

A.F.R.

Neutral Citation No. - 2023:AHC-LKO:44488-DB

Court No. - 1

Case :- SPECIAL APPEAL DEFECTIVE No. - 430 of 2023

Appellant :-

Respondent :- Union Of India Thru. Secy. Ministry Of Home Affairs ,
New Delhi And Others

Counsel for Appellant :- Sameer Kalia, Srideep Chatterjee

Counsel for Respondent :- A.S.G.I.

Hon'ble Devendra Kumar Upadhyaya, J.

Hon'ble Om Prakash Shukla, J.

C.M. Application No. 1 of 2023 : Application for condonation of delay

- (1) Heard Shri Sameer Kalia and Shri Srideep Chatterjee, learned Counsel representing the appellants and Shri Surya Bhan Pandey, learned Senior Advocate/Deputy Solicitor General of India assisted by Shri Sudhanshu Chauhan, representing the respondents.
- (2) Having gone through the averments made in the affidavit filed in support of the application seeking condonation of delay, this Court is satisfied that delay has sufficiently been explained.
- (3) The application is, accordingly, **allowed** and delay in filing the special appeal is hereby condoned.

Order on Appeal

- (4) The present *intra Court* appeal under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952 has been filed by the appellant/writ petitioner whereby the judgment and order dated

24.05.2023 passed by the learned Single Judge in Writ-A No.18903 of 2021 has been sought to be interdicted. Apparently, the appellant is aggrieved by an order dated 17.05.2021 issued by the Inspector General of Police, Central Sector, Central Reserve Police Force, Lucknow, whereby the appellant's name for promotion to the post of Head Constable made on 26.02.2013 has been removed from the approved list A/GD-11/2009 on the ground of him having been found Human Immunodeficiency Virus (hereinafter referred to as 'HIV') Positive, which according to him was not just, proper and legal. Since, the appellant's proposition did not find any favour with the learned Single Judge, his writ petition (supra) was dismissed/rejected and as such the appellant is before us in special appeal.

A. FACTUAL BACKGROUND

- (5) The appellant was recruited as a Constable (General Duty-GD) in the Central Reserve Police Force (hereinafter referred as 'CRPF') on 28.08.1993. He was initially allocated to 16th Battalion, Jammu & Kashmir Zone.

- (6) The post of Lance Naik and Naik came to be abolished by the respondents on 10.10.1997 and as such any Constable in CRPF, if found to be eligible, was directly promoted to the post of Head Constable on or after the said date. The appellant having not been promoted to the said post of Head Constable, even after two

decades of service, approached this Court by instituting the writ petition.

- (7) It would be pertinent to mention herein that Standing order No. 06/1999 lays down the procedure for promotion for members of the force from the rank of Constable to Head Constable. The promotional course to be undergone is as per Clause-B and sub-Clause 1 says that promotional course of section commander course (SCC) has to be qualified by a member of the force to be eligible for promotion from the rank of constable to the rank of Head Constable. Admittedly, the appellant successfully underwent the said course bearing No. 35 at CTC-3 Nanded in the year 2006.
- (8) The appellant, although had completed 13 years of service and also had underwent the aforesaid SCC successfully, however he was not promoted to Head Constable in the year 2006, albeit the Standing Order No. 06/1999 prescribed 8 years of completed service as Constable to be promoted to the post of Head Constable.
- (9) Nevertheless, in the year 2006, Standing Order No. 06/2006 was issued laying down the action plan on HIV/AIDS for awareness, prevention, detection, treatment and rehabilitation of the members of the force. However, the provision for medical

examination and classification of members of the force is contained in Standing Order No. 04/2008, which invariably lays down the instructions/procedure for carrying out annual medical examination. Further, there also exists an Establishment Manual which provides for various procedures and modalities to be followed with respect to grant of promotion and other conditions of service of the members of the force, wherein it is mandatorily required that in order to be eligible for being considered for inclusion in the approved list for promotion, the medical category should be SHAPE-I.

- (10) In the intervening period, on or about 18.02.2008, the appellant was diagnosed with HIV positive and put on Anti-Retroviral therapy (ART) and subsequently on 21.01.2009 was given medical categorization as SHAPE-2. However, in terms of the aforesaid Standing Order No. 04/2008, the appellant was made to undergo annual medical examination in the year 2011, in which he was declared to be in SHAPE-I category and as such his name was brought in the Special Approved List-A/ GD(Male) (11 of 2009) on 04.01.2011 and he was granted the seniority No. 8545-A, which was communicated to the appellant vide office order dated 14.07.2011.
- (11) Apparently, the medical examination of the appellant was again conducted on 04.01.2012, wherein his case was categorized as

‘SHAPE-I’. Thereafter, on due consideration along with other eligible candidates, the Deputy Inspector General of Police (Establishment), vide letter dated 26.02.2013, promoted the appellant along with other eligible candidates to the post of Head Constable (General Duty), subject to the condition that all effected personnel ought to be free from vigilance angle and no departmental inquiry, prosecution for criminal charge was pending against them and were not undergoing punishment of withholding of increment and were ‘SHAPE-I’ as per Standing Order No. 4/2008. The name of the appellant in the aforesaid letter dated 26.02.2013 was at Serial No. 2094. Therefore, the appellant was promoted and posted at 183 Battalion by the order of Deputy Inspector General, South Srinagar dated 06.04.2013.

- (12) However, as per the facts of the present case, the appellant was not relieved from his duties while working at Amethi and on 17.05.2013, he was made to undergo another annual medical examination wherein on having been found HIV Positive, he was medically categorized in SHAPE-2 (T-24) and was further advised regular treatment for the said ailment. Coincidentally, the grading of SHAPE-2 was acquired on the basis of factor-P i.e physical as ‘2’, whereas the other factors were mentioned as ‘1’ only.

- (13) Furthermore, as the appellant was placed in the temporary low medical classification (LMC), he was to undergo Review Medical Examination after 24 weeks as per Para-9 of Standing Order No. 4/2008. Thus, the said review examination was conducted on 17.12.2013, wherein the appellant was again granted medical category of 'SHAPE-2' falling in the category 'P2' under the factor physical capacity. As the appellant was advised to remain under observation beyond permissible period of 24 weeks i.e. 6 months, he was placed in permanent low medical classification and his name was removed from the approved list and as per the rules, it could only be reconsidered for the approved list after expiry of one year from the date of removal of low medical category under sub-clause 6 of clause 11.2 of the CRPF Manual, 1976.
- (14) It would be apt to mention here that since the appellant was suffering from HIV, the relevant provisions of Part-IV, clause 22.5(g) of the Standing order No. 04/2008 would also apply to his case, which also gives an insight on the physical endurance of different categories of recruits placed after the AME.
- (15) According to the appellant, there was no impediment in granting him promotion to the post of Head Constable as he had been till date performing all his duties attached to his post without any kind of assistance. In the meantime, another Standing Order

being No.01/2015 came to be issued in supersession of the earlier Standing Order No. 06/1999 and again the procedure for promotion from the rank of Constable to the rank of Head Constable has been laid down.

- (16) In any case, the appellant was again made to face the annual medical examination on 13.04.2019 and was given the medical category of 'SHAPE-2 (P)' on account of being HIV Positive and was advised regular treatment. It is the case of the appellant that he had been sending several representation to the competent authority to consider his case favorably, as he was promoted to Head Constable when he was placed in medical category of SHAPE-1 earlier. He had also represented before the authorities that about 81 incumbents junior to the appellant had already been promoted from Constable to Head Constable on 13.10.2000 and it was not fair that he continued to be working as Constable for the reason that being HIV positive, could not be the solitary reason for his discrimination. According to him, his medical categorization continued to be SHAPE-2 as is evident from medical examination held on 30.01.2016, 13.04.2019 and 24.06.2021. According to him, clause 4.13 containing restriction of ineligibility of candidates for not being in SHAPE-1 medical category for promotion does not have any rationale nexus with the object sought to be achieved.

- (17) It is the case of the appellant that vide order dated 17.05.2021 issued by the respondent, his name was removed from the approved list, namely, A/GD-11/2009 and as such all his avenues to be promoted stands shattered.
- (18) Thus, the appellant preferred Writ-A No. 18903 of 2021, wherein vide the impugned order dated 02.05.2023, the learned Single Judge did not find any illegality or perversity or violation of constitutional rights in cancellation of the promotion order of the appellant and as such dismissed the writ petition. It is this order dated 02.05.2023, which has been assailed in the instant *intra Court* appeal.

B. SUBMISSIONS

- (19) Learned Counsel for the appellant has contended that the denial of promotion to the appellant on the solitary ground of being HIV positive is arbitrary and discriminatory as two similarly situated persons, who were recruited and junior to the appellant are working on the post of Assistant Sub-Inspector, whereas the appellant is working on the post of Constable for no fault on his part. According to him, as per the Standing Orders/Circulars/CRPF Manual, the only requirement for posting of a recruit like the appellant, who suffered from HIV positive is to the place where ART facility is available and not to any difficult and solitary locations. It was argued that the recruits of CRPF are

posted throughout the length and breadth of the country including the Metro and Tier-I cities, where ART facility is readily available. Therefore, as the appellant is fit for all duties subject to the aforesaid condition, there is no rationale behind denial of promotion to employees, like the appellant, who are in SHAPE-II category.

- (20) Inviting our attention to Clause 4.13 of the Standing Order No. 4/2008, learned Counsel for the appellant has contended that Clause 4.13 of the Standing Order No. 4/2008 is contradictory to Clause 25.5 (g) inasmuch as Clause 4.13 prescribes a restriction with respect to promotion of the incumbents who are not in SHAPE-I medical category, while Clause 25.5 (g) prescribes that incumbents who are SHAPE (P) 2 medical category are fit for all duties. His contention is that Clause 4.13 is irrational for the reason that as an incumbent moves up in hierarchy in the service, the physical endurance required relatively reduces. Moreso, as a Constable, the requirement of physical efficiency of the appellant is much higher than what would be required after he would be promoted on higher positions. Thus, it is the contention of the appellant that when the respondents have found him fit for the work of Constable, which requires greater physical endurance, it is difficult to understand as in what capacity he would be lacking for the promotion post of Head Constable, which in all circumstances, requires less physical endurance than a Constable.

(21) Learned Counsel for the appellant has further argued that removal of the name of the appellant from the approved list amounts to reversion and infringement of his fundamental and civil rights and which could not have been done without affording the appellant an opportunity of hearing, however, in the instant case, before removing the name of the appellant from the approved list amounting to cancellation of his promotion, no notice of any kind was ever served upon the appellant although he had been regularly promoted vide order dated 26.02.2013.

(22) Learned Counsel for the appellant has urged that it is an admitted case of the respondents that the appellant was found fit in all aspects and was granted promotion to the post of Head Constable and only after his joining at his new place of posting, he was diagnosed as HIV positive. According to him, promotion of the appellant on the post of Head Constable (General Duty) was granted on the basis of evaluation of his work, conduct and medical condition prior to issuance of promotion order and thus, the same cannot be cancelled/rescinded on the basis of his medical condition post issuance of his promotion order.

(23) Learned Counsel for the appellant, thus, has submitted that the learned Single Judge, while passing the judgment and order appears to have not taken into account the aforesaid aspects of the matter while passing the impugned order, therefore, he prays

that the instant special appeal be allowed to meet the ends of justice.

(24) On the other hand, learned Senior Counsel representing the Union of India, has opposed the aforesaid submissions of the learned counsel for the appellant and has argued that the essential eligibility condition for promotion from the post of Constable (General Duty) to Head Constable (General Duty) in CRPF is that the individual should be in the medical category of SHAPE-I. According to him, in the instant case, the appellant falls in the medical category of SHAPE-2 and as such the appellant lacks requisite eligibility of promotion to the post of Head Constable (General Duty). Therefore, the learned Single Judge has rightly dismissed the writ petition.

(25) Learned Senior Counsel representing the Union of India has further submitted that Para-6 of Clause-11.2 of the CRPF Manual provides for review of approved list which provides for annual review and names of persons who failed to keep the required standards of efficiency may be removed from the approved list by the competent authority. According to him, such removal was not to be a permanent bar for the individual for being re-considered for the approved list, provided that no action is to be initiated before expiry of one year from the date of removal. According to the learned Senior Counsel, one of the mandatory

conditions for being considered for promotion from the post of Constable to that of Head Constable as per Clause 11.5 of the CRPF Manual is that the recruit must be in medical category SHAPE-I, but in the instant case, the appellant does not fulfill this mandatory eligibility condition, hence his promotion was rightly denied by the competent authority.

- (26) Placing reliance upon the judgment of the Apex Court in **SGT Chaman Lal Vs. Union of India and others** : (2018) 14 SCC 455, **Lieutenant Colonel Nitisha and others Vs. Union of India and others** : (2021) 15 SCC 125, **Union of India Vs. Devendra Kumar Pant and others** : (2009) 14 SCC 546, and **Air Commodore Naveen Jain Vs. Union of India and others** : 2019 (10) SCC 34, learned Senior Counsel for the Union of India, has assertively argued that the learned Single Judge has rightly dismissed the writ petition by means of the impugned order and has prayed that the impugned order does not merit any interference by this court.

C. RELEVANT ACT/RULES/STANDING ORDERS

- (27) We have given our thoughtful consideration to the rival submissions made by the learned counsel for the parties and have also gone through the records available before this Court on this special appeal.

(28) Before proceeding further, it would be worthwhile to take note of some relevant provisions of law, particularly those dealing with the right of the recruit of CRPF seeking promotion to the post of Head Constable (General Duty), as applicable to the subject.

C.1. Central Police Force Act, 1949 & Central Police Force Rules, 1955.

(29) The recruits of the CRPF are governed by the Central Police Force Act, 1949 (hereinafter referred to as ‘**CRPF Act, 1949**’), which *inter alia* provides for constitution and regulation of an armed Central Reserve Police Force. Section 3 of the CRPF Act, 1949 provides for the constitution of the force, which is reproduced as under :-

“3. Constitution of the Force.—(1)
There shall continue to be an armed force maintained by the Central Government and called the Central Reserve Police Force.

(2) The Force shall be constituted in such manner, and the members of the Force shall receive such pay, pension and other remuneration, as may be prescribed.”

(30) Section 8 of the CRPF Act, 1949 vests the superintendence, control and administration of force upon the Central Government. Section 18 of the CRPF Act, 1949 deals with power to make rules, which reads as under :-

“18. Power to make rules.—(1) The Central Government may, by notification in the Official

Gazette, make rules for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) regulating the classes and grades of, and the pay, pension and other remuneration of, members of the Force, and their conditions of service in the Force;

(b) regulating the powers and duties of officers authorised to exercise any functions by or under this Act;

(c) fixing the period of service for members of the Force;

(d) regulating the award of minor punishments under section 11, and providing for appeals from, or the revision of, orders under that section, or the remission of fines imposed under that section, and the remission of deductions made under section 13;

(e) regulating the several or collective liability of members of the Force in the case of the loss or theft of weapons and ammunition;

(f) for the disposal of criminal cases arising under this Act and for specifying the prison in which a person convicted in any such case may be confined.

(3) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule, or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or

annulment shall be without prejudice to the validity of anything previously done under that rule.]”

- (31) In exercise of the power conferred upon it by the aforesaid Section 18 of the CRPF Act, 1949, the Central Government has framed rules, namely, Central Reserve Police Force Rules, 1955 (hereinafter referred to as “**CRPF Rules, 1955**”). Chapter IX of the CRPF Rules, 1955 lays down the provisions relating to promotion of the member of force. Rule 55 of CRPF Rules, 1955 provides that all promotions shall be governed by merit and other things being equal, seniority shall count for promotion. Rule 55 of CRPF Rules, 1955 is reproduced as under :-

**“CHAPTER – IX
RULES FOR PROMOTION
SECTION-I GENERAL PRINCIPLES**

55. Merit: (a) All promotions shall be governed by merit. Other things being equal seniority shall count for promotion. For promotion, a member of the Force must be qualified and recommended by the Commandant, Assistant Commandant or Company Commander as the case may be.

(b) For exceptional reasons the Commandant may promote an unqualified Head Constable to the rank of Sub-Inspector or an unqualified Sub-Inspector to the rank of Subedar(Inspector) with the prior approval of the Deputy Inspector General or Inspector General respectively, provided that such promotions in either case do not exceed ten percent of the sanctioned strength in such ranks.”

- (32) Rule 61 of the Rules, 1955 provides for maintenance of list of approved candidates. Rule 62 of Rules, 1955 provides for the procedure for preparing of list of approved candidates. Rule 61 and 62 of the Rules, 1955 are reproduced as under :-

“61. Maintenance of Lists of Approved Candidates: Lists of approved candidates for

promotion to various ranks, required to be maintained under sub-rule (b) of rule 62, shall be kept in the office of the Commandant, and promotions shall ordinarily be made from these lists according to the provisions of Rule 55.

62. Preparation of Lists of Approved Candidates: (a) The Commandant may for special reasons, promote to the next higher rank any qualified candidate whose name is not on the appropriate approved list. In the case of Subedars(Inspectors) and Sub-Inspectors prior approval of the Inspector General and Deputy Inspector General respectively shall be obtained.

(b) Promotions shall be made from among the best men in the Force as whole and for this purpose the Commandant shall maintain separate lists for promotion to different ranks as shown below:-

(1) List 'A' containing names of Constables fit for promotion to the rank of Lance Naik

(2) List 'B' containing names of Lance Naiks suitable for promotion to the rank of Naik.

(3) List 'C' containing names of Naiks suitable for promotion to the rank of Head Constables.

(4) List 'D' containing names of suitable Head Constables for promotion to the rank of Sub-Inspectors.

(5) List 'E' containing names of suitable Sub-Inspectors for promotion to the rank of Subedar(Inspectors).

(c) Ordinarily, only those men shall be considered for inclusion in List 'A' who have passed the prescribed course for Drill instructors and are sufficiently educated to be able to read and write Hindi, Roman and Hindi Numerical. Higher educational qualification is necessary for promotion above the rank of Head Constable, but the normal standard shall be Third Class for promotion from Constable to Lance Naik and Second Class from Naik to

Head Constable. A selected for promotion should have initiative, power and leadership the making of an officer. Men on promotion list for Naiks and above shall be on probation for at least one year and names of those one the list who do not come upto the required standard shall be removed thereof from time to time. Entry of names of lists A, B and C shall be made by the Commandant and lists D and E by the Commandant with the approval of the Deputy Inspector General of Police and Inspector General of Police respectively.”

- (33) Rule 67 of the CRPF Rules, 1955 lays down the requisite qualification for promotion to the post of Head Constable, which reads as under :-

“67. Head Constables: Promotions to the rank of Head Constable shall be made by the Commandant according to seniority from the list 'C' referred to in Rule 62 subject to the general provisions of Rule 55 on the recommendations of Company Commanders. The requisite qualification for such promotions are the passing of the Senior Cadre Course and the possession of the Second Class Certificate of Education or a Matriculation or equivalent or higher academic qualification certificate(GSR 527 dated 6.6.1981)”

- (34) Perusal of the aforesaid Rule 67 of CRPF Rules, 1955 reveals that promotion to the rank of Head Constable shall be made by the Commandant according to seniority from the list ‘C’ referred to in Rule 62 subject to general provisions of Rule 55 on the recommendations of Company Commanders. Further, two things have been made mandatory for promoting to the post of Head Constable, the first being passing of the senior cadre course and second being the possession of the second class certificate of education or a matriculation or equivalent or higher academic qualification certificate.

C.2. ESTABLISHMENT MANUAL CRPF, 1976

(35) The Establishment Manual CRPF, 1976 (corrected upto 11.5.2022) was published under the Authority of Government of India, Ministry of Home Affairs, U.O. No. 1390/76-Pers-1, dated 21.04.1976 and subsequent executive orders issued by the Government and Director General, CRPF, from time to time. The criteria of promotion from Constable to Head Constable has been set out in Para-11.5 of the Establishment Manual CRPF, 1976, which reads as under :-

“11.5 APPD LIST-'A' (GD) FOR PROMOTION FROM CT TO HC.

The CTs who fulfill the following conditions will be eligible for being considered for inclusion in Appd List-'A'/GD:-

- i) Must have completed minimum five years regular service as Constable including three years in a duty Battalion.
- ii) Must have qualified Section Commander Course (SCC)/Head Constable promotional Course (HCPC) or any other course prescribed by the DG, CRPF as per requirement.
- iii) Must be in Medical Category SHAPE-1.
- iv) Must not have adverse report in Confidential Card in preceding five years.
- v) Must not have major punishment in preceding five years.
- vi) Must have good record of service.

Constables who fulfill above conditions upto a particular seniority as notified by the Dte.Genl from time to time and found fit by a Selection Board as per Standing Orders on the subject shall be brought on Approved List-'A'(GD) drawn by DIGP of

GC/Principal/Commandant and their particulars forwarded to Dte.Genl, Estt Branch duly consolidated at Range/Sector/Zone Officers. After having arranged the Lists on Force Level seniority, Dte General will circulate it for the information of all concerned and they will be released on promotion as per availability of vacancy.

Note-1 Where juniors who have completed their qualifying or eligibility service are being considered for promotion, their seniors would also be considered provided they are not short of the requisite qualifying or eligibility service by more than half of such qualifying or eligibility service or two years, whichever is less and have successfully completed their probation period for promotion to the next higher grade alongwith the juniors who have already completed such qualifying eligibility service.

Note-2 For the purpose of computing minimum qualifying service for promotion, the service rendered on a regular basis by an officer prior to the 1 January,2006, the date from which the revised pay structure based on the sixth Pay Commission recommendations has been extended, shall be deemed to be service rendered in the corresponding scale of pay and grade pay extended based on the recommendations of the commission.

Note-3 Qualitative requirement of field service shall be deemed to have been condoned in the cases of Head Constables who are actively engaged in Central Sports or games by representing the Force at the All India Police Games or who serve as coaches or trainers of teams participating at least at national level or those posted Training Staff in Training Institutions."

C.3. STANDING ORDERS

(36) Rule 4 under Chapter II of CRPF Rules, 1955 deals with the Powers of the Central Government and Certain Officers of the Force, which reads as under :-

"4. Powers of the Central Government and Certain Officers of the Force:

(a) In all cases not specifically provided, for in these rules, instructions issued from time to time by the Central Government or the Director General or under his directions by the Additional Director General or the Inspector General shall regulate working of the Force. (Substituted vide GSR-784 dtd 8/10/88)

(b) Omitted vide GSR 784 dated 8.10.88

(c) Omitted vide GSR 784 dated 8.10.88”

(37) Pursuant to the power conferred under Section 4 of the CRPF Rules, 1955, Standing Orders have been issued by the competent authority from time to time.

(38) The Director General, CRPF in supersession of earlier Standing Order Nos. 4/79, 3/95 and 1/96 (including all subsequent addendum/amendments) for governing promotions of NG (Executive, Trade and Technical including signal) personnel had issued Standing Order No. 6/99. Clause A of the Standing Order No. 6/99 lays down the eligibility conditions for promotion. Sub-clause (I) of Clause (A) deals with promotion from the post of Constable to the post of Head Constable, which reads as under :-

“(A) (I) Constable to Head Constable :-

- a) Must have completed minimum 8 Years service as Ct. from the date of enlistment.
- b) Must have qualified in Junior Cadre Course and Section Commander Course.
- c) Must not have adverse report in Confidential Card in preceding five years.
- d) Must not have major punishment in preceding five years.

- e) Service record should be generally good.”

(39) The brief details and eligibility for the promotional courses has been laid down in Clause B of the Standing Order No. 06/1999. Sub-clause (I) of Clause B of the Standing Order No. 06/1999 deals with the promotional course of Section Commander Course (SCC), which is required to be qualified by a member of the force in order to be eligible for promotion from the rank of Constable to the rank of Head Constable. Sub-Clause (I) of Clause (B) of Standing Order No. 06/1999 reads as under :-

“B. Brief Details & Eligibility for the promotional courses

I. From Constable to Head Constable

- i) Must have completed seven years’ service as Constable from the date of enlistment.
- ii) Must have qualified in JCC
- iii) Constables will be detailed for SCC strictly in accordance with their seniority.
- iv) SCC of 6 weeks duration will be conducted in Training Institution and if need be by Zone/Sectors/Ranges as per requirement in accordance with the syllabus prescribed by Training Directorate.
- v) Note more than three chances shall admissible.

(40) The Director General CRPF has also issued a Standing Order No. 06/2006 on 03.09.2006, laying down the action plan on HIV/AIDS for awareness, prevention, detection, treatment and rehabilitation of the members of the force. Under the caption ‘Management of HIV/AIDS cases’ in the aforesaid Standing Order No. 06/2006, it has been stated as under :-

“As the CRPF is an armed Force and mostly deployed in the disturbed areas across the country. Hence, there is a need to maintain the high standard of physical fitness of the personnel. HIV infection is such a type of problem/disease which decreases the physical stamina of the individual in several stages in a long run. Therefore, there is a need to amend the Standing Order-1/2003 in regards to HIV infection (S/O-1/2003 is under review) so that the new SHAPE SYSTEM could be introduced for medical categorization and invalidation. The following points may also be incorporated in the policy in consultation with Government of India:-

- a. Promotion of active participation of affected personnel in all functions.
- b. No discrimination in posting/promotion/social activities.
- c. Creation of self help group for PLWHA.
- d. Enabling the environment for care and support.
- e. Care by the family members and others.”

(41) Thereafter, the Director General CRPF has issued Standing Order No. 04/2008 : *Health Care System in Central Para Military Forces-Instructions for Medical Examination and Classification of Personnel in CPMF's* on 15.12.2008 in supersession of Standing Order No. 1/2003. Standing order 04/2008 lays down the instructions/procedure for carrying out annual medical examination and classification of the combatised officers and other personnel in CRPF. Clause-4 lays down the Annual Medical Examination. Sub-Clause 4.10 of the Standing Order

No. 04/2008 lays down the procedure for Annual Medical Examination (AME), which reads as under :-

“4.10 Procedure for AME

- a. The individual officer/personnel undergoing AME will ensure availability of his/her original Health card and previous year's AME in proforma 3 duly certified, while reporting for AME. No fresh/new Health card will be opened unless a COI has been conducted and responsibility fixed for loss of the previous health card to the satisfaction of the concerned controlling Officer.
- b. The examining Medical Officer Board will endorse the medical categorization on completion of AME. The MO Board will also enter the findings/remarks in a register to be maintained at the unit/Hospital level for record.
- c. When ever an individual is already in temporary low medical category (LMC) in any factor of SHAPE system at the time of AME and his re-categorization medical board is due within next 3 months, the AME will be suitably advanced so that both are carried out together. If the gap is 6 months or more, both will be held separately.
- d. The medical category in AME will remain valid for one year unless his/her medical category has been changed for reasons of subsequent diseases or injury in that case, the changed grade will prevail till next AME or reclassification if recommended earlier for temporary LMC.
- e. Officers on deputation with other Govt/PSUs at Delhi will have their AME got done at their respective Force CH/Station Hospitals at Delhi. Others, who are away from Delhi will get the same done at the nearest respective CH of any CPF, for which they shall apply in advance through their administrative authorities.
- f. The previous year's AME report will be made available to the AMA/Medical board as the case may be, by the unit insist this from the previous unit at the time, the member of the Force is received in the unit on transfer/attachment. In case the report is not received, the unit will demand the same in advance, much before AME before AME.
- g. The body weight will be checked as per the chart given in Appendix-E/F. Those found over weight,

will be disposed of as per guidelines in Pan-III 23.5(e).”

- (42) Clause 4.13 of the aforesaid Standing Order No. 04/2008 says that SHAPE-I is the essential condition for promotion of combatised personnel and in case of personnel whose illness is of permanent nature and who are not SHAPE-I will be declared unfit for promotion, even if, they otherwise attain SHAPE-I. The illness of temporary nature, DPC would grade them as fit for promotion subject after attaining SHAPE-I. Clause 4.13 reads as under :-

“Medical Category SHAPE-I will be an essential condition for promotion of all combatised personnel in all groups/ranks/cadres in the CPMFs. In case of those whose illness is of permanent nature and who are not SHAPE-I, they will be considered for promotion by DPC but will be declared unfit for promotion, even if they at otherwise it for promotion. In case of those personnel, whose illness is of temporary nature, after considering their cases for promotion along with others, if they are otherwise fit, the DPC will grade them as 'fit for promotion' subject to attaining SHAPE-I medical category. As and when they regain the SHAPE-I medical category, they will be promoted as per recommendations of DPC. But they will not be entitled to back wages. However they will retain their seniority.”

- (43) Clause-5 contained in Part-II of the aforesaid Standing Order No. 04/2008 deals with procedure for medical categorization. Clause 5.3 of the aforesaid Standing Order lays down the classification principles for assessing fitness of the members of the force in terms of the code letters SHAPE as under :-

- “S- Psychological
- H- Hearing
- A- Appendages
- P- Physical Capacity
- E- Eye sight.”

(44) Clause 5.4 of the aforesaid Standing Order lays down that functional capacities of the members of the force would be graded in the scale of 1 to 5 indicating declining functional efficacy and increasing employability limitations. The detailed guidelines with respect to each of the aforesaid functional capacity and employability as per the aforesaid factors (SHAPE) are contained in Part-IV of the aforesaid Standing Order. At this juncture, clause 22.4 contained in Part-IV is relevant, which is reproduced as under :-

“22.4. “P” FACTOR (PHYSICAL CAPACITY)

This factor shall cover to describe in details about the physical capacity, strength, endurance, mobility, agility and a person, which might be restricted by Medical/surgical conditions and those which are not covered under actors Concessions are embedded as a function of age under this factor, since stamina and endurance do decrease with ageing process without any obvious pathology being visible.

Numerical Grading	Functional Capacity	Employability limitations
P-1	Has full functional capacity and physical stamina Minor impairment fully under control, but has full physical stamina	Fit for all duties any where Fit for all duties any where but under medical observation, having no employability restrictions.
P-2	Has moderate physical capacity and stamina. Suffered from	Fit for duties not requiring severe stress. May have

	constitutional metabolic/ infective disease operative procedures, but now well stabilized.	restrictions in employability at high altitude (above 2,700 meters/9,000 feet in hilly terrain and extreme cold areas)
P-3	Has major disablement with limited physical capacity and stamina	Fit for sedentary duties not involving undue stress. May have restricted employability as advised by medical authorities such as :- a. To avoid places with high humidity level 75% round the year. b. Have access to specialist services near by. c. To avoid driving/handling of weapons near water, fire or heavy machinery. d. Restricting physical excess, work in desert/snow bound areas etc. e. Restricting active participation in hoses, counter insurgency operations etc. (excluding staff logistics and allied support duties)
P-4	On Sick/leave on medical ground in hospital	Temporarily unfit for force duties
P-5	Gross limitations on physical capacity and stamina	Permanently unfit for Force Service

(45) Clause 5.5 of the aforesaid Standing Order lays down the functional capacity scale, which reads as under :-

“5.5. Functional Capacity Scale

1. Fit for all duties any where
2. Fit for all duties except with limitations in duties involving severe physical/mental strain. They would also require perfect acuity of vision and hearing.
3. Except S Factor, fit for routine or sedentary duties but have limitations of employability; both job wise and Terrain wise as spelt out in classification against each factor as specified in Part-IV.
4. Temporarily unfit for duties in the force on account of hospitalization/sick leave.
5. Permanently unfit for service for any type in the force.”

(46) Clause-6 of the aforesaid Standing Order says that it is obligatory for the Temporary Low Medical Category to appear before re-classification Medical Board at stipulated time and permanent Low Medical Category is to be revised after two years. Clause-6 of the aforesaid Standing Order reads as under :-

“For individuals placed in temporary LMC it is obligatory for them to appear before the reclassification medical board at the stipulated time as given in the previous medical board proceedings/medical examination. No early premature review will be allowed in case of any temporary LMC, irrespective of the duration. In permanent LMC, the individual will be reviewed after two years. However early review can be requested provided, the AMA certifies that the individual's condition has improved materially, along with a technical report on convincing grounds. This has to be recommended by the unit commandant certifying normal performance of the individual and this will be forwarded to the Director (Medical) for granting early review or otherwise.”

- (47) Clause-9 says that temporary classification in factor will be permissible for a maximum period of 24 weeks. If an individual requires observation beyond permissible period, he/she will be placed in permanent LMC except in 'S' Factor. Opinion given by a Specialist for review in Proforma as per Appendix-D will be valid for a period of three months only.
- (48) Clause-15 of the aforesaid Standing Order provides for the appeal against the findings of a medical Board with regard to low medical categorization. Clause-16 and 17 of the aforesaid Standing Order lays down the reclassification of personnel in Low Medical Category, which reads as under :-

“15 RECLASSIFICATION OF PERSONNEL IN LMC

When one is placed in a medical category lower than SHAPE-ONE, whether temporary or permanent, it is obligatory on his/her part to appear before a reclassification medical board on time. It is re-emphasized that it is the responsibility of the unit/establishment in which the officer is serving to ensure compliance of this mandatory requirement. It will be ensured by the unit/Commandant/OC that it an individual who is due for such reclassification is not sent on annual leave/long casual leave temporary out station duty if the board is due. He can be detailed for a course/temporary duty only after taking prior permission from the MO IC of the respective Unit/GC/Composite Hospital in case of SO & ORS and from the Director (Medical) in the case of officers; at least 2 weeks in advance with adequate justification for either postponing the medical board or for holding it the station to which the individual is proceeding on longer attachment duty:

17. When ever a reclassification Medical board/ Examination falls due during the period of AME, the Individual will undergo reclassification first and the

fresh medical category will be reflected in the AME when held subsequently. When AME falls due before reclassification both will be held independent of each other and in no circumstances, the date of reclassification medical board will be changed. In case of permanent LMC board, it is to be preponed by 3 months to be held first, followed by the AME.

(49) Clause 22.5 (g) deals with the HIV/AIDS cases, which reads as under :-

“Individuals who are only HIV positive but asymptomatic will be categorized P-2 & required to be observed periodically. Those who are HIV positive and symptomatic with or without opportunistic infection (AIDS disease), shall be assessed on their physical/medical condition and placed in P-3 permanent if ambulatory to facilitate continued ARTV, provided that they fully co-operate with management plan. If the disability percentage goes beyond 50%, individual will be placed in P-5. The medical classification for HIV positive personnel will be done as provided below:-

P1	HIV Positive Asymptomatic Not on ART CD4, CD8 Count normal Other Parameters like Viral load Normal	Fit for all duties anywhere
P2	HIV Positive Weight Loss more than 10% CD4 (Above 200 Cells/ Microlite) CD8, Count within normal range Total Lymphocyte Count above 1200/mm3 Minor Mucocutaneous Manifestations/minor infections with or without ART	Fit for all duties anywhere except at difficult and solitary locations, preferably where ART facilities are available.
P3	HIV Positive Weight loss more than 10%	Fit for sedentary duties only and only at locations

	CD4 Count less than 200 Cells/Microlite Viral load more than 50,000 copies Unexplained chronic, Diarrhea/fever more than 1 month Opportunistic infections :- (1) Pulmonary TB (2) Oral thrush (3) Herpes Zoster more than 1 month (4) Leukoplakia etc. on ART	were advance medical facilities are available
P4	Hospitalization/leave due to HIV related diseases/AIDS	Temporary UNFIT for Force duties
P5	Unsatisfied response to ART, (CD4 count less than 200 cells/microlitre with ART) HIV wasting syndrome, Disabling Neurological/Pshychiatric Problems Disseminated Tuberculosis Poor Physical endurance Malignancies associated with AIDS Functional disability more than 50%	Permanently UNFIT for any type of service, invalidation.

(50) Subsequently, on 12.03.2015, the Director General CRPF has issued Standing Order No. 01/2015 in supersession of Standing Order No. 6/1999, wherein the procedure for promotion of NGO (GD) Executive Personnel (Male) to various ranks from Constable to Head Constable has been laid. Clause 3 (A) of the Standing Order No. 01/2015 lays down the eligibility conditions for promotion from Constable (GD/PUG/Mali/PTR) to Head Constable, which reads as under :-

“(A) CONSTABLE (GD/BUG/MALE/PTR) TO HEAD CONSTABLE :-

- a) Must have completed minimum 3 years of service as Constable (GD/Bug/Mali/Painter) from the date of enlistment including three years' service in a duty Bn.
- b) Must have qualified Section Commander Course or Head Constable Promotional Course (SCC or HCPC).
- c) Service records should be good viz. must not have major punishment and adverse report in Confidential Card (APAR) in preceding five years.
- d) Out of last five years grading in Confidential Card (APAR), there must be at least 'Good' including the grading of latest year i.e. the year preceding the drawal of Appd. List.
- e) Must be in medical category SHAPE-One as per instructions existing on medical SHAPE system.”

D. ANALYSIS

(51) Having noticed above the Act, Rules, Establishment Manual and the Standing Orders issued by the respondents from time to time, this Court is of the view that this Special Appeal has to be decided in its own peculiar facts and circumstances.

(52) It is manifest from the records available on the special appeal that the appellant herein was recruited on the post of Constable (General Duty) on 28.08.1993. Although the appellant had completed 13 years of service and had also successfully underwent the mandatorily required Senior Cadre Course (SCC) in the year 2006 as per Rule 67 of the CRPF Rules, 1955,

however the appellant was not promoted to Head Constable, de hors the Standing Order No. 06/1999, which prescribed merely completion of 8 years of service as Constable to be promoted to the post of Head Constable.

(53) As the facts unfold, it is found that the appellant was diagnosed with HIV Positive and sent for Anti-Retroviral Therapy on 18.02.2008 and was also apparently given medical categorization SHAPE-2 in the year 2009. However his Annual Medical Examination (AME) was conducted in the year 2011 by which he was declared to be in SHAPE-I category. Therefore, considering the nature of the disease and service record of the appellant, his name was brought in the Special Approved List -A/GD (Male) (11 of 2009) and he was also granted Seniority No. 8545-A. Thereafter, vide order dated 26.02.2013, appellant was promoted to the rank of Head Constable (General Duty) and was posted in Jammu & Kashmir Zone, Srinagar Sector.

(54) It is available on record that the appellant belongs to 16th Battalion, Jammu & Kashmir Zone, but has been posted at 93rd Battalion, Lucknow from the year 2008 to January, 2022 and till date he has been posted at Mathura. Thus, the posting of the appellant has been either static or not severe during all these years. Apparently, after promotion order dated 26.02.2013, the appellant was posted at 183 Battalion, however on account of

non-relieving from Amethi, the appellant was again sent for Annual Medical Examination on 17.05.2013, wherein he was medically categorized as SHAPE-II (T-24) and advised for regular treatment for the said ailment.

(55) Perusal of the Annual Medical Examination dated 17.05.2013 reveals that the grading of the medical condition of the appellant was S-I, H-I, A-I, P-2, E-I, which reflects that the appellant was found to lack only ‘P’ factor relating to physical capacity. However, ‘P-2’ as contained in Clause 22.4 of Part-IV of the Standing Order No. 04/2008, which deals with procedure for medical categorization, corresponds to “Fit for duties not requiring severe stress” in the tabular chart. The said categorization is extracted as follows:

Numerical Grading	Functional Capacity	Employability limitations
P-2	Has moderate physical capacity and stamina. Suffered from constitutional metabolic/infective disease operative procedures, but now well stabilized.	Fit for duties not requiring severe stress. May have restrictions in employability at high altitude (above 2,700 meters/9,000 feet in hilly terrain and extreme cold areas)

(56) The aforesaid grading of medical condition of the appellant indicates that although he has been placed in SHAPE-2, but he is physically fit for duty and the employability limitation indicates that he may have restriction in employability at high attitude.

(57) This Court finds that CRPF was sensitive and alive to the fact that HIV positive recruits could not be treated differently from their other recruits, who did not suffer from this disability as far as promotion and other conditions of the service were concerned. Clause 22.5 (g) of the Standing Order No. 04/2008 deals with the case of HIV/AIDS cases, which invariably says that “**P2**” **category of HIV Positive recruit would be fit for all duties anywhere except at difficult and solitary locations, preferably where ART facilities are available.** Although, Clause 4.13 and Clause 22.5(g) are borne out of the same Standing Order, however they are at stark difference, as on the one hand the General Clause 4.13 prescribes a recruit to be in SHAPE-1, whereas the special provisions related to HIV positive says that a personnel having even SHAPE-2 medication conditions is fit for duties.

(58) Further, this Court finds that the Director General CRPF has also issued a Standing Order No. 06/2006 on 03.09.2006, laying down the action plan on HIV/AIDS for awareness, prevention, detection, treatment and rehabilitation of the members of the force. Under the caption ‘Management of HIV/AIDS cases’ in the aforesaid Standing Order No. 06/2006, it has been specifically stated in Clause (b) that **adequate policy should be made in consultation with the Government of India, so that**

there is no discrimination in posting/ promotion and social activities of these HIV infected employees.

- (59) Further, it is decipherable from records that the medical category 'P-2' does not in any manner affect the promotional avenue of the person but only prescribes for employability limitations, keeping in mind that promotion is nothing but an incidence of employment. However, Clause 4.13 of the Standing order No. 04/2008 merely prioritizes by saying that medical category SHAPE-1 would be essential condition for promotion of all combatised personnel. The word "Combatised Personnel" is of great significance as the word loosely means personnel who are involved in actual fighting duty, which generally involves handling and using weapons of various types and actual engagement with people causing unrest or disturbing public peace and tranquility. Whereas holders of non-combat posts are those that facilitate the work of the combatants, which include services like supply, administration, transport, general logistics, intelligence gathering etc. The said Clause 4.13 primarily relates to 'combatised' personnel and it cannot be construed to be applicable to all across the board, keeping in view of Clause 22.5 (g) of the Standing Order No. 04/2008. Further, the said clause itself dilutes the requirement of SHAPE-1, wherein it mentions that in case of personnel whose illness is of permanent nature and who are not SHAPE-I, they will be declared unfit for promotion,

even if, they otherwise attain SHAPE-I and most importantly it says, in case the illness is of temporary nature, DPC would grade them as fit for promotion subject to attaining SHAPE-1. Thus, a personnel can go off and come in combatised post as per his medical evaluation. However, in the view of this Court, the said clause does not relate to promotional avenue, especially when there is no similar embargo/restriction in the Act, 1949 or the Rules of 1995 for HIV positive personnel. To the similar effect is clause 11.5 (iii) and clause 11.6 (iii) of the Establishment Manual CRPF 1976, which contain the prescription of ineligibility of candidates not being in SHAPE-1, medical category for being promoted and Clause 3 (A) (e) and Clause 3 (B) (e) of Standing Order of 2015 dated 12.03.2015.

- (60) This Court cannot be oblivious to the fact that it is common knowledge that once a personnel moves higher up in hierarchy in the service, the requirement of his physical endurance relatively reduces and in that sense it could be well construed that the appellant who is presently performing and is found fit physically for the post of Constable can be always be found fit for a less physically enduring duties of Head Constable. The said analogy has been drawn keeping in mind the peculiar fact that in the AME of the appellant, only the physical endurance of the appellant has been categorized as 'P-2', whereas all other requirements in SHAPE have been given one (1) and most importantly the said

medical conditions has been consistent as can be found from medical examination held on 30.01.2016, 13.04.2019 and 24.06.2021.

(61) Further, this Court is of the view that protection against discrimination is a fundamental right guaranteed to Citizen of India. No one can be discriminated on the basis of his HIV/AIDS status in India. Even the CRPF Standing Orders issued from time to time reverberate their belief to provide equal status and opportunity to these affected personnel. HIV/AIDS patients have a right of equal treatment everywhere and they cannot be denied job opportunity or discriminated in employment matters on the ground of their HIV/AIDS status. Even in case of promotion, the said non-discrimination is echoed in Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (Act of 1995), which inter-alia states:

“47. Non-discrimination in Government employments -

(i) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service.

Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits;

Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until suitable post is

available or he attains the age of superannuation, whichever is earlier.

(2) No promotion shall be denied to a person merely on the ground of his disability:

Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.”

(62) A perusal of the aforesaid section reveals that sub-section (2) of Section 47 mandates that no promotion shall be denied to a person merely on the ground of his disability.

E. Conclusion

(63) Appellant has relied upon a judgment passed by the Hon'ble Punjab & Haryana High Court in “**Bishamber Dutt Vs Union of India and others**” reported in 2010 (2) LLR Punjab & Haryana 228, wherein a Single Judge of Punjab & Haryana High Court was called upon to decide the issue of promotion of an identically placed personnel of ITBP as that of the appellant herein. The learned. Single Judge in that judgment after recording the various contention as well as the departmental instructions as applicable to ITBP, observed that the policy and the rules provided for continuance of HIV positive personnel in the job of Para Military forces except those falling in unfit category. The learned. Single Judge found in that case that although the petitioner had been detected with HIV positive in the year 1995, he continued to be

in service till the passing of the order on 2010 and as such concluded that there was no reason to deny him the promotion.

(64) In the facts of the present case, this Court does not have even an iota of doubt that the aforesaid judgment has a persuasive effect. The appellant was detected with HIV positive in the year 2008 and he was promoted in the year 2013 and he was reversed from the promotion in 2014 and even today after close to 9 years, the appellant continues to be employed as Constable with the respondents and is in the same medical condition of SHAPE-2. This Court finds that the aforesaid judgment relied upon by the appellant contains a similar chart of physical endurances similar to clause 22.4 of Part-IV of the Standing Order No. 04/2008, which deals with procedure for medical categorization. Since, the appellant has been found fit for duties, this Court also finds no reasons as to why his promotion could not have been granted.

(65) This Court is of the view that since a person, who is otherwise fit, could not be denied employment only on the ground that he or she is HIV positive and this principle also extends to grant of promotion. In any case, a person's HIV status cannot be a ground for denial of promotion in employment as it would be discriminatory and would violate the principles laid down in Articles 14 (right to equality), 16 (right to non-discrimination in

state employment) and 21 (right to life) of the Constitution of India.

(66) As a consequence of the above discussion, while we set-aside the impugned order dated 24.05.2023 passed by the learned Single Judge, it is declared that the appellant would be entitled to full benefits of promotions as is extended to those who do not suffer from HIV Positive. All the directions and orders impugned in the present case which denied or deprived the appellant the chance or right to occupy the promotional posts are hereby quashed. The respondents are directed to issue consequential orders with effect from the date the appellant's junior(s) were/was promoted.

(67) The appeal is *allowed* in the aforesaid terms.

(68) There shall be no orders as to cost.

(Om Prakash Shukla, J.) (Devendra Kumar Upadhyaya, J.)

Order Date: 06.07.2023

Ajit/-