



GAHC010012172022

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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/454/2022

GS-192254K SRI BORASE PRADEEP VIKRAM
S/O. SRI VIKRAM RAJARAM PATIL, PRESENTLY SERVING AS UDC AT HQ
763 BRTF PIN-930763, C/O. 99 APO.

VERSUS

THE UNION OF INDIA AND 4 ORS
REP. BY JOINT SECRETARY (BR), MINISTRY OF DEFENCE (EARLIER
DESIGNATED AS SECRETARY (BRDB)), ROOM NO.418, (B) WING 4TH
FLOOR SENA BHAWAN, NEW DELHI-110011.

2:DIRECTOR GENERAL

BORDER ROADS ORGANIZATON
SEEMA SADAK BHAWAN
RING ROAD
DELHI CANTT. NEW DELHI-110010.

3:THE CHIEF ENGINEER
HQ CE (P) VARTAK
TEZPUR
ASSAM C/O. 99 APO.

4:COMMANDER
763 BRTF PIN-930763
C/O. 99 APO.

5:THE HEAD OF OFFICE

ANTHROPOLOGICAL SURVEY OF INDIA
GOVT. OF INDIA
27
JAWAHARLAL NEHRU ROAD



KOLKATA-700016
WEST BENGAL

Advocate for the Petitioner : MR. D. BORAH

Advocate for the Respondents : MR. C.K.S. BARUAH, ASSTT.S.G.I.

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH
JUDGMENT AND ORDER (ORAL)

Date : 08-12-2022

Heard Mr. D. Borah, the learned counsel appearing on behalf of the petitioner and Mr. C. K. S. Baruah, Asstt. S.G.I. appearing on behalf of the respondent Nos. 1 to 5.

2. By way of the instant writ petition, the petitioner have challenged the policy decision included in the Office Memorandum bearing No.12279/POL Deput/DGBR/52/EG2 dated 10.01.2018 (for short the "Policy of 2018") and the consequential action by which the petitioner's application seeking transfer on deputation dated 31.12.2021 being rejected.

3. The brief facts of the instant case as could be seen from a perusal of the pleadings on record is that the petitioner was enrolled in the General Reserve Engineer Force (GREF)/Border Roads Organization (BRO) which is an integral part of the armed forces on 05.09.2009 in the post of Lower Division Clerk (LDC). Thereupon, the petitioner was promoted to the rank of Upper Division Clerk (UDC) in Level-4 of the 7th CPC w.e.f. 15.04.2021 vide HQ 763 BRTF (P)



Vartak Assumption report No.1640/DPC/129/E1 Camp dated 17.04.2021. The petitioner is presently holding the rank of UDC since 15.04.2021 and is serving with HQ 763 BRTF (P) Vartak since 02.02.2021.

4. The respondent No.5 issued an advertisement published in employment News for the week ended 18-24 December, 2021 for the post of "Senior Secretariat Assistant" a Central Government Service, Group "C" (Non-gazetted) (Ministerial) on Transfer or Transfer on deputation (including short term contract) basis in the Level-4 of 7th CPC.

5. The petitioner submitted an application for the post of "Senior Secretariat Assistant" in Anthropological Survey of India to Commander HQ 763 BRTF and requested to accord permission for sending the application to them through proper channel vide his application dated 29.12.2021. The said application was however rejected vide the Office Letter bearing No.1632/29/E1 Camp dated 31.12.2021 by the Offg Adm Officer on the ground that the petitioner was not eligible for applying for transfer or transfer on deputation basis till completion of his normal tenure in HAA and in that regard, referred to the Policy of 2018 and more particularly to Para 2(c) therein. The petitioner therefore being aggrieved has approached this Court under Article 226 of the Constitution of India challenging the Policy of 2018 and more particularly Para 2(c) as well as the impugned order dated 31.12.2021.

6. This Court vide an order dated 01.02.2022 issued notice making it returnable by 11.03.2022 and further directed the respondent No.4 as an interim measure to forward the application of the petitioner to the respondent No.5, so as to reach the concerned office on or before 15.02.2022. It has also been mentioned in the said order that the respondent No.5 shall allow the

petitioner to provisionally take part in the selection process awaiting further order of this Court.

7. It further appears on the records that the respondent Nos. 1 to 4 have filed a joint affidavit-in-opposition. In the said affidavit-in-opposition it has been mentioned that in view of the Policy of 2018 certain restrictions have been imposed while sending applications for deputation/inter departmental transfer/permanent absorption. Reference was made to Clauses 2 (c) and 2(I) which for the sake of relevance are quoted herein below.

“2. (c) Individuals posted in units located in HAA will not be eligible for applying for deputation till completion of their normal tenure in HAA and completion of six months in new unit on being posted out of HAA.

(I) Individuals should be sponsored for higher post/post carrying higher pay scale only.”

8. It has further been mentioned that the Border Roads Organization is undertaking construction of number of strategically important roads including Indo China Border Roads (ICBRs) in the remote and inhospitable areas of the nation. It has been further been mentioned that the works are of high priority and the work is being done on war footing. The restrictions imposed by the Policy of 2018 including the restrictions mentioned in Para 2(c) and 2(I) are for protecting the national and organizational interests. Further to that, it has also been mentioned that in view of the said Para 2(c) and 2(I), the respondent authorities has rightly issued the impugned order dated 31.12.2021.

9. To the said affidavit-in-opposition, the petitioner has filed an affidavit-in-reply wherein it has been mentioned that the rejection of the petitioner's



application for inter departmental transfer on the basis of the Policy of 2018 was without any reasonable basis. It was also mentioned that the said impugned Policy of 2018 and more particularly Para 2(c) did not have any sanction from the Ministry of Defence since a separate policy with regard to forwarding of application already exists. It was further mentioned that solely on the ground that the petitioner being presently posted in HAA (High Altitude Areas), his application could not be forwarded and since these kind of career advancing opportunities being limited in availability, the respondents could have taken a liberal approach to his application and could have relaxed the bar on those personnel who are posted in HAA. It has also been mentioned that the respondents have failed to justify their stand as what was the rational behind to differentiate those personnel who are posted in HAA areas from those posted in non-HAA areas and as to how the incumbents posted in non-HAA areas stand at a better footing when compared with the ones who are posted in HAA areas. It has also been mentioned that though pay scale of the petitioner in the parent organization and that in the borrowing organization are similar but the experience and scope of advancing one's career in the borrowing organization is far greater than it exists in the present BRO and as the petitioner is not a member of the technical staff, his services are so dispensable and as such he could be released. It has also been mentioned that the Department of Personnel & Training is the nodal agency/department for framing of policy for forwarding of applications for outside employment/deputation and had stipulated in the Office Memorandum bearing No.28011/1/2013-Estt(C) dated 23.12.2013 that forwarding of applications should be the rule rather than an exception and the petitioner is at liberty to leave their parent organization in search of better promotional prospects.

10. In the backdrop of the above pleadings, let this Court take into consideration the submissions made by the respective counsels for the parties. Mr. D. Borah, the learned counsel for the petitioner had submitted that the petitioner is aggrieved by Paragraphs 2(c) of the Policy of 2018 inasmuch as there is no rational behind depriving the individuals posted in the units located in HAA for applying for deputation till completion of the normal tenure in HAA and completion of 6 (six) months in the new unit on being posted out of HAA.

11. Referring to the judgment enclosed as Annexure-5 to the writ petition i.e. in the case **of Rajesh Kumar and Others Vs. Union of India** reported in **MANU/GH/0111/2017**, the learned counsel has drawn the attention of this Court to paragraph Nos. 20 and 21 of the said judgment and submitted that in the said case the Co-ordinate Bench of this Court had duly interfered with the ban imposed by the respondent authorities in not permitting deputation for a period of 20 years. He further submitted that a perusal of the said judgment makes it clear that the Co-ordinate Bench of this Court had categorically held that the said ban had no rational basis to the objects sought to be achieved and had observed that a decision would have to be taken depending on the attending facts and circumstances of each case and not on the basis of a blanket ban.

12. The learned counsel further submitted that on the basis of the said judgment passed by this Court there was a revision of the deputation policy of the BRO vide an Office Memorandum dated 06.09.2017 wherein it was decided that deputation of all cadres of BRO Officers/employees to other Departments/Organizations would henceforth be dealt with under the DoP&T guidelines in that regard issued from time to time and there will be no specific

ceiling on numbers. He has also drawn the attention of this Court to another policy decision of the Border Roads Wing issued by the under Secretary to the Government of India, Ministry of Defence, dated 27.11.2017 whereby it was mentioned that deputation, outside employment etc. cases of GREF Personnel may be processed as per DoP&T guidelines under which reasonable restrictions are inbuilt to safeguard organizational interest and can be invoked by the DteGBR. It was also mentioned that as far as processing the cases of employees who serve in BCA (Bhutan Compensatory Allowance)/ MCA (Myanmar Compensatory Allowance) area suitable clause may be incorporated in the posting policy/service bond for BCA/MCA area. The learned counsel therefore submitted that immediately thereupon the respondent authorities without having any basis have come up with this Policy of 2018 thereby barring those individuals posted in units located in HAA from applying for deputation till completion of their normal tenure in HAA and completion of 6 months in new units on being posted out of HAA. He further submitted that the petitioner serves in a non-technical cadre and as such the bar which has been imposed in Para 2(c) of the Policy of 2018 should not be applied insofar as the petitioner is concerned.

13. On the other hand Mr. C.K.S. Baruah, the learned counsel appearing on behalf of the respondents submits that the Policy of 2018 is a policy decision of the respondent authorities taking into consideration that the Border Roads Organization undertakes construction of a number of strategically important roads including Indo China Border Roads (ICBRs) in the remote and inhospitable areas of the nation. The said works are of high priority and the work has to be done on war footing. He further submitted that during the entire tenure of employment of an individual in the Border Roads Organization, a person is

posted in HAA area for 3 (three) times and for each posting the period is for 2 years. He therefore submitted that the avenues as well as the comfort of the individuals in the High Altitude Areas (HAA) is comparatively less than those individuals posted in the normal areas and under such circumstances, the BRO have formed this particular policy to the effect that individual posted in units located in HAA would not be eligible for applying for deputation till completion of their normal tenure in HAA. Therefore, it is necessary for protecting the national and organizational interest and any interference therein made to the said policy would affect the administrative exigencies as well as the organization of the respondent authorities. He further submitted that the individuals posted in the units located in HAA areas is a class apart and it is for the purpose of the object pertaining to national and organizational interest in the High Altitude Areas (HAA) that the said Policy of 2018 have been framed. Under such circumstances, the question of violation to Article 14 of the Constitution does not arise in the facts of the instant case.

14. He further submitted that paragraph 2(I) mandates that the individuals should be sponsored for higher post/post carrying higher pay scale only and in the instant case from a perusal of the affidavit-in-reply by the petitioner it is clear that the pay scale in the parent department as well as in the borrowing department is similar and under such circumstances by virtue of paragraph 2(I) the petitioner is therefore not entitled to be accorded the sanction.

15. Upon hearing the learned counsels for the parties and upon perusal of the materials on record, it transpires that the Co-ordinate Bench of this Court on 21.10.2017 vide a judgment and order dated 21.02.2017 passed in **Rajesh Kumar (supra)** disposed of the writ petition directing the respondents to

forthwith forward the applications along with the Vigilance Clearance Certificates/NOC in respect to the petitioners therein who had applied through proper channel, permitting them to join the Coal Mines Provident Fund Organization subject to the condition that they submit resignation in the present job under the Border Roads Organization. It further appears from a perusal of paragraph Nos. 20 and 21 to which the learned counsel for the petitioner has drawn the attention that the Co-ordinate Bench of this Court had also taken note of that the Border Roads Organization are called upon to perform the difficult task of preparing border roads in a time bound manner especially for the use of armed forces, who are engaged in the work of guarding the frontiers of the country. It was observed that the nature of task performed by the Border Roads Organization places the Department in a differing footing from many other Government of India Enterprises. This Court in the said judgment also took into consideration that there was a possibility that large scale exodus of its employees at a short notice may seriously jeopardize its projects and in such case the Border Roads Organization would be justified in refusing to forward applications for deputation/transfer of service to outside the employment. It was observed that even without there being a policy decision, it would be open for the Border Roads Organization to refuse NOC for outside employment if the Department is of the view that such a stand would be necessary in public interest as well as in the interest of the Department. However, this Court in the said judgment observed that such a decision will have to be taken depending on the attending facts and circumstances of each case and not on the basis of blanket ban.

16. It further appears that though the learned counsel for the petitioner submitted that in pursuance to the said judgment and order passed by this

Court on 21.02.2017, in the Office Memorandum dated 06.09.2017, it was decided that deputation of all cadres of BRO Officers/Employees to other Department or Organization would henceforth be dealt under the DoP&T guidelines issued from time to time and there will be no specific ceiling on the number but a perusal of the said Office Memorandum dated 06.09.2017 does not refer to the decision of this Court dated 21.02.2017.

17. Be that as it may, subsequent thereto, the Under Secretary to the Government of India, Ministry of Defence had on 27.11.2017 made it clear that the Deputation outside employment etc. cases of GREF Personnel may be processed as per the DoP&T guidelines under which reasonable restrictions are inbuilt to safeguard the organizational interest and can be invoked by the DteGBR. It was also mentioned that as regards the processing of cases of employees who served in BCA/MCA areas, suitable clause may be incorporated in the posting policy/service bond for BCA/MCA areas. The learned counsel for the petitioner has also drawn the attention of this Court to Clause-6 of the guidelines of the DoP&T of December, 2013 enclosed to Office Memorandum dated 23.12.2013 which stipulates when the application should not be forwarded. A perusal of the said Clause-6 would show that it is only in cases where a person who is in under suspension or any disciplinary proceedings are pending against him or charge sheet has been issued or sanction for prosecution have been accorded or where a prosecution sanction is not necessary, a charge sheet has been filed in the Court of law or where a person is undergoing a penalty; then in such regard, application for transfer on deputation or transfer to any other post should not be considered.

18. Be that as it may, the respondent authorities thereupon has come up with

this policy decision of 2018 whereby amongst others, it has been mentioned that individuals posted in units located in HAA will not be eligible for applying for deputation till completion of their normal tenure in HAA and completion of 6 (six) months in new unit on being posted out of HAA. This is a policy decision of the respondent authorities.

19. The law is well settled that the administrative authorities are in the best position to decide the requirement as to who should be stationed where and it is not for the Court to sit over their decision like a Court of Appeal. Article 14 of the Constitution cannot be stretched too far, otherwise it would make the functioning of the administrative authorities impossible. The administrative authorities have experience in administration and the Court must respect this and should not interfere with administrative decisions. The decision as stipulated in the Policy of 2018 for individuals posted in High Altitude Areas to be not eligible for applying for deputation till completion of their normal tenure of two years and completion of six months in new unit on being posted out of the High Altitude Areas being done so in the organizational interest, this Court is of the opinion that such a policy decision cannot be interfered with in the attending facts inasmuch as from the submissions made by the learned counsel for the respondent and from the perusal of the affidavit, it appears that the said policy more particularly Para 2(c) have been adopted on account of administrative exigency and organizational interest as the Border Roads Organization has to perform the difficult task of preparing border roads in a time bound manner especially for use of armed forces who are engaged in the work of guarding, the frontiers of the country. The said Border Roads Organization is also undertaking construction of number of strategically important roads including Indo China Border Roads (ICBR) in the remote and inhospitable areas of the nation and

those roads which are built in High Altitude Areas.

20. It further appears that if the restriction which have been mentioned in Para 2(c) of the policy dated 10.01.2018 is not imposed, it would be difficult for the Border Roads Organization to carry out its functions as the individuals in question may apply for deputation which would affect their organizational interest. The reasons so assigned in the opinion of this Court are justifiable reasons and cannot under any circumstances be said to be unreasonable, irrational or having no nexus to the objects sought to be achieved. More so, when the individuals posted at High Altitude Areas, form a class on its own. Under such circumstances, the question of interference in respect to Para 2(c) of the policy dated 10.01.2018 which have been impugned in the instant proceedings do not arise in the facts and circumstances of the instant case. Consequently, the order dated 31.12.2021 which have been passed on the basis of Para 2(c) of the policy dated 10.01.2018 cannot also be interfered with.

21. The learned counsel for the petitioner have also submitted that although in the impugned order dated 31.12.2021, the reasons assigned for rejection of the petitioner's application is in terms with Para 2(c) but in the affidavit, the respondent authorities have supplemented another reason i.e. Para 2(l) whereby it has been mentioned that the individuals should be sponsored for higher post/post carrying higher pay scale only. The learned counsel for the petitioner has submitted that by way of an affidavit, new reasons cannot be supplemented for rejection of the application of the petitioner and in that regard he has drawn the attention to the judgment of the Supreme Court in the case of **Gordhandas Bhanji Vs. Commissioner of Police** reported in **AIR 1952 SC 16** as well as the Constitution Bench Judgment of the Supreme Court in the case of

Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and others reported in AIR 1978 SC 851.

22. From a perusal of the impugned order dated 31.12.2021, it transpires that the reasons assigned for rejection of the petitioner's application have been only on account of Para 2(c) of the policy dated 10.01.2018. However, in the affidavit, further reasons have been supplemented in terms with Para 2(l) of the policy dated 10.01.2018. This is in the opinion of this Court cannot be done so in view of the clear observations made by the Supreme Court in the case of ***Mohinder Singh Gill (supra)*** and more particularly paragraph No.8 which is quoted hereinbelow:

“8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. In Gordhandas Bhanji (AIR 1952 SC 16)

“Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself”

Orders are not like old wine becoming better as they grow older.

A Caveat."

23. In view of the above, therefore, this Court disposes of the instant writ petition with the following directions and observations:

(a) The policy decision of the respondent authorities as stipulated in the letter No.12279/POL Deput/DGBR/52/EG2 dated 10.01.2018 insofar as Para 2(c) is in accordance with law and cannot be said to be violative of Article 14 of the Constitution of India.

(b) The rejection of the petitioner's application vide a letter No.1632/29/E1 Camp dated 31.12.2021 in terms with Para 2(c) of the letter No.12279/POL Deput/DGBR/52/EG2 dated 10.01.2018 is in accordance with law and therefore cannot be interfered with.

(c) From the affidavit-in-reply filed by the petitioner, it appears that vide a Memorandum dated 07.07.2022, the petitioner has been offered the appointment on deputation to the post of Senior Secretariat Assistant General, Central Government Service, Group-C (Non-gazetted) (Ministerial) in Level 4 as per the 7th CPC in the Office of the Anthropological Survey of India subject to the conditions stipulated therein. It is within the Administrative Exigency of the respondent No.5 to wait for the petitioner to complete his tenure in terms with Para 2(c) of the policy decision dated 10.01.2018 or take such decision as may deem fit in that regard.



(d) In the attending facts, this Court is not inclined to impose costs.

JUDGE

Comparing Assistant