Rule 125 or new Rule 9. Otherwise, it will make no sense in preparing a common list of all candidates who are to be selected for promotion from the post of Sub-Inspector to Inspector. Support for this view is also provided by the Proviso to Old Rule 136 (5) corresponding to Proviso to New Rule 19(1). The order of merit may be changed

by the Board and 'seniority' of any candidate may be relegated if another candidate's performance, merit and record of service are found to be of 'outstanding grade'. It is clear that the proscribed procedure postulates A.C.Rs. of all candidates to be available and taken into consideration and as such, there can be little scope for considering at that stage, any 'State wise' or 'Frontier-wise' seniority as service records of all candidates are pooled for a singular grading.'

15. Noticing the purport and object of the BSF Act and the Rules framed there under, it was observed :-

'15. For another just grievance, in which we see much merit, no cause at all has been shown and no Explanationn is forthcoming to satisfy us how petitioner's batch-mates, named in Annexures P/5 and P/8, could be given accelerated promotion some of them putting in only two years service only. Petitioner's name came on List E for promotion to post of Inspector with effect from 20.9.1975 while his compeers got promotion in that post between 1970 and 1973, he made representation as per Annexure P/1 on 7.6.1974 submitting that with him 13 of the batch-mates came to be posted in the Rajasthan/Gujarat Sectors, but only four remained in Rajasthan other being posted out to such places as Manipur and Jammu and Kashmir. He submitted that he could have got atleast 3 or 4 chances to appear in pre-promotion course like his colleagues who had become Inspectors for three years and indeed in his next representation, submitted on 21.4.1976, he also mentioned that in qualification, he ranked best among his compeers being a Science Graduate and that his performance was excellent, evidenced by Commendation cars/appreciation certificates and A.C.Rs. He also submitted that in the first chance itself in 1973, he passed promotion course and was approved for promotion and that fact was vocal to smuggest his 'merit and suitability' for timely promotion Along with his compeers, which was denied to him.'

16. Noticing that no Explanationn has been forthcoming it was held that the petitioner was entitled to a mandamus and consequently the Madhya Pradesh High Court issued the following directions :

'17. For all the foregoing reasons, we have no hesitation to hold that petitioner is entitled to a mandamus and that is issued in terms of a twofold direction to be

carried out by respondents 1-3. In doing so, we have taken in view the just, submission of Shri Mittal that is not possible for us to assess on facts the point of time when petitioner could be validly promoted to a particular post and what rank he should hold now. He has claimed that his batch-mates are Deputy Commandants for several years, but it has to be decided by the respondents, by assessing his merit and dues step-wise in terms of the relevant statutory provisions. He has to be given promotion on particular dates to particular posts and his seniority- in respective posts has also to be fixed on appropriate dates. We direct the respondents that petitioner's entitlement to promotion due be fixed with reference to 1970 and to pass orders in regard to his promotion to respective posts on due dates, fixing properly his seniority in respective posts, in the light of observations herein made. That shall be done within three months. This direction we have made keeping in view not only discrimination suffered by petitioner vis-a-vis Respondent No. 18, but also the provisions of new Rule 18(2). The petitioner being appointed on 16.11.1967, he had completed three years on 16.11.1970. As such his entitlement to promotion for higher post had to be considered on that date; and on other subsequent dates for next higher post then of Inspector and beyond. That has to be done now by respondents.'

17. Some other Officers also filed a writ petition (CWP 2840/90) before the same Bench of Madhya Pradesh High Court. Following the decision in Babu Joseph's case (supra) it was directed :

'14.We direct the respondents that the entitlement to promotion of all the petitioners to be fixed with reference to a date falling on completion of three years from the date of joining service and to pass orders in regard, to their promotion to respective posts on due dates fixing properly seniority in respective posts in the light of the observations made by this Court in Babu Joseph's case (supra) and this order. Each of the petitioners shall be deemed to have become entitled to promotion for higher post on completion of three years from the date of the appointment and on other subsequent dates for next higher posts than of Inspector and beyond. Each of the petitioners shall be considered for promotion on each of the higher posts than of the Inspector at least on the dates on which Babu Joseph Writ Petitioner in M.P. No. 257/80 be-came entitled for consideration and

was considered and given promotion.'

18. Special Leave Petition filed there against before the Apex Court bearing No. 6283/90 was dismissed on 16th July 1990. Babu Joseph was promoted as Inspector. Assistant Commandant and Dy. Commandant on the basis of his ante-dated seniority.

19. The said decision led to a spate of writ petitions. One of them was filed by one Puran Singh on 2nd July 1992. Allegedly a conscious decision to extend the benefit of the said judgment was taken by the respondents, where for Review Boards were held in April 1995.

20. However, before delivery of the judgment in Puran Singh, six petitioners filed CWP 1673/92. The said writ petition is pending. In the meantime allegedly Punjab & Haryana High Court allowed a similar writ petition being CWP No. 9659/92 in the case of Parshotam Lal Dy. Comdt. and an another writ petition has also been allegedly allowed in the case of one Jag Kartar by the Madhya Pradesh High Court by a judgment dated 30th March 1995.

21. Directly recruited Assistant Commandants, however, filed a writ petition (CWP 316/93) questioning the grant of promotion or the seniority to the promotes Sub-Inspectors before the Gwalior Bench. In the said writ petition by an order dated 4th November 1993 further promotion of the Babu Joseph was stayed.

22. Having regard to the fact that several writ petitions came to be filed before different High Courts, an application for transfer was filed before the Supreme Court, which was marked as T.P. (Civil) Nos. 41-55 of 1995 (Mohan Lal and Ors. v. Union of India and Ors.).

23. By an order dated 6th April 1995, with a view to avoid conflict of decisions as also to enable the Court to have a unified and over all view of the dispute, all the writ petitions have been transferred to this Court.

24. In the case of Babu Joseph and others the Madhya Pradesh High Court had delivered a judgment, the implementation thereof, however, was made subject to the result of the judgment in these cases.

25. The Direct Entry Officers thereafter moved this Court in CM No. 2682/95 for extending the aforesaid stay granted by the Apex Court, which was allowed by an order dated 1st May 1995. The petitioners moved CMP No. 5558/95 praying for grant of similar stay against the promotion of the intervenor Direct Entry Officers but no order thereupon had been passed.

26. Mr. R.P. Sharma and G.D. Gupta, learned Senior Counsel, advanced arguments on behalf of the promote officers, whereas the direct recruit officers were represented by Ms. Geetanjali Mohan. Mr. Keshav Dayal, learned Senior Counsel, appearing for Union of India, supported the case of the direct recruits.

27. A contention has been raised by the promotee officers to the effect is that as the judgment passed by the Gwalior Bench of the Madhya Pradesh High Court attained finality and implementation thereof having been undertaken, there is absolutely no reason as to why the Petitioners shall not be granted the benefit of the said judgment. Reliance in this connection, has been placed on Inder Pal Yadav and Ors. v. Union of India and Ors. : (1985)IILLJ406SC .

28. It was contended that in the case of Babu Joseph (supra) although the direct recruit Assistant Commandant had not been impleaded as parties but those belonging to the category of direct recruit Sub-Inspectors and who had superseded their seniors were impleaded therein inasmuch as the dispute exclusively related to the supersession of Senior Officers in the matter of promotion as Inspector and onwards. Direct Entry Assistant Commandants it is considered had nothing to do with the internal dispute of the Direct Entry Sub-Inspectors and as such it was not necessary to implead him as parties in the said writ petition.

29. It has been pointed out that the respondents notionally revised the seniority of 357 Sub-Inspectors as Inspectors including the petitioners and on the basis thereof their cases for notional promotions to the rank of Assistant Commandants were also reviewed by the Departmental Promotion Committee, as a result whereof, orders promoting 281 Inspectors as Assistant Commandant had been issued. The cases of those 281 Assistant Commandant were further reviewed to the rank of Deputy Commandant and Second-in-Command respectively by the

Review DPCs and out of them, 277 had been empanelled for promotion to the rank of Deputy Commandant and 132 for notional promotion as Second-in-Command. But their promotions had been held in abeyance. It has been pointed out that at least 204 Officers have since retired and only 77 are left in service out of whom 57 are due to retire by the end of the current year. The learned counsel would contend that as decisions in Babu Joseph's case (supra) and Puran Singh had attained finality the same benefits are to be extended to the directly recruited Sub-Inspectors, particularly when the said decisions got the approval of the Apex Court. Reliance in this connection has been placed upon *V.V. Joseph and Ors. v. Union of India and Ors.*, : AIR 1993 SC299 and *Shreedharan Kallat v. Union of India and Ors.* : [1995]3SCR828 .

30. Mr. Keshav Dayal, Ld. Senior Counsel, appearing on behalf of the UOI would, however, submit that Babu Joseph's case (supra) was wrongly decided. Learned counsel would contend that a bare perusal of the Rules would clearly show that the seniority was required to be maintained State-wise and Frontier-wise and not at the level of the Head Quarter. He would submit that no rule exists in terms whereof promotions were to be granted automatically upon completion of three years. The very fact that changes have been brought out in the Rules, contended Mr. Dayal, would clearly go to show that earlier it was not necessary to maintain a common seniority list. If, he would contend, it is held that the judgment of the Gwalior Bench of the Madhya Pradesh High Court is wrong, the direct recruits Sub-Inspectors cannot take any benefit thereof. Our attention, in this connection, has been drawn to the additional affidavit filed by the respondents wherein how the mistake was committed by the respondents had been explained. Learned counsel placed strong reliance, in this connection, *State of Orissa v. Chintamani Khuntia and Ors.* : (1997)8SCC422 .

31. Learned counsel would contend that no promotion can be granted with retrospective effect. Reliance in this connection has been placed upon *Vinodanand Yadav v. State of Bihar* 1995 (7) SLR 713.

32. As regard finality of the judgment of the Madhya Pradesh High Court, learned counsel would rely upon *State of Bihar and Ors. v. Kameshwar Prasad Singh and*

Anr. : AIR 2000 SC2306 .

33. As regard Article 14 of the Constitution of India, it was submitted that in a case of this nature the same would have no application.

34. Reliance, in this connection, has been placed upon Government of Andhra Pradesh and Ors. v. A.P. Jaiswal and Ors. AIR 2001 SC 499, wherein it has been held :

'26. The tribunal, in this case, after holding that retrospective regularization of Andhra Engineers to be erroneous committed another error in proceeding to grant relief to the respondents without quashing the gradation list. In this regard, it held in view of the fact that the respondents had already retired, no purpose will be served by quashing the list, therefore, it directed the Government to treat the Telangana Engineers as seniors to the Andhra Engineers of the same cadre and issued a further direction to give these Telangana Engineers proforma promotions at various stages which were given to their Andhra counterparts and then to pay all consequential monetary benefits with interest @ 10%. These directions, in our opinion, are without jurisdiction. Under the service conditions applicable to the respondents, there is no absolute right to them for promotion from stage to stage. They only had right to be considered for such promotion as and when a vacancy arose. Assuming for argument's sake that the tribunal in the impugned judgment was justified in holding that the respondents were entitled to seniority over their Andhra counterparts even then it could not have straightway directed their promotion and granted them all consequential monetary benefits that too with interest. This Court has held in a number of cases that the Courts cannot issue a mandamus to promote. In the case of State of Mysore v. P.N. Nanjundiah : (1969)3SCC633 this Court held as follows : 'As to the issuance of mandamus by the High Court, the High Court ought not to issue writs directing the State Government to promote the aggrieved officers with retrospective effect. The correct procedure for the High Court was to issue a writ to the State Government compelling it to perform its duty and to consider whether having regard to his seniority and fitness the 1st respondent should have been promoted on the relevant date and so what consequential benefits' should be allowed to him'. This

decision has been consistently followed by this Court in a catena of other cases. We are sorry to note that the tribunal did not apply these principles in the instant case. therefore, we are of the opinion that the tribunal by the impugned order grossly erred in directing the promotions of the respondents as also the payment of consequential monetary benefits. We having held the retrospective regularization of the Andhra Engineers as valid, the gradation lists prepared on that basis, therefore, must be held to be valid gradation lists. The impugned order of the tribunal holding otherwise has to be set aside. In view of this finding of ours, the consequential relief granted to the applicants in the main batch of petitions has to be quashed, and it is ordered accordingly.'

35. Ms. Mohan appearing on behalf of the directly recruited Assistant Commandant would submit that this writ petition should be dismissed, on the ground of delay and laches on the part of the petitioners. According to the learned counsel since 1975 the Direct Recruited Sub-Inspectors had neither filed any representation nor questioned their suppression. Learned counsel would contend that they had waited for a period of 17 years in filing these writ petitions and thus they are not entitled to any equitable reliefs. Reliance, in this connection, has been placed upon B.S. Bajwa and Anr. v. State of Punjab and Ors. : AIR 1999 SC1510 .

36. Ms. Mohan would also contend for the purpose of Inter se seniority and of the promotion the decisions of the Madhya Pradesh High Court be applied in view of passage of time.

37. Our attention, in this connection, has been drawn to the chart given at page 374 for the purpose of showing as to what extent the benefits would be derived by the direct recruited Sub-Inspectors, in the event their writ petitions are allowed.

38. Ms. Mohan would urge that had the direct recruited Assistant Commandant been made parties in the earlier writ petition they could have shown that the direct recruited Assistant Commandants had been seriously prejudiced thereby. Mr. Sharma and Mr. Gupta in reply would submit that Union of India cannot be permitted to approbate and reprobate. It was submitted that in fact mistake of the Government, if any, learned counsel would contend, has resulted in injustice to the Sub-Inspectors as although their promotion was due in 1973-74 and they have

been promoted at the appropriate stage, in which event, they would have become senior to the directly recruited Assistant Commandants. It was pointed out that at that stage the direct recruited Assistant Commandants had not come into picture at all. Learned counsel would urge that the official respondents had passed wrong orders of promotion wherever the petitioner did not have any control and as such they cannot suffer any prejudice in this behalf. Delay, if any, submitted the learned counsel is on the part of the direct recruited Assistant Commandant inasmuch as they had approached the Court of Law only in the year 1994. Mr. Gupta would further submit that it has not been demonstrated as to how and in what manner the judgment of the Gwalior Bench of the Madhya Pradesh can be said to be wrong.

40. Interpretation of Rule 136(6) of the Rules having fallen for consideration and the same having rightly been interpreted, Mr. Gupta argued, no case has been made out for holding that the said judgments are not correct. As regard delay, reliance has been placed by Mr. Gupta upon K.C. Sharam and Ors. v. Union of India and Ors. : AIR 1997 SC3588 and Chairman Railway Board and Ors. v. C.R. Rangadhamaiah and Ors. : AIR 1997 SC3828 .

41. Before advertng to the rival contentions of the parties, as noticed hereinbefore, we may notice that admittedly 50% posts of the Assistant Commandants is to be filled up by way of direct recruitment and 50% of them are to be filled up way of promotion.

42. Rule 118 of the Rules states that in all ranks promotion shall be based on merit and suitability in all respects with due regard to seniority. Rule 119 provides that passing of pre-promotion course is an essential condition for promotion. Rule 123 provides for the list of seniority of Sub-Inspectors at the State level. For the purpose of the said rule certain Organisations for imparting training were also to be construed as 'State'. As per Rule 124 list of seniority of Inspectors, however, is to be maintained frontier-wise. Rule 125 categorically states continuous officiation or appointment in such rank would form basis of seniority in any rank.

43. Rule 136 whereupon strong reliance has been placed provides for procedure for selecting Sub-Inspector for List 'E' and promotion from Sub-Inspector to Inspector. Sub-rule (1) of Rule 136 provides that promotion of Sub-Inspectors to

the post of Inspectors shall be made by Inspector General to whom recommendations therefor would be made through Deputy Inspector General stating who, according to him, would be suitable therefor. Sub-rules (2), (3) and (4) provide for the manner in which such promotions are to be effected. Sub-rule (5) of Rule 136 provides that the names would be arranged in order of seniority. Sub rule (G) thereof states that the list of Sub-Inspectors approved for inclusion in list 'E' shall be maintained at the Head Quarters of BSF.

44. Rules 7,8,9,13 and 19 of the BSF (Subordinate Officers and Under Officers) Promotion and Seniority Rules, 1975 are as follows :

7. List of seniority of Sub-Inspectors.

The list of seniority of Sub-Inspectors shall be maintained by the Deputy Inspector General.

Provided that in respect of persons working in the Border Security Force Academy, Tekanpur, Border Security Force Training Centre and School Hazaribagh, Central School of Weapons and Tactics, Indore and all Battalions in the Headquarters Reserve and Artillery Regiment, such list shall be maintained by the Commandant, Border Security Force Academy, Tekanpur, and all such Institutions and Battalions shall, for the purposes of this rule, be construed as one sub-sector.

8. List of seniority of Subedars (Inspectors) :-

The list of seniority of Subedars (Inspectors) of the Sector shall be maintained by the Inspector General:

Provided that in respect of persons working in the Border Security Force Academy Tekanpur, Border Security Force Training Centre and School, Hazaribagh, Central School of weapons and Tactics, Indore and all Battalions in the HQrs. Reserve and Artillery Regiment. Such list shall be maintained by the Commandant, Border Security Force Academy, Tekanpur and all such Institutions and Battalions shall, for the purposes of this rule, be construed as one sector.

9. Basis of seniority

Seniority in any rank shall be determined on the basis of continuous regular appointment in that rank. 13. Maintenance of Promotion Lists

(1) The Commandant shall make entries in Lists 'A' to 'C', the Deputy Inspector-General in list 'D' and the Inspector General in List 'E'. Entries in list 'D' and 'E' in respect of units directly under the Director-General shall be made by the Director-General.

(2) Consolidated gradation lists of Head-Constables approved for inclusion in list 'D' and of Sub-Inspectors (Platoon Commanders) approved for inclusion in list 'E' shall be maintained at the Directorate General, Border Security Force.

19. Procedure for preparation of promotion lists :-

(1) The names of nominees found fit for inclusion in the aforementioned promotion lists shall be arranged by the Board concerned in the order of seniority:

Provided that any junior person who, in the opinion of the Board, is of exceptional merit, may for reasons to be recorded in writing, be assigned a position in the list higher than that of others senior to him.

(2) The names of such persons as are approved by a Board for inclusion in a promotion list shall be placed below the names of those persons who had been approved by the previous Boards.'

45. Before the Gwalior Bench in Babu Joseph's case (supra) the respondents even did not produce documents traversing annexures to the writ petition. It is not disputed that promotion was subject to promotion Course. The learned Judge proceeded on the basis that there was no reason as to why such an opportunity had not been granted, particularly, when Babu Joseph was posted under the third respondent in the Rajasthan Sector. Referring to Rule 118 of the Rules although it had been held that merit and suitability were to be considered by the concerned respondent but the same were held to be governed by the performance in the existing rank.

46. The question which arose for consideration therein was as to how accelerated promotion had been given to some in the petitioners-batch but the same had not been properly explained by the official respondent. In that case Babu Joseph's name in list 'E' for promotion found place on 20th September 1975. The Court considered the fact that had his case been considered he would have got opportunity to appear in pre-promotion courses at least thrice or four times but he got the said benefit for the first time only in 1973. On the fact of that case, therefore, it was held :

'16. On facts accordingly, it has been established beyond dispute that no Explanation is forth coming as to why petitioner could not be considered for promotion in 1970 Along with respondent No. 18. Whether respondent No. 3 or for that matter the Commander or D.I.G. concerned performed their respective duties envisaged under Old Rules 129 and 136 read with Rule 18. There is no whisper of it in the return.....'

47. Keeping in view the fact that the petitioner therein had been appointed on 16th November 1967 and had completed the period of three years on 16th November 1970 it was directed that his entitlement to promotion for higher posts would be considered as on that date and on other subsequent dates for next higher promotion. It was directed accordingly.

48. In Puran Singh's case the Court followed the earlier decision in Babu Joseph's case. On ground all the writ petitioners therein had obtained taken training even before Babu Joseph and others. In that case also the respondents did not explain the situation. In the afore-mentioned situation the directions, as noticed hereinbefore had been issued.

49. However, in the instant case, the respondents have filed an additional affidavit wherein it has categorically been contended that the decision in Babu Joseph's case is based on wrong interpretation.

50. Interpretation of statutory rules would depend upon the text and context thereof. For the afore-mentioned purpose the entire rules are to be read in their entirety and then Chapter by Chapter and then provision by provision. The said

rules do not contemplated automatic promotion. Merit and suitability of the concerned officer would be the primary test but seniority has also to be taken into consideration.

51. It is not disputed that in these cases no accelerated promotion has been granted. No person has been found to be having exceptional qualification and found fit by the competent authority for accelerated promotion in terms of Sub-rule (3) of Rule 115.

52. It is also beyond any cavil of doubt that whereas Sub-Inspectors are under the control of the Deputy Inspector-Generals, the Inspectors are under the control of the Inspector-Generals. Rules 123 and 124 provide for maintenance of list of seniority of Sub-Inspectors and Inspectors as State-wise and Frontier-wise respectively. Even for the said purpose some organizations were to be treated as 'State' and 'Frontier'. It is also not in dispute that undergoing the pre-promotion Course as specified in Rule 128 is mandatory for promotion. It may be that an employee has wrongly been denied entry in such Courses but therefore an appropriate order could be passed, but that by itself, in our considered opinion, cannot be a ground for holding that all the Sub-Inspectors and Inspectors irrespective of their position and date of promotion and irrespective of the fact that as to whether they had undergone the requisite training for promotion would be entitled to promotion as a matter of right. The answer to the said question must be rendered in the negative.

53. The rules do not say that automatic promotion would be granted upon completion of three years. Grant of promotion would not only depend upon the existence of vacancy but also on the intention of the Central Government to fill up the same.

54. No employee has a right to obtain a writ of or in the nature of mandamus directing the respondents to promote him to a rank irrespective of the fact as to whether he may be found suitable on merit therefore or not.

55. At several stages of promotion not only the vacancy position is required to be considered but also the merit of the respective candidates are also required to be

considered.

56. Rule 136(6) itself is not a rule specifying as to how seniority is to be maintained. If such was the intention of the Central Government, there was absolutely no reason as to why the provisions like Rules 122, 123 and 124 had to be made which specifically deal with the subject of seniority.

57. It is not correct to contend that Rules 123 and 124 are merely procedural in nature. The same, in our opinion, are substantive. Ex facie there appears to be a conflict but the same is not unexplainable. Sub-rule (6) of Rule 136 speaks of a gradation list, Since gradation list is to be prepared only in respect of Sub-Inspectors to be selected for list 'E' and promotion from Sub-Inspector to Inspector. Such gradation list is confined only to the persons appointed. The same, however, would not govern the seniority list which would vary from time to time having regard to the provision of accelerated promotion and supersession. Such a gradation list is required to be maintained for the purpose of inclusion in list 'E'. Promotion of a person at times may depend upon fortuitous circumstances but it is trite that nobody can, having regard to the specific rules of seniority, contend that despite the fact that seniority lists are required to be maintained State-wise and Frontier-wise, they can claim automatic promotion although no vacancy had arisen within a State or within a frontier.

58. We, therefore, with utmost respect to the learned Judges, are of the opinion that Babu Joseph and Puran Singh cases' (supra) were decided in the facts of that case. In those judgments no law has been laid down nor any finding to the effect that the promotion would be automatic had been arrived at. Case of each person, therefore, has to be considered separately. It is held that by reason of the said judgment to the effect that irrespective of merit the writ petitioners are entitled to automatic promotion the same would lead to a situation which is not contemplated by the statutory rules. By reason of such interpretation the seniority of the official in the rank of Assistant Commandant and Deputy Commandant and Second-in-Command would be required to be re-fixed. Such re-fixation of seniority would unsettle the settled position at the level of Assistant Commandant and Deputy Commandant which is wholly unwarranted.

59. However in the peculiar facts and circumstances of this case, we are of the opinion that the writ petitions are not liable to be dismissed only on the ground of delay and laches.

60. The official respondents, therefore, must carry out the selection process in terms of the old rules. The extent of prejudice which may be caused to the direct recruits may be noticed from chart aforementioned.

61. From the said chart, it would appear that the promoted Sub-Inspectors would be getting the benefit of seniority ranging from two years to seventeen years. Furthermore, if and when, even in terms of the judgments in Babu Joseph and Puran Singh's cases (supra) they are promoted as Assistant Commandant, further promotion to the post of Commandant onwards cannot be automatic. The case of the directly recruited Assistant Commandant also were required to be considered having regard to the vacancy position.

62. These writ petitions are disposed of with the afore-mentioned directions. However, in the facts and circumstances of these cases, there shall be no order as to costs. We, however, direct the authorities/respondents, having regard to the delay that has occurred in the meantime, to consider the desirability of considering the cases of promotion of concerned persons as expeditiously as possible, preferably within three months from the date of communication of this order. In the event any of the persons, who became entitled to promotion has been deprived therefrom, has retired, he may be granted national promotion.

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