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

+ **W.P.(C) 2233/2018**

KULDEEP KUMAR

..... Petitioner

Through Mr. Ankur Chhibber, Advocate

versus

UNION OF INDIA AND ORS.

..... Respondents

Through Mr. Gaurang Kanth, Advocate
Mr. Brajesh Kumar, Advocate

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE SANJEEV NARULA

ORDER

% **30.11.2018**

Dr. S. Muralidhar, J.:

1. The Petitioner, who joined the Indo-Tibetan Border Police ('ITBP') as Constable (GD) on 7th September 1989, seeks the quashing of the order dated 16th October 2017 issued by the Respondents rejecting the Petitioner's request for notional promotion to the rank of Head Constable (HC) with effect from 22nd October 2007.

2. It appears that during the pendency of the present petition, the Respondents themselves withdrew the aforementioned order dated 16th October 2017 by a subsequent order dated 24th April 2018 and granted the Petitioner notional promotion as HC with effect from 26th November 2011. The Petitioner, however, seeks notional promotion as HC with effect from 22nd October 2007 on par with his batchmates. The

Petitioner also seeks the consequential promotion to the post of Assistant Sub-Inspector (ASI) notionally from the date his batchmates were so promoted. In effect, therefore, the Petitioner's grievance survives notwithstanding the subsequent order dated 24th April 2018 issued by the Respondents.

3. The background facts are that the Petitioner was sent for a Commando Course in 1993. On 25th July 1994, he along with other personnel of the force were headed from SOG Camp to CGO Complex when a gunshot was fired accidentally by one of his colleagues as a result of which he was injured on his left leg. The Petitioner received treatment from the ITBP Base Hospital from 25th July 1994 to 23rd September 1994. He was advised six weeks of sick leave.

4. The incident was investigated by way of a Court of Inquiry and by its order dated 24th December 1994, it was opined that the injury caused to the Petitioner was neither intentional nor due to his own negligence. It happened while he was performing his duties due to the negligence of personnel travelling along with him. It was also opined that the accidental injury was sustained by the Petitioner while he was on Government Duty and, thus, all expenses of his treatment would be borne by the Government.

5. In the medical examination conducted by the Respondents, the Petitioner was placed in the category of CEE (T) for six months with effect from 18th February 1995, with 'T' denoting 'Temporary'. He continued to be placed in this category with effect from 31st October 1996. Pursuant to another medical examination the Petitioner was, as of 6th May 1997, the

Petitioner was placed in the category of BEE (P) [with 'P' denoting Permanent]. However, for reasons that are not clear even from the counter affidavit filed by the Respondents in the present case, he was not immediately thereafter placed in the A-2 (P) category. Eight years thereafter on, the Petitioner's medical category was changed to LMC (Low Medical Category) A-2 (P) in line with the SHAPE-I medical categorisation..

6. At this stage, it is necessary to discuss in some detail Standing Order No.4/2002 dated 29th May 2002 issued by the Respondents introducing SHAPE-I medical categorisation for the purposes of promotions in the ITBP. The word 'SHAPE' is actually an acronym of various parameters with the letter 'S' denoting Psychiatric, 'H' denoting hearing, 'A' denoting appendages, 'P' denoting physical, and 'E' denoting. Further, the functional capacity for military duties under each of the aforesaid parameters is denoted by numerals indicating declining functional efficiency. For instance, '1A' indicates that the officer is "fit for all duties anywhere" and '1B' indicates that the officer is "fit for all duties anywhere; under medical observation and has no employability restrictions".

7. The medical records of the Petitioner have been enclosed by him as Annexure-P4 to the petition. These are not disputed by the Respondents. On 6th May 1997, the medical opinion of the Medical Board was for the Petitioner to be placed in the category of LCM BEE (P) with 'P' denoting 'Permanent'. Then we have the Medical Board proceedings on 8th September 2007 (Annexure-P5) in which, in Column 14, under the head of "Previous details of Medical Category with date", it was noted:

- “1. CEE(T) w.e.f. 18.02.95
2. CEE(T) w.e.f. 31.10.96
3. BEE(P) w.e.f. 06.05.97
4. BEE(P) w.e.f. 10.06.99”

8. In Column 15, titled ‘The date of last Medical Board held’, the date was noted as 12th June 1999. In Column 17, titled ‘specialist medical opinion’, a reference was made to the medical opinion of a specialist at the Safdarjung Hospital, which was enclosed with the sheet. Column 18 is the opinion of the board which reads “Board recommends to place in individual in LMC A-2(P) w.e.f. 07/09/2007”.

9. Now reverting to SO No.4/2002, what is relevant for the purposes of the present case is para 15 thereof , which reads as under:

“15. The relaxation in SHAPE-I medical category will be admissible to the following two categories of CPMF’s personnel to the extent detailed below:

(a) Officials/personnel wounded/injured during war of while fighting against the enemy/militants/intruders/ armed hostilities/insurgents due to an act of these in India or abroad will be eligible for promotion while placed in one of the following medical classifications:

i) **Individual Low Medical Factors**

(aa) 112 or E2 or P2 (Dental) which will be consider at par with SHAPE-I; and

(ab) A2 or P2 or A3

ii) **Combined Low Medical Factors**

(aa) 112 and E2 combined, and

(ab) 112 or E2 combined with A2, A3 or P2

(b) Officers/men who are wounded/injured during field firings/accidental firings/explosion of Mines or other explosive devices and due to accidents while on active Government duty in India or abroad will be eligible for promotion in the following SHAPE categories:

- (i) S1H1A2P1E1
- (ii) S1H1A1P2E1
- (iii) S1H2A1P1E1
- (iv) S1H1A1P1E2
- (v) S1H2A1P1E2”

10. Since the Petitioner was wounded in an accidental firing, he argues that his case is covered under para 15 (b) and he would be eligible for promotion in the SHAPE category at (i) hereinabove having been categorized in the A-2 category.

11. In the counter affidavit filed by the Respondents, after referring to the above SO, it is stated that the Respondents rejected the Petitioner's representation seeking notional promotion to the post of HC from the date on which his batchmates were granted promotion in the year 2007 because his batchmates were brought in the approved list C of 2003 and granted promotion with effect from 22nd October 2007. At that time, the Petitioner was in the category of LMC BEE(P) with effect from 6th May 1997 and was upgraded to the category of LMC A-2(P) only with effect from 7th September 2007.

12. In seeking to further explain why the Petitioner was not granted seniority along with his batchmates who were promoted as HC with effect from

22nd October 2007, it is stated in para 11 of the counter affidavit as under:

“11. That since he was upgraded to A-2 (P) Category only w.e.f. 07.09.2007, therefore, he was brought in the approved list C of 2008 at Sl.No. 33A and notional promotion was granted to him to post of HC/GD w.e.f. 25.11.2011 at par with other personnel who were brought in the approved list C of 2008.”

13. It must be recalled that at the time of filing the present petition, the Respondents had passed an order dated 16th October 2017 rejecting the Petitioner's representation. However, by the time the counter affidavit was filed on 12th July 2018, the said order dated 16th October 2017 was withdrawn by the Respondents themselves by an order dated 24th April 2018. The Respondents themselves granted the Petitioner promotion to the post of HC with effect from 26th November 2011.

14. The Petitioner's case is that it was the failure of the Respondents to properly fix his medical category as A-2(P) with effect from the last date of medical examination way back in 1999 that resulted in the subsequent failure to promote him to the post of HC along with his batchmates with effect from 22nd October 2007, and further promote him to the post of ASI in 2013. In other words, no fault was attributable to the Petitioner in his being denied promotions with effect from the dates on which his batchmates were promoted.

15. Learned counsel for the Respondents repeatedly urged that the SO permits grant of promotions only to those officers who fall within the sub-categories (i) to (v) under para 15 (b) thereof and since the Petitioner was placed in the A-2(P) category only with effect from 7th September 2007, he

could only be brought on the approved list of 2008 at S.No.33(A). Therefore, his notional promotion could only be granted with effect from 26th November 2011.

16. However, learned counsel for the Respondents was unable to explain the delay of eight years in the Respondents placing the Petitioner in the correct medical category. The Medical Board which was held on 12th June 1999 had recommended that he be placed in the category of BEE (P) and yet his medical category was changed to A-2(P) only with effect from 7th September 2007. In fact, the Petitioner was recommended to be placed in a 'Permanent' medical category as early as 6th May 1997 and even that was not acted upon by the time of the subsequent medical board held on 12th June 1999.

17. Learned counsel for the Respondents then submitted that it was the Petitioner who did not make representation in good time. Once he made a representation, there was no delay on the part of the Respondents in reviewing his medical categorisation.

18. This Court is not satisfied with the above explanation. The failure of the Respondents to correctly place the Petitioner in the appropriate medical category cannot be attributed to his not making representations to them with regard to their inaction. The Respondents did not need the Petitioner to make representations to grant him what was due to him. It was for the Respondents to take the corrective action based on the medical opinion. The 8 year delay in doing so remains unexplained.

19. With his batchmates having been promoted as HC with effect from 22nd October 2007 and with his permanent medical categorisation being fixed as A-2(P) with effect from 7th September 2007, there should have been no difficulty in promoting the Petitioner along with his batchmates with effect from 22nd October 2007.

20. It may be noted that Mr. Chhibber, learned counsel for the Petitioner, pointed out that if the Respondents had placed the Petitioner in the correct medical category after the Medical Board held on 12th June 1999, he could have been sent for the pre-promotional course in 2003 along with his batchmates. In such event there would have been no delay and he too could have been granted promotion as HC with effect from 22nd October 2007. This failure also is attributable only to the Respondents.

21. Consequently, the Court directs that the Respondents will now issue a fresh order in modification of the order dated 24th April 2018 granting the Petitioner promotion to the post of HC notionally from the date on which his batchmates were granted promotion, i.e. 22nd October 2007. This exercise be completed by the Respondents and the necessary orders issued within a period of six weeks from today.

22. Further, as regards the Petitioner's further promotion as ASI, the Petitioner will be detailed for the pre-promotional course of ASI. If he qualifies in such course, he will be considered for promotion as ASI notionally with effect from the same date as his batchmates were granted such promotion i.e. 2013.

23. If there is a failure on the part of the respondents to comply with the above directions, it will be open to the Petitioner to seek appropriate remedies in accordance with law.

24. The petition is allowed in the above terms.

S. MURALIDHAR, J.

SANJEEV NARULA, J.

NOVEMBER 30, 2018

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