

RAVI PAUL AND ORS.

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v.

UNION OF INDIA AND ORS.

JANUARY 19, 1995

[KULDIP SINGH, S.C. AGRAWAL AND B.L. HANSARIA, JJ.]

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Service Law—Border Security Force Act, 1968—BSF—Seniority—Emergency Commissioned Officers and Short Service Commissioned Officers—Recruitment as Assistant Commandants after their release from the Army—Claim for counting service rendered by them in the Army for fixation of their seniority in BSF—Whether entitled to invoke Rule 8(b) of CRPF Rules—Held. No—Appointments/absorptions were made under BSF Act and executive order—Not under CRPF Rules 1955.

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Service Law—Central Reserve Police Force Rules, 1955—Rule 8 (b) (i)—Expression 'rank'—Means rank in CRPF—Earlier army service of an army Officer or a re-employed Army Officer—Whether can be counted for the purpose of seniority in the CRPF.

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Constitution of India—Arts. 14 & 16—Seniority—Determination of—Recruitment of ECOs/SSCOs as Assistant Commandants in BSF and CRPF—CRPF and BSF governed by separate statutory provisions—Benefit of past service in Army given to SSCOs in CRPF and not in BSF—Whether suffers from the vice of discrimination—Held No—Government not granting benefit of past service in Army to SSCOs in BSF during 1974-78—Condition mentioned in letters of appointment—Whether discriminatory—Held. No—ECOs absorbed/appointed in BSF during 1967—SSCOs appointed/absorbed during 1974-78—Officers belonging to two different categories and not persons similarly situate.

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Service Law—Appointment as Assistant Commandments in BSF in year 1966-67—Seniority—Ex-ECOs absorbed/appointed as Assistant Commandants during 1966—1971 given benefit of past service in Army—Such a condition not prohibited by CRPF Rules or BSF Rules—No legal infirmity in fixation of seniority.

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Service law—Exercise of executive power by Government—Authority to recruit on basis of executive orders—Permissible—Not obligatory to make

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A *recruitment rules before Service constituted—Government can make appointments in absence of rules.*

Hearing a Writ Petition and a Civil Appeal together the Supreme Court considered the issue of 'seniority' in the BSF.

B In the wake of the Chinese aggression in 1962, in order to meet the shortage of Commissioned Officers in the Indian Army, the Government of India had started a special scheme of selection of officers through Service Selection Board and granted them Commissions in the Indian Army. Such Commissioned Officers were called Emergency Commissioned Officers (ECOs). In 1965, additional system of Short Service Commission (SSC) was introduced.

C The Border Security Force, a para military force, was constituted in 1965. It was governed by the CRPF Rules, 1955 made under the CRPF Act, 1949. In order to attract ECOs/SSCOs from the Army to the BSF to fulfill its need for experienced officers in the BSF the Government offered that their service in the Army would be counted for the purpose of seniority in the BSF. During 1966-71 a number of ECOs were appointed as Assistant Commandants (ACs) in the BSF.

D On September 2 1968, Parliament enacted the BSF Act, 1968. BSF (Assistant Commandments Recruitment) Rules were made in 1969 but were repealed by the BSF (Assistant Commandments) Recruitment (Repeal) Rules, 1973. Thereafter, the Government of India, Ministry of Home Affairs' executive order dated January 16, 1974 prescribed the manner for recruitment to the posts of ACs in the BSF.

E On July 5, 1972 the Government of India indicated that the service in the Army was to be counted for the purpose of seniority of ex-ECOs appointed as DSP/Company Commander in the BSF, CRPF, ITBP and Assam Rifles.

F By letter dated September 6, 1972 the Government of India changed its recruitment and seniority policy. It constituted a Special Selection Board for recruitment of released SSCOs and ECOs as ACs in the BSF, CRPF and Assam Rifles etc. As very few applications were received wider publicity was requested from the Army Headquarters. It was stated that the Army Service rendered as SSRCOs would not be counted for the

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purpose of seniority and pension, if selected in the para military forces. The letter of appointment of candidates selected thereafter also reflected the same position.

Respondent No. 3 to 445 in the Civil Appeal were ECOs absorbed/appointed as AC's in BSF during 1966-71 whose past Army service had been taken into account while fixing seniority. Appellants have been directly recruited as AC's in the year 1966-67. Upon the dismissal in 1983 of the appellants' earlier Writ Petition in the High Court assailing the fixation of seniority they preferred the present Civil Appeal.

The petitioners in the present Writ Petition were SSCOs who after their release from the Indian Army were appointed as ACs in the BSF after selection by the Special Selection Board during the years 1974-78. In a separate Writ Petition in the Supreme Court they had challenged the denial of benefit in their past service in the Army for the purpose of seniority or promotion when the said service was considered in the matter of fixation of pay. The respondents countered with the letters of appointment which showed that past Army service would not count towards seniority and promotion in the BSF. The writ petition was dismissed in 1964.

After the Delhi High Court, and on appeal, the Supreme Court in 1986 had given the benefit of Past Army service in the matter of seniority of ECOs/SSCOs absorbed in the CRPF, the ECOs/SSCOs absorbed during 1974-78 as ACs in the BSF represented for revision of their seniority. The said representation was rejected relying on the terms in the appointment letters. They filed a Writ Petition in the Delhi High Court seeking benefits of their Army service as given to officers absorbed in CRPF which was dismissed as barred *res judicata*. They then filed a Special Leave Petition wherein they were granted time to submit a detailed representation to the Government of India regarding the merits of their case.

Upon the rejection of the representation so presented they filed present Writ Petition claiming that they had been absorbed/appointed in the BSF in accordance with the provisions contained in Rule 113(3)(iv-A) of the CRPF Rules and that their seniority was governed by rule 8 of the CRPF Rules. Further, that they had been selected by the Special Selection Board which had also selected the SSCOs the CRPF and that there was no rational basis for treating SSCOs thus selected who were all similarly situated prior to their selection by the Board, differently, in the matter of

A fixation of seniority. It was also urged that ECOs who were absorbed/appointed to the BSF during the period of 1967- 71 had been given the benefit of counting their past service in the Army and there was no reason why similar benefit should not be extended to SSCOs absorbed/appointed in the BSF during 1974- 78.

B Dismissing the Writ Petition as well as the Civil Appeal, this Court

C HELD : 1.1. The CRPF Rules, which governed recruitment to the BSF ceased to have application after the enactment of the BSF Act, 1968. Thereafter, the BSF Recruitment Rules and after their repeal the Government of India order dated January 16,1974 governed recruitment. The repeal of the BSF Recruitment Rules in 1973 would not have the effect of receiving the applicability of the CRPF Rules to the BSF. Absorption/appointment of SSCOs to the post of ACs in the BSF after selection by the Selection Board during 1974-78 was not made under the provisions of Rule 113(3)(iv- A) of the CRPF Rules but under the provisions of the BSF Act and the executive order of the Government of India dated January 16, 1974.

D [433-G-H, 434-A]

E 1.2. Rules regarding seniority of officers in the BSF were made for the first time, on December 9, 1978 when the BSF Seniority Rules were published. Till then, there was no rule regarding fixation of seniority of officers in the BSF and the said matter was governed by executive orders only. One such executive order was contained in the letter dated September 6, 1972 wherein it was specifically mentioned that service rendered as SSCOs in the Army would not count towards seniority and pension in the BSF and was further clarified in the letter of appointment of the petitioners. Even the BSF Seniority Rules, 1978 had no provision for giving the benefit of past Army Service to SSCOs absorbed/appointed in the BSF. Therefore, the seniority of SSCOs absorbed/appointed in the BSF on selection by the Special Selection Board during 1974-78 was not governed by Rule 8(b) of the CRPF Rules but by the provisions contained in the BSF Act, the Rules made thereunder and the Executive Orders issued by the Central Government. [435-C-E-G-H]

G 1.3. In law it is permissible to do so because it is well settled that it is not obligatory to make rules for recruitment etc. before a service is constituted or a post created or filled; and the Government, in exercise of its executive power, could make appointment in the absence of rules.

H [433-F]

B.N. Nagarajan and Ors. v. State of Mysore and Ors., [1966] 3 SCR 682, relied on. A

1.4. Rule 8(b)(i) of the CRPF Rules only governed the seniority as between Army Officers inter se and there was nothing therein to indicate that the earlier Army Service was to be counted for the purpose of seniority in CRPF since Rule 8(b) (i) was silent in that regard. Executive instructions could be issued by the Central Government for the purpose of giving benefit of Army service. With that end in view the Government of India, in the letter dated July 5, 1972 had laid down certain principles for the purpose of fixation of seniority of ex-ECOs appointed in the BSF, CRPF and Assam Rifles applicable only to ex-ECOs absorbed/appointed in these forces during 1967-1970. [437-C-D] B C

U.B.S. Teotia and Ors. v. Union of India and Ors. Delhi, decided by the Delhi High Court on 2.9.1995, referred to.

1.5. CRPF and BSF being two distinct forces were governed by separate statutory provisions. If in the CRPF, the benefit of past service in the Army was given to SSCOs absorbed/appointed after selection during 1974/78 on account of the provisions of Rule 8(b) of CRPF Rules as construed by the High Court, it was not necessary that the said benefit should also be made available to the petitioners who were absorbed/appointed in the BSF as in the BSF there was no rule similar to Rule 8(b) of the CRPF Rules which conferred this benefit. In fact the said benefit had been expressly denied to the officers absorbed/appointed in the BSF during 1974-78, inasmuch as prior to recruitment, the Government of India had clearly indicated that service rendered as SSRCOs would not count towards seniority and pension. [438-E-G] D E F

Merely because the policy enumerated in the letter of September 6, 1972, which was applicable to all released SSCOs who were to be absorbed/appointed in the various para military forces of the Government of India could not be given effect in CRPF on account of Rule 8(b) of the CRPF Rules, would not mean that the said policy in its application to the BSF, where there was no such legal impediment, suffered from the voice of discrimination. [439-B] G

1.6. ECOs who were absorbed/appointed in the BSF during 1967-71 had joined the Army during the emergency in the wake of the Chinese H

A aggression when there was a need for competent officers and in order to attract such officers to the BSF it was considered necessary to give the benefit of the Army service for the purpose of seniority in the BSF.

[439-E-F]

B 1.7. Later SSCOs had joined the Army as a career after the emergency resulting from the Chinese aggression was over. When they were absorbed/appointed during 1974-78 there was a change in the government policy and the benefit of their army service was not to be given. This condition had been expressly mentioned in their letters of appointment and they had opted to join the BSF knowing fully well that their Army service would not be counted for seniority in the BSF. The ECOs absorbed/ap-
C pointed during 1967-71 and the SSCOs absorbed/appointed during 1974-78 were officers belonging to two different categories and they could not be regarded as persons similarly situated. [439-G-H, 440-A]

D 1.8. Respondents, in the Civil Appeal were ex-ECOs absorbed/ap-
pointed as ACs in the BSF during 1966-71, given the benefit of past army
service and shown as senior to the appellants who were directly appointed
as ACs during 1966-67. The Writ Petition filed by the appellants challeng-
ing the fixation of seniority of respondents had been rightly dismissed by
the High Court because for the ex-ECOs it had been expressly stated that
their Army service would be counted towards seniority. Such a condition
E was not prohibited by any provision of the CRPF Rules, BSF Act or the
rules made thereunder. It could not be said that the fixation of seniority of
the respondents suffered from any legal infirmity. [440-C-D]

CIVIL ORIGINAL JURISDICTION : Writ Petition (C) No. 146 of
1992 & C.A. No. 2127/85.

F (Under Article 32 of the Constitution of India.)

G K.T.S. Tulsi, Additional Solicitor General, Harish N. Salve, P.P. Rao,
Ashok K. Mahajan, K.K. Mohan, Ms. Geetanjali Mohan, P. Parmeswaran,
A. Subba Rao, Ms. A. Subhashini, C.V.S. Rao, Dipak K. Nag, for V.B.
Saharya & Co. for the appearing parties.

The Judgment of the Court was delivered by

H S.C. AGRAWAL, J. Both these matters raise a common question
regarding determination of seniority of Emergency Commissioned Officers
(ECOs) and Short Service Commissioned Officers (SSCOs) who were

recruited as Assistant Commandants in the Border Security Force after their release from the Army. The question is whether the said Officers are entitled to count the service rendered by them in the Army for the purpose of fixation of their seniority in the Border Security Force.

In the wake of the Chinese aggression in 1962, in order to meet the shortage of Commissioned Officers in the Indian Army, the Government of India started a special scheme to select officers through Service Selection Board and granting them Commission in the Indian Army. Such Commissioned Officers were called Emergency Commissioned Officers (ECOs). In 1965, in addition to the Emergency Commissioned Officers the system of Short Service Commission (SSC) was introduced. The initial period of such Commission was 5 years but it was extendable for another 5 years depending on the requirement/suitability of the officer. After the expiry of the initial period of 5 years, the officer, even if granted extension, could request for release during the extended period at any stage. After the expiry of the extended period, he was to be released unless he was found acceptable for grant of permanent Commission in the Indian Army and was granted permanent Commission.

The Border Security Force is one of the paramilitary forces of the Government of India. It was constituted in 1965. It was initially governed by Central Reserve Police Force Rules, 1955 (hereinafter referred to as the 'CRPF Rules') made under the provisions of the Central Reserve Police Force Act, 1949. For that purpose Chapter XV (Rules 112 to 116) was inserted in the CRPF Rules on December 21, 1966. The said Chapter bears the heading "Special Provisions relating to Border Security Force". Rule 113 thus introduced made provision for appointment and promotion of superior officers. Sub-Rule (2) of Rule 113 related to appointment on the posts of Deputy Commandant, Assistant Commandant or Adjutant or Joint Assistant Directors or other equivalent rank and sub-Rule (3) related to appointment on the posts of Company Commanders, Quarter-masters and Junior Staff Officers and other posts in the force equivalent thereto. On May 11, 1967, the CRPF Rules were further amended and Clause (ivA) was inserted in sub-Rule (3) of Rule 113 and thereby provision was made for appointment of ECOs and SSCOs who were commissioned on or after November 1, 1962 and were released at any time thereafter. A similar provision was contained in clause (ivA) introduced in sub-Rule (4) of Rule 105 of the CRPF Rules which provided for appointment to the post of

- A Company Commanders or Quarter-master in Battalians other than Signal Battalians or Assistant Principal Central Training College in the Central Reserve Police Force. On September 2, 1968, Parliament enacted the Border Security Force Act, 1968 (hereinafter referred to as the 'BSF Act') to provide for the constitution and regulation of an armed force of the Union for ensuring the security of the borders of India and for matters connected therewith. Sub-section (1) of section 141 of the BSF Act empowers the Central Government to make rules for the purpose of carrying into effect the provisions of the said Act. Clause (b) of sub-section (2) of Section 141 confers the specific power to frame rule to provide for the enrolment of persons to the force and the recruitment of other members of the Force. Clause (c) of Sub-Section (2) of Section 141 confers the power to make rules providing for conditions of service (including deductions from pay and allowances) of the members of the Force. Under sub-Section (2) of Section 142 members of the Border Security Force in existence at the commencement of the Act are deemed to have been appointed or, as the case may be, enrolled as such under the Act.

In exercise of the powers conferred by Section 141 of the BSF Act the Central Government has made the Border Security Force Rules, 1969 (hereinafter referred to as the 'BSF Rules') which came into force on June 13, 1969. Rule 9 which provides for appointment of officers lays down :

- E "9. *Appointment of Officers* .-

The Central Government may appoint such persons as it considers to be suitable in the Force, and their conditions of service shall be such as may be provided in the rules made in this behalf by the Central Government."

- F As regards seniority the following provision is made in sub-rule (2) of Rule 14 :

- G "14(2) Matters relating to *inter se* seniority of persons belonging to the same rank shall be determined in accordance with such rules as may be made in this behalf."

- H By notification dated December 8, 1969, the Central Government made the Border Security Force (Assistant Commandants Recruitment) Rules, 1969 (hereinafter referred to as the 'BSF Recruitment Rules') which

provided for the manner of recruitment to the post of Assistant Commandants in the Border Security Force. The said Rules were repealed by the Border Security Force (Assistant Commandants) Recruitment (Repeal) Rules, 1973 published on November 23, 1973. After the repeal of the BSF Recruitment Rules, the Government of India, Ministry of Home Affairs, issued an order dated January 16, 1974 prescribing the manner for recruitment to the posts of Assistant Commandants in the Border Security Force. The said order provided that the posts of Assistant Commandants shall be filled in by (i) direct recruitment from amongst candidates possessing the qualifications laid down therein; or (ii) re-employment of retired or released army officers who have held the rank of Captain or retired State Police Officers or retired Officers of the Border Security Force who have held the rank of a Deputy Superintendent of Police or an Assistant Commandant or other equivalent ranks; or (iii) transfer on deputation from the rank of Captain from the Army or Assistant Superintendent of Police or Deputy Superintendent of Police from the State Government; or (iv) transfer on deputation (by promotion) of Officer holding the post of Inspector of Police or equivalent post, having held such post for a period of three years in any Central or State Police Organization; or (v) promotion of Subedars (Inspectors) of the Border Security Force who have not completed the age of 50 years; or (vi) transfer/promotion from suitable ministerial staff not below the rank of an Assistant, serving at Headquarters, Director General, Border Security Force.

Soon after the constitution of the BSF in 1965 the Government needed experienced officer for the force and in order to attract ECOs/SSCOs from the Army to the BSF it was offered that their service in Army would be counted for the purpose of seniority in the BSF. Similar benefit with regard to counting of Army service for seniority was also given to ECOs/SSCOs who were appointed in other civil services under the Emergency Service Commissioned Officers (Recruitment and Vacancies) Rules 1967. The said Rules ceased to have application on June 24, 1974 and the facility of recruitment of the ECOs/SSCOs against vacancies in civil services was discontinued. Similarly, in the matter of absorption/appointment in the para military forces there was a change in the policy of the Government of India. By letter dated September 6, 1972 it was indicated that Army service would not be counted for the purpose of seniority in respect of SSCOs who were absorbed/appointed on the basis of future selections. The Border Security Force (Seniority, Promotion and Superan-

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- A nuation) Rules, 1978, (hereinafter referred to as the 'BSF Seniority Rules') were published on December 9, 1978. Rule 3 of the said Rules provided for seniority of officers and in clause (v) of sub-Rule (2) it was prescribed that "seniority of re-employed officers in a particular rank shall be determined from the date of their re-employment in that rank."
- B During the period 1966 to 1971, a number of ex-ECOs were appointed as Assistant Commandants in the Border Security Force. In the letter of appointment of many of them, it was specifically mentioned that "you shall be treated as belonging to the year in which you would have been appointed or attained the minimum age of entry into the service/post concerned or on the date of your joining military service whichever is earlier." Moreover, the Government of India vide order dated July 5, 1972 had also indicated the principles which were to be followed in the matter of fixation of seniority of ex-ECOs who were appointed as Deputy Superintendents of Police/Company Commander in the Border Security Force, the Central Reserve Police Force, the Indo-Tibetan Border Police and the Assam Rifles. Under the said principles the service in the Army was to be counted for the purpose of seniority in the manner indicated therein. Respondents Nos. 3 to 445 in Civil Appeal No. 4127 of 1985 are such ECOs who were absorbed/appointed as Assistant Commandants in the Border Security Force during the period 1966-71 and whose seniority has been fixed by taking into account their past service and training period in the Army. The appellants in the said appeal are officers who were directly recruited as Assistant Commandants in the Border Security Force in the year 1966-67. They filed a Writ Petition (C.W.P. 701 of 1978) in the Delhi High Court wherein they assailed the fixation of seniority of the ex-ECOs in the Border Security Force. The said Writ Petition was, however, dismissed by a learned Judge of the High Court by Judgment dated September 9, 1983. Civil Appeal No. 4127 of 1985 is directed against the said judgment of the learned Single Judge.
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- G The Government of India, Ministry of Home Affairs in their letter dated September 6, 1972 addressed to the Army Headquarters, Military Secretary's Branch (MS) intimated that the Government has constituted a Special Selection Board for recruitment of released SSRC Officers/ECOs to the Posts of Assistant Commandants/Company Commanders (Deputy SP) in the BSF, CRPF, Assam Rifles, etc. under the Chairmanship of the Director General, Border Security Force. In the said letter it was stated
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that few applications have been received from SSRC Officers who have since been released or who have not been placed in an acceptable grade for the grant of Permanent Regular Commission in the Army. By said order it was requested that wider publicity be given so that SSRC Officers who were not aware of the constitution of the Board and are not placed in an acceptable grade for Permanent Regular Commission may get the opportunity of being considered for appointment in the para-military forces under the Ministry of Home Affairs. The Army Headquarters were requested to inform this category of officers serving in various formations/units that they may forward their applications direct to the Deputy Director (Organization), Directorate General, Border Security Force latest by October 10, 1972. In the said letter it was further stated :-

"The circular issued by you may also inform the applicants that the service they have rendered as SSRCOs will not count towards seniority and pension, if selected, in the para-military forces."

The petitioners in Writ Petition No. 146 of 1992 filed in this Court under Article 32 of the Constitution are SSCOs who, after release from the Indian Army, were appointed as Assistant Commandants in the BSF after selection by the Special Selection Board during the years 1974 to 1978. In their case, the letters of appointment expressly stated :-

"Your pay will be fixed at the appropriate stage of the aforesaid scale considering your age at the time of your Army Commission and your Army Commissioned service. Your Army service shall not count for seniority or promotion in BSF."

While their Army service was taken into consideration in the matter of fixation of pay they were not given the benefit of their past service in the Army for the purpose of seniority or promotion.

It appears that ECOs appointed in the CRPF during the same period were also not given the benefit of their past service in the Army in the matter of fixation of seniority. A Writ Petition (C.W.P. No. 44 of 1975, *U.B.S. Teotia & Ors. v. Union of India & Ors.*) was filed in the Delhi High Court by the ECOs in the CRPF claiming that they were Army Officers within the meaning of Rule 8 of the CRPF Rules and that they were entitled to add the length of their unbroken Army Service towards seniority in the CRPF. The said writ petition was dismissed by the Delhi High Court

A by judgment dated February 6, 1978 on the view that ECOs were not Army Officers and, therefore, they were not entitled to avail their past Army service. Civil Appeal No. 1389 of 1979 (*U.B.S. Teotia & Ors. v. Union of India & Ors.*) filed by the ECOs in this Court against the said decision of the High Court, was disposed of by this Court by Order dated December 5, 1984 wherein it was observed :-

B "It is now agreed by all parties that they were Army Officers."

C On that view, the Court remanded the matter to the High Court for fresh decision of the issues involved on the basis that the appellants in the said appeal were Army Officers. The matter was thereafter considered by the High Court and by judgment dated September 2, 1985, a Division Bench of the High Court allowed the writ petition and held that the petitioners in the said writ petition, viz., the released ECOs, were entitled to get benefit of their past service in the Army on the view that since the ECOs were Army Officers, they were entitled to protection of Rule 8(b) of CRPF Rules which governs the *inter se* seniority of superior officers in the CRPF. The Union of India as well as the direct recruits in the CRPF filed petitions for special leave to appeal against the said judgment of the Delhi High Court. Special Leave Petition (Civil) No. 13910 of 1985 (*P.J. Shetty & Ors. v. Union of India & Ors.*) was filed by the direct recruits and Special Leave

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E Petition (Civil) No. 16911 of 1985 (*Union of India & Ors. v. U.B.S. Teotia & Ors.*) was filed by the Union of India. Both these petitions were dismissed by this Court by order dated January 21, 1986 on the view that the respondents were Army Officers within the meaning of Rule 8 of the CRPF Rules and they were entitled to add the length of their unbroken service

F as ECOs and SSCOs for the purpose of reckoning their seniority. In accordance with the said decision of the Delhi High Court, which was upheld by this Court, the seniority of ECOs/SSCOs who were absorbed in the CRPF has been revised and they have been given the benefit of past service.

G The SSCOs who were absorbed in the BSF filed Writ Petition No. 3469-72 of 1983 (*Kanwar Mehar Chand & Ors. v. Union of India & Ors.*) in this Court under Article 32 of the Constitution wherein they claimed that their service in the Army be counted for the purpose of seniority. In the said Writ Petitions a counter affidavit was filed wherein reliance was placed

H on the letters of appointment showing that past Army service shall not

count towards seniority and promotion in the BSF. The said Writ Petitions were dismissed by order dated April 6, 1984. After the seniority of the ECOs/SSCs who were absorbed in the CRPF was revised in 1986, a representation was submitted by the ECOs/SSCOs who were absorbed in the BSF for revision of their seniority. The said representation was, however, rejected on December 4, 1986 on the view that in the appointment letters it was clearly stated that Army service will not count towards seniority and promotion in the BSF. Thereupon, the said officers filed a Writ Petition (Writ Petition No. 1024 of 1988) in the Delhi High Court wherein they relied upon the judgment of the Delhi High Court in *U.B.S. Teotia's* case (supra) which had been upheld by this Court and claimed that they were also entitled to the benefit of their Army service as was given to the officers who had been absorbed in the CRPF. The said Writ Petition was dismissed by the High Court by judgment dated November 16, 1990 on the ground that it was barred by *res judicata* in view of the dismissal of the earlier Writ Petition filed under Article 32 of the Constitution in this Court. Feeling aggrieved by the said judgment of the High Court, petitioners filed Special Leave Petition (Civil) No. 1802 of 1991 (*Ravi Paul v. Union of India & Ors.*) wherein the Court passed the following order on July 30, 1991 :-

"Mr. Harish Salve, learned counsel for the petitioners, states that notwithstanding the dismissal of the writ petition by the High Court on the ground of *res judicata* he would submit a detailed representation before the Government on the merits of this case. He may do so within two weeks from today. The private respondents may, if they so desire, file counter to the representation. The Government will decide the representation on merits after hearing the parties within four months from today. The speaking order so passed be placed before this Court and be given to parties also. List the special leave petition on December 4, 1991."

The petitioners submitted a detailed representation on August 12, 1991. The said representation was rejected by order dated January 13, 1992. Feeling aggrieved by the said Order, Writ Petition No. 146 of 1992 has been filed under Article 32 of the Constitution wherein it has been prayed that the order dated January 13, 1992 be quashed and it be declared that the petitioners are entitled to add the length of their unbroken service rendered as Short Service Commissioned Officers towards seniority in the

A BSF as per Rule 8 of the CRPF Rules, 1955. In view of the development that had taken place in pursuance to the order passed by this Court on July 30, 1991, viz., the filing of the representation and the rejection of the same by order dated January 13, 1992 which is the subject matter of challenge of Writ Petition No. 146 of 1992, this Court on March 27, 1992 disposed of S.L.P. (Civil) No. 1802 of 1991 with the following observation:-

B "In view of this development the Special Leave Petition arising out of the impugned judgment and order of the Delhi High Court dated 16.11.1990 does not survive and we, therefore, dispose it of accordingly without prejudice to the rights and contentions which the parties have raised in the substantive Writ Petition filed under Article 32 of the Constitution."

C We will first take up Writ Petition (Civil) No. 146 of 1992 filed by the SSCOs who were absorbed/appointed as Assistant Commandants in the BSF during the period 1974-78 after being selected by the Special Selection Board. The petitioners in their Writ Petition have challenged the fixation of their seniority and have claimed that they should be given the benefit of their past service in the Army. The basis for the claim of the petitioners is that they were absorbed/appointed in the BSF in accordance with the provisions contained in Rule 113(3)(iv-A) of the CRPF Rules and, like other officers who were absorbed in the CRPF, the seniority of the petitioners is governed by Rule 8 of the CRPF Rules and that in view of the decision of the Delhi High Court dated September 2, 1985 in *Shri U.B.S. Teotia & Ors. v. Union of India & Ors.*, which has been upheld by this Court by Order dated January 21, 1986, the petitioners are also entitled to have their seniority fixed by taking into account their past service as SSCOs in the Army. The said plea of the petitioners raises two questions:- (1) Was the absorption and appointment of the petitioners as Assistant Commandants in the BSF in 1975-78 under Rule 113(3)(iv-A) of the CRPF Rules? and (2) Is the seniority of the petitioners governed by Rule 8 of the CRPF Rules?

G As regards the absorption/appointment of the petitioners as Assistant Commandants in the BSF during the period 1974-78 it has already been noticed that initially, i.e., before the enactment of the BSF Act, appointment of superior officers in the BSF was governed by Rule 113 of the CRPF Rules. The enactment of the BSF Act in 1968 brought about a

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change. The said Act, in Section 4, provides for the constitution of the BSF and in sub-Section (2) of Section 4 it is prescribed that subject to the provision of the BSF Act, the Force (BSF) should be constituted in such manner as may be prescribed and the condition of service of the members of the Force shall be such as may be prescribed. In sub-Section (1) of Section 141 power has been conferred on the Central Government to make rules for the purpose of carrying into effect the provisions of the Act. In sub-Section (2) of Section 141 it has been specifically provided that such rules may, *inter alia*, provide for the enrolment of the persons to the Force and the recruitment of the other members of the Force [clause (b)] and the conditions of service (including deductions from pay and allowances) of the members of the Force [clause (c)]. It would thus appear that after the enactment of the BSF Act in 1968, the CRPF Rules ceased to have application in the matter of recruitment to the BSF as well as the conditions of service of the members of the said force and the BSF was governed by the provisions of the BSF Act only. The BSF Act does not provide for continuing the applicability of CRPF Rules to the BSF. On the other hand, we find that in the matter of recruitment to the post of Assistant Commandant, the Central Government made BSF Recruitment Rules on December 8, 1969 which continued in force till they were repealed on November 23, 1973. Thereafter, recruitment to the post of Assistant Commandant in the BSF was governed by the executive order dated January 16, 1974 issued by the Government of India. In law it was permissible do so because it is well settled that it is not obligatory to make rules for recruitment etc. before a service can be constituted or a post created or filled and the Government, in exercise of its executive power, can make appointments in the absence of rules. [See : *B.N. Nagarajan & Ors. v. State of Mysore & Ors.*, [1966] 3 SCR 682 at p. 686].

The position which emerges is that the CRPF Rules, which governed recruitment to the BSF, ceased to have an application after the enactment of the BSF Act, 1968 and , thereafter, the matter of recruitment to the post of Assistant Commandant was first governed by the BSF Recruitment Rules and after the repeal of the said Rules in 1973 the said recruitment was governed by the order of Government of India dated January 16, 1974. The repeal of the BSF Recruitment Rules in 1973 would not have the effect of reviving the applicability of CRPF Rules to the BSF. We are, therefore, of the view that absorption/appointment of SSCOs on the post of Assistant

A Commandant in the BSF after selection by the Selection Board during the period 1974-78 was not made under the provisions of Rule 113(3)(iv-A) of the CRPF Rules, as claimed by the petitioners, but was made under the provisions of the BSF Act and the executive order of the Government of India dated January 16, 1974.

B As regards the applicability of Rule 8(b) of the CRPF Rules which governs the *inter se* seniority of superior officers it may be stated that Rule 116 of CRPF Rules (which falls in Chapter XV introduced in 1966) contains the following provision :-

C *Rule 116. Application of rules to B.S.F.*

(1) The provisions of this Chapter shall apply only to the members of Border Security Force and nothing contained in Rule 105 or 106 or 108 shall apply to the members of any such force.

D (2) Save as otherwise provided in sub-Rule (1), the provisions of the Central Reserve Police Force other than this Chapter shall apply to any member of the Border Security Force as it applies to any other member of the Central Reserve Police Force."

E In view of of the said provision, Rule 8(b) of the CRPF Rules was applicable to the officers who were recruited to the BSF under Rule 113 of the CRPF Rules. The said Rule, however, ceased to have application to the BSF after the enactment of the BSF Act and the publication of the BSF Rules. In the matter of conditions of service of the members of the BSF, Section 4(2) of the BSF Act provides that "the conditions of service of members of the Force shall be such as may be prescribed." The expression 'prescribed' is defined in Section 2(S) of the BSF Act to mean "prescribed by rules made under this Act." Section 141(2)(c) of the BSF Act empowers the Central Government to make rules providing for conditions of service of members of the BSF. In Rule 14(2) of the BSF Rules it is provided that matters relating to *inter se* seniority of persons belonging to the same ranks shall be determined in accordance with such rules as may be made in this behalf. The BSF Seniority Rules were such rules which were made in 1978.

H From the aforementioned provisions contained in the BSF Act and BSF Rules it is evident that the conditions of service, including seniority of members of the BSF, is to be governed by the provisions of the rules made

under the BSF Act and not by the CRPF Rules and, therefore, Rule 8(b) of the CRPF Rules which governs seniority of superior officers in CRPF ceased to have application to the BSF on the enactment of BSF Act and thereafter the seniority was to be governed by the rules made under the BSF Act and till such rules were made it was open to the Central Government to regulate such seniority by orders. The seniority of the petitioners in Writ Petition No. 146 of 1992 and other ECOs/SSCOs who were absorbed/appointed in the BSF after the enactment of BSF Act in 1968, is, therefore, not governed by Rule 8(b) of CRPF Rules but is governed by the provisions of the BSF Act and the Rules made thereunder and in the absence of such rules by the executive orders issued by the Government of India in that regard. As pointed out earlier rules regarding seniority of officers in the BSF were made for the first time in December 9, 1978 when the BSF Seniority Rules were published. Till then, there was no rule regarding fixation of seniority of officers in the BSF and the said matter was governed by executive orders only. One such executive order is contained in the letter dated September 6, 1972 addressed by the Government of India to Army Headquarters, Military Secretary Branch (MS) wherein it was specifically mentioned that service rendered as SSCOs could not count towards seniority and pension. This matter was further clarified in the letter of appointment of the petitioners wherein it was specifically mentioned "Your Army service shall not count for seniority or promotion in BSF." Even in the BSF Seniority Rules made in 1978 no provision has been made for giving the benefit of past Army Service to SSCOs who were absorbed/appointed in the BSF. Rule 3(1) which provides for fixation in *inter se* seniority among officers holding the same rank, the following provision has been made in clause (v) :-

"Seniority of re-employed officers in a particular rank shall be determined from the date of their re-employment in that rank."

We are, therefore, unable to hold that the seniority of SSCOs who were absorbed/appointed as Assistant Commandant in the BSF on selection by the Special Selection Board during the period 1974- 78 is governed by Rule 8(b) of the CRPF Rules. In our opinion, the seniority of such officers must be governed by the provisions contained in the BSF Act and Rules made thereunder and in the absence of rules by executive orders issued by the Central Government in that regard.

A Even if we proceed on the basis that Rule 8(b) of the CRPF Rules was applicable to the petitioners, we cannot say that the said Rule enables the petitioners to count their service in the Army as SSCOs for the purpose of seniority in the BSF. The provisions governing seniority of superior officers are contained in clause (b) of Rule 8 of the CRPF Rules and the relevant provision is that contained in sub-clause (i) which was as follows:-

B (b) The *inter se* seniority of superior officers shall be determined as under :

C (i) An Army Officer shall maintain his seniority as between Army Officer, within a particular rank. Similarly, an Indian Police Service Officers shall maintain his seniority between himself and other Indian Police Service Officer. For purpose of *inter se* seniority between non-Army and Army Officers of equivalent rank, substantive incumbent shall be senior to officiating or temporary officers, their *inter se* seniority depending on the dates of their continued unbroken service in that rank. The *inter se* seniority of officiating or temporary officers shall be determined by their continuous length of service in that rank. An Army Officer re-employed in the Central Reserve Police Force shall maintain his Army Seniority between Army Officers within a particular rank.

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E The said provision is a composite provision governing seniority of various categories of officers. It can be split up into following components:-

(1) An Army Officer shall maintain his seniority as between Army Officers within a particular rank.

F (2) An Indian Police Service Officer shall maintain his seniority between himself and other Indian Police Service Officers.

(3) Between non-Army and Army Officers of equivalent rank *inter se*;

G (a) substantive incumbent shall be senior to officiating or temporary officers.

H (b) Amongst substantive incumbents *inter se* seniority shall depend on the dates of their continuous unbroken service in that rank.

(c) The *inter se* seniority of officiating or temporary officers shall be determined by their continuous length of service in that rank. A

(4) Re-employed Army Officer shall maintain his Army seniority between Army Officers within a particular rank. B

It would thus appear that Rule 8(b)(i) of the CRPF Rules only governs the seniority as between Army Officers *inter se*, Army Officers and re-employed Army Officers *inter se*, Indian Police Service Officers *inter se*, and non-Army and Army Officers of equivalent rank *inter se*. The expression "rank" in this Rule means the rank in CRPF. There is nothing in Rule 8(b) to indicate that the earlier Army service of an Army Officer or a re-employed Army Officer is to be counted for the purpose of seniority in CRPF. Since Rule 8(b)(i) is silent in this regard executive instructions can be issued by the Central Government for the purpose of giving benefit of Army service to Army Officers or re-employed Army Officers. With that end in view the Government of India, in its letter dated July 5, 1972 addressed to the Director General BSF and CRPF as well as I.G. (ITBP) and Secretary (Home), Arunachal Pradesh Administration, has laid down certain principles for the purpose of fixation of seniority of ex-ECOs appointed in the BSF, CRPF, ITBP and Assam Rifles. The said principles were, however, applicable only to ex-ECOs who were absorbed/appointed in these forces during the period 1967 to 1970. In *U.B.S. Teotia & Ors. v. Union of India & Ors.* (supra) the Delhi High Court has construed Rule 8 of the CRPF Rules to mean that Army Officers who are re-employed or Army Officers who come on deputation, have to retain their original seniority and will get the benefit of their Army service. We are unable to read Rule 8 as having such an effect. In our opinion, the said Rule when it says that "an Army Officer shall maintain his seniority as between Army Officers within a particular rank and an Army Officer re-employed in the Central Reserve Police Force shall maintain his Army Service between Army Officers within a particular rank" only means that amongst Army Officers *inter se* and a re-employed Army Officer and an Army Officer *inter se* their seniority to a particular rank in the CRPF would be fixed on the basis of their seniority in the Army. We have not found any provision in Rule 8(b) which enables an Army Officer or a re-employed Army Officer to count his Army service for the purpose of seniority in the CRPF. We are, therefore, unable to uphold the decision of Delhi High Court in *U.B.S.* C
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- A *Teotia & Ors. v. Union of India & Ors.* (supra). For the same reasons the observations in the order dated January 21, 1986 passed by this Court in special leave petitions arising out of Delhi High Court decision in *U.B.S. Teotia's* case (supra) that "the respondents are the Army Officers within the meaning of Rule 8 of the CRPF Rules and they are entitled to add the length of their unbroken service as ECOs and SSCOs for the purpose of reckoning their seniority" cannot be regarded as based on a correct interpretation of Rule 8 of the CRPF Rules. The said observations must, therefore, be confined to that particular case only.

- C It has, however, been contended by learned counsel for the petitioners (in Writ Petition No. 146 of 1992) that the said petitioners were absorbed/appointed as Assistant Commandants in the BSF after being selected for appointment by the Special Selection Board which had also selected the SSCOs for absorption in the CRPF and that there is no rational basis for treating those SSCOs thus selected by the Special Selection Board, who were all similarly situated prior to their selection, differently in the matter of fixation of seniority merely on the fortuitous circumstance that out of them those who were assigned to the CRPF, would get the benefit of their past service in the Army, while those like the petitioners, who were assigned to the BSF would be denied the said benefit. In our view, there is no merit in this contention. The CRPF and the BSF are two distinct forces governed by separate statutory provisions. The fact that in the CRPF, the benefit of past service in the Army has been given to SSCOs who were absorbed/appointed after selection by the Special Selection Board during the period 1974-78 on account of the provisions of Rule 8(b) of CRPF Rules, as construed by the Delhi High Court, does not mean that the said benefit should also be made available to the petitioners who were absorbed/appointed as Assistant Commandants in the BSF, though in the BSF there is no rule similar to Rule 8(b) of the CRPF Rules which confers this benefit. On the other hand, the said benefit has been expressly denied to the officers who were so absorbed/appointed, inasmuch as prior to the recruitment, the Government of India had clearly indicated in the letter dated September 6, 1972 that service rendered as SSCOs will not count towards seniority and pension. This stipulation was also incorporated in the letter of appointment of the petitioners when they were absorbed/appointed as Assistant Commandants in the BSF. In the said letter it is expressly stated that the benefit of the past service in the Army would not be available for the purpose of seniority. From the letter of the Government

of India dated September 6, 1972 it appears that this policy was for recruitment of released ECOs/SSRCOs as Assistant Commandants/Company Commanders (Dy. S.P.) in the BSF, CRPF, Assam Rifles, etc. Merely because the said policy which was applicable to all released SSCOs who were to be absorbed/appointed in the various para military forces of the Government of India could not be given effect in CRPF on account of Rule 8(b) of the CRPF Rules, would not mean that the said policy in its application to the BSF, where there is no such legal impediment, suffers from the vice of discrimination.

It has also been urged by the learned counsel for the petitioners (in Writ Petition No. 146 of 1992 that ECOs who were absorbed/appointed to the BSF during the period of 1967-71 have been given the benefit of counting their past service in the Army for the purpose of seniority and that there is no reason why similar benefit should not have been extended to SSCOs, like the petitioners, who were absorbed/appointed to the BSF during the period 1974-78 and that the denial of such benefit to the petitioners results in arbitrary and invidious discrimination and denial of the right to equality guaranteed under the Constitution. We are unable to agree. The ECOs who were absorbed/appointed to the BSF during the period 1967-71 had joined the Army during the emergency in the wake of the Chinese aggression. By joining the Army when the country needed their services they had made a sacrifice. Keeping in view the sacrifice made by them, the Government of India evolved a policy wherunder they were given certain benefit of their Army Service for counting their seniority on re-employment in public services after their release from the Army. Moreover, they were absorbed in the BSF at a time when there was need for competent officers in the BSF and in order to attract such officers in the BSF it was considered necessary to give the benefit of the service of the Army for the purpose of seniority in the BSF to the officers who were absorbed/appointed in the BSF during the period 1967-71. The SSCOs had joined the Army as a career after the emergency resulting from the Chinese aggression was over. When they were absorbed/appointed to the BSF during the period 1974-78 there was a change in the policy of the Government of India and the benefit of the service in the Army was not to be given to the SSCOs who were absorbed/appointed in the BSF after release from the Army. This condition was expressly mentioned in their letters of appointment and they opted to join the BSF knowing fully well that their Army service would not be counted for seniority in the BSF. The ECOs who

A were absorbed/appointed in the BSF during the period 1967-71 and the SSCOs who were absorbed/appointed in the BSF during the period 1974-78 are officers belonging to two different categories and they cannot be regarded as persons similarly situate.

B For the reason aforementioned, we find no merit in Writ Petition No. 146 of 1992 and it must, therefore, be dismissed.

C Civil Appeal No. 4127 of 1985 relates to the fixation of seniority of respondents Nos. 3 to 445 who are ex-ECOs absorbed/appointed as Assistant Commandants in the BSF during the period 1966 to 1971 and who have been given the benefit of past service and training period in the Army for the purpose of seniority in the Cadre of Assistant Commandant in the BSF. As a result, the said respondents were shown as senior to the appellants who were appointed as Assistant Commandants in the BSF in the year 1966-67. The Writ Petition filed by the appellants challenging the fixation of seniority of respondents was rightly dismissed by the High Court D because in the letters of appointment of ex-ECOs it was expressly stated that their Army service shall be counted towards seniority. Such a condition was not prohibited by any provision of the CRPF Rules or BSF Act and the rules made thereunder. Hence, it cannot be said that the fixation of seniority of the respondents suffers from any legal infirmity. The appeal is, therefore, dismissed. E

In the result Writ Petition No. 146 of 1992 as well as Civil Appeal No. 4127 of 1985 are dismissed. No order as to costs.

A.G.

Petition and appeal dismissed.