

(1985) 12 MP CK 0006

Madhya Pradesh High Court

Case No: M.P. No. 307 of 1984

Rajendra Singh

APPELLANT

Vs

Union of India and
Others

RESPONDENT

Date of Decision: Dec. 10, 1985

Acts Referred:

- Border Security Force Act, 1968 - Section 11, 141

Citation: (1986) JIJ 202

Hon'ble Judges: T.N. Singh, J

Bench: Single Bench

Advocate: R.D. Jain and S.K. Dubey, for the Appellant; N.P. Mittal, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Dr. T.N. Singh, J.

Tekanpur is a place near Gwalior, where there are several installations and institutions of the Border Security Force. One such installation is the Tear Smoke Unit, engaged in the manufacture of tear smoke material. Central Act No. 47 of 1968, called "The Border Security Force Act, 1968" was enacted to provide for the constitution and regulation of the said Force for ensuring the security of the borders of India. Chapter II of the Act contains provisions concerning conditions of service of the members of the said Force. Section 11 prescribes the procedure for "dismissal, removal or reduction" (in rank) of the members of the Force, wherein it is provided by sub-section () that the power exercisable thereunder "shall be subject to the provisions of this Act and the Rules". Section 141 of the Act contemplates making of rules for the purpose of carrying into effect the provisions of the Act. The Border Security Force (Subordinate Officers and Under-Officers) Promotion and Seniority Rules, 1975 have been framed u/s 141 of the Act.

2. Writ petitioners-one M. P. No. 307 of 1984, eight in M. P. No. 376 of 1984 and another one in M. P. No. 528 of 1984 are all "Under-Officers" of Border Security Force, serving in the Tear Smoke Unit at Tekanpur. Because common points of law are involved in all these cases, the petitions were heard analogously and are being disposed of by this common order.

3. The common grievance of all the petitioners is singular, complaining infraction of their statutory rights contemplated under the Act and the Rules. They are holding the posts or Naik and there are impending orders of their being "posted out" and reduced in rank. Respondents rely on the terms of what they call "Promotion Orders" made in each case and duly recorded in the Service Book of each of the petitioners. It is common case of the parties that the petitioners were Constables before being promoted to the rank of the Naik and indeed, they got "accelerated promotions" which was contemplated under the Rules. It is, however, respondents' case that the petitioners have no legal right to resist orders of "posting out" inasmuch as in each case, the petitioner has served in the Tear Smoke Unit in the rank of Naik for a period of more than three years. This stand was taken to repel the charge of hostile discrimination in virtue of Article 16 of the Constitution as the petitioners contend that they have been singled out for demotion by impending orders of "posting out" inasmuch as other officers similarly situated, have been spared the ordeal and humiliation. Reliance was placed by the petitioners' side on the statement made in para 9 (i) of the return in M. P. No. 376/84, wherein it is asserted that "the respondents have every right to implement the said order as and when the retention of the petitioners in T. S. U. is not found to be justified and they are treated as unsuitable". However, in a supplementary return, filed in the case, this position is clarified by stressing that petitioners had not undergone the prescribed pre-promotion tests and their suitability to hold the post remained open to be adjudged.

4. At one stage, I had taken the view that the petitions should be disposed of on a single point, but the factual background being nebulous, I insisted on the parties to clear the cloud so that I could stand on terra firma to decide the issue. It was contended by the petitioners that the respondents themselves asked the petitioners to make an option and the requirement having been complied with, the effect of the conditional promotion order in which the respondents reserved the right to "post-out" the petitioners, was wiped out. However, what the option papers, filed by the parties, reveal is that the petitioners were holding "temporary posts" of Naik ("NK (T)") in the Tear Smoke Unit and in each case their substantive appointment was in the rank of "L. C" (Constable). It is also disclosed that the petitioners offered to resign their posts in case of their appointment against temporary posts of "NK (T)" was "accepted". Respondents have made clear the doubtful position by filing Annexure C, which is a letter dated 19-8-80, addressed to the Assistant Director (Personnel) in the Directorate General of B. S.F. Headquarters, New Delhi by the General Manager of the Tear Smoke Unit, Tekanpur, by which some "option-papers"

were forwarded. This letter, purports to be the reply to Annexure A, which is a letter from the Director General's Office, asking for the "option-papers". What appears further from Annexure D, which is also a letter from the Directorate, written on 7-4-84, to the General Manager of Tear Smoke Unit, is that there was a proposal to frame a separate set of recruitment rules for the Tear Smoke Unit which enterprise was later abandoned. These Annexures, A, C and D, were filed with the supplementary return and reliance is placed on the following passage to submit that the petitioners had no right to remain attached to the Tear Smoke Unit for more than three years. It reads thus :-

Recruitment rules for the TSU are not specifically required as all the personnel manning various posts in a Unit are drawn from B.S F. on the basis of educational/technical qualification. The personnel thus remain B. S. F. men and fully combatised They return to the parent organisation every three years or so. Even in the project Report no rules for TSU.

5. I propose to deal first with the respondents' contention based on the aforesaid extract as it relates to the core of the controversy. One thing, however, must be made clear even at this stage. I must say that the "option-papers" filed by the several petitioners were never accepted or acted upon and no right ensued to the petitioners on the basis of those papers. Still, I have no hesitation also to take the view that the reliance on the extracted passage does not avail the respondents either as would appear clear from the discussion of the relevant rules which follow hereafter. Because, as held [Roshan Lal Tandon Vs. Union of India \(UOI\)](#), once a person becomes a Government Servant, he acquires the "status" attached to the post and the rights and liabilities of the post are no longer determinable by consent of parties, but only by statutes or statutory rules. Any change in the service conditions of any Government Servant, to his detriment, can only be made by amending the statutory rules governing him and not by an Executive order. This view was taken by me in the opinion delivered in Dr. D. C. Choudhary's case ((1985) 1 GLR 362) decided by a Division Bench of Gauhati High Court, after taking into consideration the decision of their Lordships of the Supreme Court in [Ramchandra Shankar Deodhar and Others Vs. The State of Maharashtra and Others](#), and [The State of Mysore Vs. Padmanabhacharya etc.](#), I would only like to add that in the instant case, the 1975 Rules aforesaid, were enacted u/s 141 of the Act and, therefore the same could be amended in the same manner in exercise of the same power and further that apart from the question whether the extracted passage could claim legitimacy, validity and legal force in virtue of Article 73 or the Proviso to Article 309 of the Constitution, the constitutional provisions are inapplicable. Indeed, factually, Annexure D, being a letter by the Deputy Director in the Directorate General of B.S.F. Headquarters, it cannot be said that the proposals made in the letter including the one contained in the extracted passage can claim legal authority from the said constitutional provisions. Even though the letter Annexure D, was meant to carry instructions, which, according to the Union of India's counsel Shri

Mittal, were binding on the petitioners, I have no doubt that if they meant anything, they merely explained the decision of the Government of India declining to frame separate set of rules for Tear Smoke Unit. At the most, according to me, they may be accepted only as proposals, which the Government may have in mind to be implemented in appropriate manner, but, in no view of the matter, it can be said that they were binding on the petitioners. In the absence of statutory service rules "Executive Instructions", according to S. D, Chowdhury (supra), may fill up the gap. But, not by any instructions, issued by any official or any authority in any manner; the instructions must, in my opinion, the "Executive Instruction", issued by competent authority, manifesting exercise of executive power of the Union or the State, contemplated under Article 73 or 162 of the Constitution.

6. Now, the Rules. Basis of promotion according to Rule 4, shall be ""merit and suitability in all respects, with due regard to seniority". Rule 5 provides for a "pre-promotion course" to be passed by a member of the Force, but the Proviso to Rule 5(1) relaxes the condition-precedent in the "exigencies of service or other reasons" and enables competent authority to order a promotion with the prior approval of the next superior authority subject to the condition that the officer promoted shall pass the next available "pre-promotion course", failing which he may be reverted. Sub-rule (3) contains a table in respect of the said course, but the Director General is authorised by sub-rule (1) itself to "specify" the course from time to time. Rule 6 deals with maintenance of seniority list of Constables, Lance Naiks, Naiks and Head Constables and provides importantly, that transfer in these ranks from one Unit or Institution or Battalion to their respective counterpart "shall be kept to the minimum except when such transfers are necessary in view of exigencies of operations", despite the fact that "battalion-wise or institution-wise or unit-wise" seniority list shall be maintained. It is true that the term "Institution" is not defined in the Rules or even in the Act.

7. But, I have no doubt that Tear Smoke Unit has to be regarded as an "Institution" within the meaning of Rule 6 because of what is found in Rules 7 and 8. In the said Rules, the expression "and all such institutions" follows "Border Security Force Academy, Tekanpur" and I have no hesitation to invoke the maxim *Noscitur as* (sic) to support the view I have taken. Rule 9 contemplates that seniority in rank shall be determined "on the basis of continuous regular appointment in that rank". Promotion to "short term vacancies" is provided in Rule 10, which contemplates such promotions being made "on an officiating basis if the exigencies of service so require". Rule 12 provides, in a tabulated form, different "lists" (namely, A, B, C, D, E) to be maintained of candidates approved for promotion. Lists A and B respectively are required to contain names of Constables and Lance Naiks fit for promotion respectively to the posts of Lance Naiks and Naiks. Rules 14 and 15 deal respectively with the procedure for selection of candidates for lists A and B and contemplate that such selection shall be made once in every year and among other requirements, it is contemplated that the prescribed officer shall "assess" the nominees in such

manner as may be laid down from time to time by the Director General. The promotion lists are required by rule 19 to be prepared in order of seniority. Rule 20,1 propose to extract:

Accelerated promotions-The competent authority may with the prior approval of the next superior authority promote out-of-turn, to the next higher rank any person who is considered to be of exceptional merit :

Provided that the number of persons so promoted shall not exceed ten per cent of the total number of vacancies in each rank in any one year."

The last Rule is Rule 21, which deals with "promotion of technical personnel" and having signal relevance, relevant portion thereof may also be extracted :

21. Promotion of Technical personnel.-The promotion of such personnel upto and including the rank of Inspector as may be designated as technical, by the Director General from time to time shall also be governed by the foregoing rules with the exception that.-

(a) Such technical personnel shall be required to pass such prescribed trade tests in their respective trades instead of the pre promotion courses mentioned in sub-rule (3) of rule 5, for promotion to such higher ranks as may be specified by the Director General.

8. Because, admittedly, all the petitioners get "accelerated promotion" and all of them, as recorded in the service books, which were produced in original in the course of hearing, show them as "Technical personnel" and indeed reserving the right of "posting out", it is necessary to determine their status in terms of the Rules. Although petitioners have claimed that they had undergone tests and trainings and promotion in case of each of them were made in such manner that they must be held to have been promoted in the "regular" manner, I find no factual basis to support the contention. Petitioners rely on Annexure P/I in M. P. No. 307/84, Annexure P/2 in M. P. No. 376/84 and Annexures P/I and P/2 in M. P. No. 528/84. The several orders are passed on different dates in the years 1979 and 1980. However, the compliance with the requirement either of Rule 12 or 21 is not manifested in any of the said Annexures. Though the petitioners may have passed some tests as indicated in Annexure P/I of M. P. No. 528/84 or P/2 of M. P. No. 376/84, it cannot be said that the statutory requirement of Rule 12 or even of Rules 14 and 15 and indeed of 21 was fulfilled in case of any of the petitioners. What is only transparently clear in each case is that merely on fulfilling the requirement of Rule 4 or, may be, even Rule 5, they were promoted on "officiating basis" in terms of Rule 10. This appears also clear from the fact that ""accelerated promotion" in terms of Rule 20 is limited to ten per cent of the total number of vacancies in each rank and in the instant case, indeed, it is also not clear if this requirement was duly fulfilled by limiting the promotions accordingly. It is only in the case of "short-term vacancy" that the Proviso to Rule 20 may not apply. The tests which were held to promote the

petitioners, were meant only to adjudge or assess their "merit and suitability" in terms of Rule 4 and indeed "exceptional merit" in terms of Rule 20.

9. Shri Mittal has drawn my attention to "Appendix A" annexed to the supplementary return. It is in several parts and is captioned "B. S. F. Promotion Rules" However, according to me, the instructions issued on the several dates do not do anything more than what is provided in Rules 5(1) and 21 (a). How "suitability" of candidates to be included in lists A, B and C has to be assessed as indicated in para 2 of the letter dated 14r9-83, issued by B. S. F. Headquarters. In the same letter, in para 3, it is also indicated that "professional ability" of such candidates shall be tested by both practical and written tests, in subjects enumerated in Appendix A of the said instructions, for lists A and B. I have perused the said Appendix 3rd indeed, it is not the petitioners' case that their "professional ability" was tested in any manner with reference to the said Appendix. On the other hand, what Shri Jain, appearing for the petitioners, contends-is that they were not required to be tested in terms of Rule 21 inasmuch as they had already undergone "pre-promotion course" in terms of Rule 5 (1), which submission, I find difficult to accept, because Rule 21 (a) explicitly authorises Director General to prescribe "trade-tests" instead of the "pre-promotion course" and, therefore, even if it is accepted that the petitioners did pass such "pre promotion course" for their "regular promotion", they would not be absolved of the requirement contemplated under Rule 21(a) because of what is contemplated in the proviso to Rule 5 (1) itself. Indeed, because they had not passed the test prescribed by Rule 21 (a), though they are later prescribed, their promotion, for the same reason, must also be considered to have been made under Rule 10.

9.1 Two things have come up in bold relief, in the aforesaid analysis of the Rules. Firstly, there is no concept of "tenure post" and secondly, demotion by means of "posting out" is also not contemplated or sanctioned. How an "Officiating" promotion is terminable is only deducible only from the proviso to Rule 5 (1) though indeed not expressly provided in the Rules, but what is expressly provided in Rule 6 is also of importance inasmuch as "transfer" in the ranks to which the petitioners belonged before their promotion, or now belong, after their pre motion, is required to be kept at the minimum and are made possible only "in exigencies of operations". Because the basis of seniority is "regular" appointment in the ranks, the right of each petitioner to obtain a "regular" appointment is secured by the joint mandate of the proviso to Rule 5 (1) and Rules 6, 9, 10, 14 and 15. I have, therefore, no hesitation to hold that by transferring them, the petitioners cannot be made to suffer a reduction in rank because such a course is not authorised by the Rules. Indeed, once in every year, in terms of Rules 14 and 15, lists for "regular" promotions are required to be prepared. The petitioners, therefore, have a right to be "assessed" for "regular" promotion. Therefore, though they may not be "posted out" to a lower rank, the respondents shall still have a right to ask the petitioners to offer themselves for "assessment". It is only when the petitioners refuse the offer or

when they fail to pass the prescribed test, that their "officiating" promotion may be terminated even in terms of the proviso to Rule 5 OK and not before that. I am also constrained to hold accordingly that the unqualified right to "post out" reserved by the respondents at the time of making "officiating" promotion of the petitioners is ultra vires the Rules and indeed, of Section 11 (4) of the Act itself.

10. A distinction was sought to be made out by Shri Mittal in the case of the petitioner Rajendra Singh (M. P. No. 307/84), relying on Annexure PJ1, by which he had sought his transfer to Jullundur, Shri Mittal submits that there being no Tear Smoke Unit at Jullundur, if he has to be transferred there, he must lose his rank. However, this contention has no force as the petitioner did not seek the transfer, surrendering his rank. Accordingly, he has also a right to be considered to have his "officiating" promotion regularised. In this regard, he cannot be treated dis-similarly.

11. For the foregoing reasons, I have no hesitation to hold that these petitions must succeed and accordingly, I direct that a mandamus shall issue to the respondents not to give effect to the condition of "posting out" in the promotion orders made in the case of each of the petitioners, by forfeiting their right to be considered for "regular" promotion as contemplated under the Rules. If the respondents choose to transfer them to any other Battalion or Unit or Institution in their existing "Officiating" rank, it shall be open to them to do so "in the exigencies of operations" so that they may not lose their right ipso facto, by reason of the transfer in virtue of the aforesaid conditions embodied in the promotion order, which I have held to be illegal and void. It is not necessary to deal with the other grievance of infraction of Article 16 or even with the other points agitated by the petitioners as the petitions succeed on the ground of violation of statutory rules.

12. This order shall dispose of Misc. Petition No. 376 of 1984 (Awadh Kumar Singh and Seven Others v. The Union of India and two Others) and Misc. Petition No. 528 of 1984 (Surajmal v. The Union of India and two others) as well.

13. In the result, the petitions succeed and are allowed to the extent indicated. There shall be, however, no order as to costs.

14. Outstanding amount of security be refunded to the petitioners.