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

RESERVED ON: 10.09.2015
PRONOUNCED ON: 30.09.2015

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+ WP (C) 4727/2010

NC SUNDAR SINGH

..... Appellant

Through: Ms. Rekha Palli, Sr. Advocate
with Ms. Punam Singh, Ms. Shruti Munjal,
Ms. Ankita Patnaik and Mr. Nikhil Palli,
Advocates.

versus

UOI AND ORS.

..... Respondents

Through: Mr. Sanjay Kumar Saxena and Mr.
M.K. Tiwari, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

S.RAVINDRA BHAT, J.

1. In this writ petition, directions are sought against the Border Security Force ("BSF") for the quashing of orders dated 27.04.2009 and 18.02.2010 by which the fourth respondent (hereafter referred to as "Toswara") was permanently absorbed in the Water Wing (of BSF). The petitioner complains that these orders are contrary to the BSF

Water Wing Group 'A' (Technical Staff) Recruitment Rules, 2005, (hereafter called "the Rules").

2. The brief facts are that the petitioner is currently functioning as Assistant Commandant in the Water Wing of the BSF. He was enrolled originally as Subedar (Workshop) on 16.12.1993. He holds a degree in engineering; he was promoted as Assistant Commandant (General Duty) on 22.07.2004. Toswara, on the other hand, was directly recruited by the BSF as Assistant Commandant w.e.f. 02.07.1993. He started functioning in the Water Wing from 07.07.2003. Before 2005, the BSF did not have separate Recruitment Rules for its Water Wing; its personnel were treated as part of the General Duty Cadre but in specialized units. When the Rules came into force, the provision was made by the BSF, to absorb officers serving in the Water Wing Unit/Cadre. That Rule - i.e., Rule 6 reads as follows: -

"6. Absorption in Water Wing Cadres. - Officers already working in Water Wing shall exercise their irrevocable option for absorption in Water Wing Cadre".

The permanent absorption of the petitioner in the BSF Water Wing as Assistant Commandant pursuant to the option exercised under Rule 6 was sanctioned on 12.04.2007. Consequently, the orders were made soon thereafter. The petitioner refers to the letter of 09.03.2009 where the BSF clarified that future absorption in the Water Wing would be from the date of issuances of the order of absorption in that Unit. It is stated that accordingly when on 27.04.2009 Toswara was permanently absorbed in the Water Wing, he was born in that cadre with effect

from that date. In these circumstances, the petitioner appears to have represented to the BSF on 28.05.2009 complaining that absorption of General Duty personnel in Water Wing was contrary to the Rules because only those possessing technical qualifications would be treated as part of the Water Wing Cadre. He further represented to the respondents along the same lines and highlighted that 09.03.2009 letter issued earlier had specifically stated that future absorptions would be made effective from that date. On 18.02.2010, the BSF issued a letter, clarifying the *inter se* seniority as between the petitioner and Toswara. The relevant extract of the said letter is as follows: -

“As approved by the MHA, the inter-se seniority in the rank of Assistant Commandant (Water Wing) in respect of Shri C S Toswara (IRLA No.19360751) who absorbed in Water Wing permanently with effect from 27 April 2009, is fixed with effect from 02 July 1993.

Authority : MHA CR No.101741/2009/Pers-III dated 23 Dec 2009.”

3. The petitioner complains that despite his representation against this *inter se* seniority fixation, the respondents did not take any steps to reverse their action. The petitioner, therefore, contends that the absorption of Toswara sought to be made effective from a date prior to the letter of absorption is unprincipled and contrary to the norms. Ms. Rekha Palli, learned senior counsel, argues that under the Rules, the post of Assistant Commandant (Water Wing) is to be filled either by promotion or deputation. It is stated that as between the petitioner and Toswara, only the former possesses the requisite qualification to hold

the post of Assistant Commandant (Water Wing). Consequently, the mere fact that Toswara worked in the Water Wing since 2003 was insufficient to entitle him to an earlier place in the seniority list given that the petitioner was absorbed earlier w.e.f. 12.04.2007. Ms. Palli also highlights that the letter dated 09.03.2009 had clearly stated that future absorption in the Water Wing would be from the date of issue of the order of absorption and all personnel would be entitled to seniority from such dates of “their absorptions” and not from the date of seniority of the “General Duty Cadre”. Despite such clear policy, Toswara was granted an undue favour completely unsupported by the Rules.

4. The BSF does not dispute the essential facts. It, however, points out that Toswara was a direct recruit Assistant Commandant whereas the petitioner had joined the lower cadre of Subedar - albeit in the Water Wing Unit of the BSF. At that point of time, the Water Wing did not have a separate cadre and was a part of the General Duty Cadre. In these circumstances, the petitioner’s claim, according to both BSF as well as Toswara - is unfounded. It is further pointed out that Toswara was under low medical category at the time when the question of his absorption was considered by the BSF. He could not consequently be recommended. This understanding itself was suspect because the requirement of an officer to be of SHAPE-1 is in fact not prescribed by the Rules for deputationist or for absorption but is applicable to promotees. Since Toswara was already an Assistant Commandant, this condition should not have been applied to him.

The BSF relies upon the fixation of *inter se* seniority as between the petitioner and Toswara on the basis of the latter's initial entry into the cadre by relying upon the Central Government's Office Memorandum dated 29.05.1986. The relevant part of the Central Government's clarification in this regard is as follows: -

“(iv). In the case of a person who is initially taken on deputation and absorbed later (i.e. where the relevant recruitment rules provide for “transfer on deputation/transfer”), his seniority in the grade in which he is absorbed will normally be counted from the date of absorption, if he has, however, been holding already (on the date of absorption) the same or equivalent grade on regular basis in his present department, such regular service in the grade shall also be taken into account in fixing his seniority, subject to the condition that he will be given seniority from the date he has been holding the post on deputation...”

5. The BSF in its counter affidavit also produced the service profile of the two officers in a tabular form; the same is extracted as under: -

Srl. No.	Particulars	Shri C.S. Toswara	Shri N C Sunder Singh
(i)	Date of joining BSF	02-07-1993 as Assistant Commandant (Direct Entry)	16-12-1993 as Inspector/Direct Entry (Workshop)
(ii)	Date of promotion as Assistant Commandant	02-07-1993	22-07-2004
(iii)	Date of posting in Water Wing	07-07-2003	16-12-1993
(iv)	Date of	27-04-2009	11-04-2007

	absorption in Water Wing.		
(v)	Education qualification	M.Sc.	BE (Mech)
(vi)	Date of seniority in the Water Wing Cadre	02-07-1993 (inter-se seniority fixed by MHA with reference to the date from which he has been appointed on a regular basis to the same or equivalent grade in his parent department i.e. the date of Assistant Commandant (General Duty)	11-04-2007

6. The BSF refutes the petitioner's contentions by further stating that regulation of *inter se* seniority as between those working earlier in the General Duty Cadre but at the same time opting for absorption could not be regulated in terms of the Recruitment Rules at least so far as the stipulation as to educational qualification etc. were concerned. Here again, it is highlighted that Toswara entered the higher cadre of Assistant Commandant (General Duty) on 02.07.1993, i.e. ten years earlier to the petitioner who was promoted to that post, i.e. Assistant Commandant on 22.07.2004. The latter was promoted on the basis of his seniority in the Subedar (General Duty) Cadre. Both the petitioner and Toswara were in the BSF Water Wing on the basis of makeshift

arrangement in the absence of any Recruitment Rules clearly earmarking a separate cadre. It is specifically urged that seniority on promotion of all such personnel were being regulated as applicable to General Duty Cadre. The petitioner availed the benefit of promotion as Assistant Commandant in the seniority of Subedar (General Duty) Cadre while serving in the Water Wing as junior to fourth respondent but never opposed his promotion and juniority to the fourth respondent.

7. Both the BSF and Toswara rely upon Rule 8 of the Rules to say that those holding a higher rank whether in an officiating or substantive capacity shall be senior to those holding a lower rank and more importantly Rule 8 (2) which states that “seniority in any rank shall be determined on the basis of continuous regular service in that rank”.

8. As can be discerned from the factual discussion, the narrow controversy which the Court had to decide upon is the *inter se* seniority as between the petitioner and Toswara. The petitioner’s submission that Toswara should be treated as junior to him is firstly based upon the fact that he held the degree qualification - which is prescribed as essential for the post of Assistant Commandant in the Water Wing whereas Toswara does not admittedly hold that qualification. The petitioner’s second premise is that Toswara was absorbed on 27.04.2009, i.e. after the petitioner’s absorption on 12.04.2007. Here, reliance is placed upon BSF letter dated 09.03.2009

clarifying that those absorbed in the Water Wing in future would have their seniority regulated from the date of such absorption.

9. What emerges from an overall reading of the facts is that Toswara joined as a direct recruit Assistant Commandant (General Duty) on 02.07.1993. The petitioner joined the BSF later and in a lower post, i.e. on 16.12.1993 as Subedar (Workshop) in the same General Duty Cadre. This being undisputed fact, the question of the petitioner's claiming seniority over Toswara could never arise. The latter held a higher position in the same cadre and had to be treated as the petitioner's senior even after the promulgation of the Rules in 2005 by virtue of Rule 8 (2). The petitioner's argument that being asked to discharge the specialized duties pertaining to the Water Wing in these circumstances, are not persuasive for the simple reason that before 2005, there was no separate Water Wing Cadre. The Water Wing Unit was treated as part of the same cadre, i.e., General Duty Cadre to which both he and Toswara belonged. Toswara concededly was an officer holding a superior rank, i.e. one rank higher in the hierarchy. Besides the untenability of the petitioner's argument, conceding to his claim would in fact amount to directing BSF to efface 16 years of continuous service or employment rendered by Toswara in the higher cadre of Assistant Commandant and virtually treats him as having entered that cadre by some unknown method, w.e.f. 27.04.2009. The reliance on the letter dated 09.03.2009 therefore must also fail given the mandate of Rule 8(2).

10. During the course of hearing, the petitioner's counsel relied upon the judgment of the Supreme Court reported as *Madhya Pradesh Electricity Board v. S.S. Modh & Ors.*(1997) 11 SCC 6 to say that the absorption to an individual is to be based upon existing Recruitment Rules. This Court is of the opinion that the said decision related to an entirely different set of facts and circumstances. The officer concerned was working in the Chambal Hydel Scheme, Gandhisagar; his services were later absorbed after decision of the State Government to transfer the project along with the employees to the Madhya Pradesh Electricity Board. Such subsequently transferred officers were required to opt either to accept the services under the Board or opt out of employment. The officer concerned opted for services with the Board and after absorption claimed that he ought to have been absorbed as an Assistant Engineer (even though he was an Overseer). The High Court accepted the contentions. Reversing this, the Supreme Court held that the absorption in the higher cadre of Assistant Engineer had to be only of individuals who had prescribed requisite qualifications. The officer concerned did not possess the qualifications. In the present case, however, concededly Toswara was entitled and he was directly recruited as Assistant Commandant (General Duty). He was asked to work in the Water Wing sometimes in 2003. The petitioner was promoted from the post of Subedar to Assistant Commandant subsequently in 2004. If the petitioner's contentions were to be accepted, it would be impossible to give effect to Rule 6 because individuals who were allowed to opt and continue in the Water Wing may have or may not have possessed the

qualifications required by the Rules which were formulated in 2005. The option to be absorbed was given to all existing personnel. This Court is, therefore, of the opinion that the petitioner's submissions in this regard are without merit.

11. For the forgoing reasons, this Court holds that the petition lacks merit and is consequently dismissed.

**S. RAVINDRA BHAT
(JUDGE)**

**DEEPA SHARMA
(JUDGE)**

SEPTEMBER 30, 2015
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