
(2021) 07 GAU CK 0132

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 2804 Of 2020, Interlocutory Application (Civil)
No. 2023 Of 2020

GO-3006M Ram Asra Khural

APPELLANT

Vs

Union Of India And 4 Ors

RESPONDENT

Date of Decision : 19-07-2021

Acts Referred:

Constitution Of India, 1950 — Article 166(1), 226

Citation : (2021) 07 GAU CK 0132

Hon'ble Judges : Sanjay Kumar Medh, J

Bench : Single Bench

Advocate : D Borah, Rkd Choudhury

Final Decision : Allowed/Disposed Of

Judgement

1. The action of the authorities namely, the Border Roads Organization (BRO) in denying the permission for his joining the National Highway

Authorities of India (NHAI) on deputation pursuant to his selection in a recruitment process initiated vide an advertisement dated 20.01.2020 is the

subject matter of this Writ Petition. The petitioner has put to challenge specifically an order dated 19.02.2020 issued by the NHAI whereby his request

for issuance of No Objection Certificate (NOC) has been turned down.

2. For better appreciation of the issue at hand, it would be necessary to state the facts of the case in brief:

3. The petitioner is presently serving as an Executive Engineer (Civil) under the BRO and has claimed fit to be considered for appointment on

deputation to the post of General Manager (Technical) in the NHAI. He further claims to have fulfilled all criteria for such posting including the length

of service in the Parent Organization and the required stints in posting at High

Altitude Area (HAA).

4. The NHAH had issued an advertisement on 21.01.2020 for recruitment of various post including 20 posts of General Manager (Technical) on

deputation. Having fulfilled the eligibility criteria, the petitioner submitted his candidature. In the procedure prescribed in the advertisement regarding

submission of application, under Serial No. 11, it was mentioned that application can be made ONLINE only and after submission of the ONLINE

application form, a PDF format containing the details entered by the applicant would be generated and the applicant is required to take out a print of

the ONLINE application form and get the same forwarded by his Parent Department along with the prescribed Verification Certificate and certified

copies of APARs / ACRs. The application has to be forwarded by the Department by enclosing certain necessary certificates. In accordance thereto,

the petitioner had submitted an application dated 06.02.2020 to the authorities enclosing the necessary documents which were required to be submitted

to the NHAH and requested that the same be forwarded. It appears that on 07.02.2020, the application of the petitioner was duly forwarded to the

appropriate authority with recommendation by the Offg. Addl. DGBR (East). No further communication was received by the petitioner in this regard.

5. The NHAH vide letter dated 22.05.2020 informed the BRO authorities with an attached list of applicants informing the date of selection and also

requesting for permitting the officer to attend the interview as per the schedule. It appears that in the said selection, the petitioner along with other

candidates had appeared and the petitioner was selected which was intimated vide letter dated 09.06.2020 to the authorities of the BRO with a

request that NOC be issued in so far as the deputation of the petitioner was concerned. A copy of the said letter was also marked to the petitioner

with a request to forward his willingness for such deputation. Pursuant to the same, the petitioner submitted an application dated 10.06.2020 to the

DGBR requesting for such NOC. A similar letter was also addressed by the petitioner to the Addl. DGBR (East). It appears that vide a forwarding

letter dated 09.06.2020, a copy of an order dated 19.02.2020 was communicated to the petitioner stating that the petitioner was due for HAA

(High Altitude Area) turn over and acute deficiency of officers eligible for HAA posting and therefore, the case of the petitioner was not

recommended. It appears that at no earlier point of time, the letter dated 19.02.2020 was communicated to the petitioner and rather, the petitioner was given the impression that due permission was accorded for his participation in the selection process initiated vide the advertisement dated 21.01.2020.

6. In the meantime, the petitioner had also informed his willingness to join the NHAI on deputation vide letter dated 12.06.2020 and further, a communication dated 15.06.2020 was issued by the Joint Director (Admin & Personnel) to the DGBR for consideration of the case of the petitioner which was duly recommended by the ADGBR (East).

7. Certain more facts have been brought on records by the petitioner in this rejoinder affidavit filed on 28.01.2021. It appears that pursuant to the same advertisement dated 21.01.2020, certain other officers of the BRO had applied and vide a communication dated 23.07.2020, NOC was granted to 15 such officers out of which only 5 were amongst the selected candidates. The matter being brought into the notice, the BRO issued letter dated 29.07.2020 recommending only the 5 nos. of selected officers.

8. The petitioner has also brought on records a similar case of one officer Shri Rajeev Kumar whose recommendation was also rejected on identical grounds of acute shortage of eligible officers for HAA posting. However, vide an order dated 17.06.2020, the said officer was not posted to any HAA but to HQ CE (P) Puspak, Mizoram which is not a HAA.

9. The petitioner has accordingly questioned the legality and validity of the reasons for denying the NOC and thereby deprive him from joining his new post in the NHAI.

10. I have heard Shri D. Borah, learned counsel for the petitioner. I have also heard Shri R.K.D. Choudhury, learned A.S.G.I. representing the BRO and Shri C. Baruah, learned Standing Counsel, NHAI.

11. Shri Borah, the learned counsel for the petitioner has submitted that the action of the respondent authorities, more particularly, the BRO in denying the NOC to the petitioner after allowing him to participate in the selection process is absolutely unreasonable, arbitrary and whimsical. It is submitted that at no earlier point of time till the selection was finalized and the petitioner was adjudged as one of the selected candidates, no issues were raised by the Parent Department. On the contrary, from the very inception of the selection process, starting from forwarding the hardcopy (PDF) of the

ONLINE application along with all necessary documents, the petitioner was under the bona fide impression that due permission was given by the

BRO for participating in the said selection initiated vide advertisement dated 21.01.2020. Drawing the attention of this Court to Clause 11(xi) of the

advertisement, it is submitted that the letter dated 07.02.2020 left no scope to have any doubt regarding the concurrence of the Department in favour

of the petitioner. It is further submitted that the requirement of NOC is a formality to enable the incumbent to join the NHAI and the same was not a

part of the advertisement dated 21.01.2020 and has been mentioned only in the selection letter dated 09.06.2020. The learned counsel has also

submitted that the impugned rejection is of 19.02.2020 i.e. much prior to the application dated 10.06.2020 of the petitioner seeking such NOC pursuant

to the selection letter dated 09.06.2020 and therefore, it is apparent that there is absolutely no application of mind to the relevant factors.

12. Assailing the impugned rejection letter dated 19.02.2020 on merits, the learned counsel has submitted that the reasons assigned are wholly

irrelevant and non- existing and have been cited only as a shield to cover the arbitrary action of the respondents. Shri Borah, the learned counsel for

the petitioner has submitted that as per the service conditions, an incumbent has to serve in an HAA for at least two terms in a service career and the

petitioner has already served in HAA and it cannot be the case that the petitioner is the only officer who is eligible and fit to serve in HAA. Attention

of this Court has also been drawn to the affidavit-in-opposition filed on 28.01.2021 in which the petitioner has annexed a communication dated

23.07.2020 pertaining to the same selection whereby the BRO has given NOC to 15 other officers without even ascertaining that only 5 out of those

15 officers were selected and accordingly the subsequent modification letter dated 29.07.2020 was issued. Further, even out of these five, few did not

fulfill the criteria of serving in HAA. As mentioned above, with regard to another similarly situated officer namely, Shri Rajeev Kumar whose NOC

was denied on identical ground of HAA vide order dated 19.03.2020, he was thereafter, posted at a non- HAA location vide an order dated

17.06.2020. It is therefore, submitted that the so-called reasons are merely a garb to deny the legal entitlement. The petitioner has also referred to the

Deputation Policy of officers as contained in the communication dated 22.02.2018 as per which the petitioner fulfills all the criteria including minimum

10 years of service and stints in HAA.

13. Another leg of argument advanced on behalf of the petitioner is that the impugned rejection order dated 19.02.2020 was never communicated and therefore, the same cannot take effect as a response to the application dated 10.06.2020 of the petitioner seeking no NOC as per the selection order dated 09.06.2020. It is submitted that the requirement of NOC having arisen only after the selection and as a part of the appointment letter dated 09.06.2020, the BRO would not have taken the recourse of the impugned letter dated 19.02.2020 which was apparently much prior in point of time and this fact reflects total non-application of mind. It is accordingly submitted that the impugned rejection of NOC is not sustainable in law and liable to be set aside.

14. Controverting the case projected on behalf of the petitioner, Shri RKD Choudhury, the learned A.S.G.I. appearing for the respondent nos. 1, 2 & 3 submits that the petitioner has not been able to make out any case for interference by this Court in exercise of jurisdiction under Article 226 of the Constitution of India. By referring to the affidavit-in-opposition dated 18.11.2020, the learned A.S.G.I. has drawn the attention of this Court to a communication dated 11.12.2018 on the subject of Deputation. As per the said communication, necessary approval / permission for deputation must be obtained from the Directorate of Border Roads before the concerned officer attends an interview. In the instant case, it is submitted that no such permission was obtained by the petitioner thereby vitiating the entire process of participating in the selection. In this regard, Shri Dev Choudhury, the learned A.S.G.I. has referred to the pleadings in paragraph 15 of the said affidavit-in-opposition. It is further submitted that the rejection order dated 19.02.2020 contains reasons for such rejection which are germane to the issue at hand, namely due for the HAA handover and acute shortage of officers to be posted in HAA and this Court may not go to the extent of sufficiency of the reasons in exercise of its extraordinary jurisdiction. It is lastly submitted that deputation being a subject matter wholly within the domain of the Parent Department, refusal to issue NOC for such deputation cannot be routine matters of judicial review, more so, when the refusal is supported by reasons assigned in the order itself.

15. Shri C. Baruah, learned Standing Counsel, NHAH submits that he is not in a

position to comment on the merits of the dispute regarding the release of the petitioner from his Parent Organization. He however, supports the mode of selection and also asserts the urgent need of officers in the rank of General Manager (Technical). He further states that though in the mean time two more recruitment processes were undertaken due to arising of more vacancies, post in the same rank are still existing and kept vacant pursuant to the interim order of this Court. Shri Baruah, the learned Standing Counsel, NHAH further submits that as a matter of fact, he has filed I.A. No. 2023/2020 in this Writ Petition praying for modification of the order dated 26.06.2020 passed by this Court as the post which was kept vacant pursuant to the said order was urgently required to be filled up.

16. The rival submissions of the parties have been duly considered and the materials before this Court have been carefully examined. This Court has also noted that while issuing notice vide order dated 26.06.2020, this Court had directed in the interim that the post of General Manager (Technical) which was offered to the petitioner vide the order dated 09.06.2020 may not be filled up without leave of the Court.

17. To examine the validity and legality of the impugned rejection order dated 19.02.2020, it would be necessary to take certain relevant factors into consideration. The present process of deputation is not deputation simpliciter but deputation after a recruitment process initiated vide an advertisement dated 21.01.2020. Unlike an ordinary process of deputation wherein a request is made by the Borrowing Department to the Parent Department to depute certain eligible officers after taking their consent, in the present exercise, apart from being eligible, the officers have to undergo a selection process. The petitioner in the instant case had undergone the selection process and was shortlisted for interview vide the offer of appointment dated 09.06.2020. Such selection could not have been undergone by the petitioner without the concurrence of the Parent Department namely, the BRO inasmuch as per the advertisement dated 21.01.2020, the hardcopy in PDF format of the ONLINE application had to be forwarded by the Parent Department along with a number of certificates and only thereafter, a candidate is allowed to take part in the selection. This Court has further noted that requirement of NOC was not a part of the advertisement dated 21.01.2020 but only after the selection as informed vide communication dated

09.06.2020. That being the position, this Court is unable to accept the justification that NOC was rejected vide order dated 19.02.2020 which is much prior to the need of NOC. Even otherwise the impugned order dated 19.02.2020 is not sustainable in law because of more than one count. Firstly, the order was never communicated to the petitioner which is an admitted case and was only forwarded vide the order dated 09.06.2020. The Honâ??ble Supreme Court in a catena of cases have clearly laid down the consequences of non-communication of orders to the affected party and in this regard one may gainfully refer to the decision in Sethi Auto Service Station vs. DDA reported in (2009) 1 SCC 180 wherein the Honâ??ble Supreme Court after referring to the case of Bachhittar Singh vs. State of Punjab reported in AIR 1963 SC 395 made the following observation:-

â??14. It is trite to state that notings in a departmental file do not have the sanction of law to be an effective order. A noting by an officer is an expression of his viewpoint on the subject. It is no more than an opinion by an officer for internal use and consideration of the other officials of the department and for the benefit of the final decision-making authority. Needless to add that internal notings are not meant for outside exposure. Notings in the file culminate into an executable order, affecting the rights of the parties, only when it reaches the final decision-making authority in the department, gets his approval and the final order is communicated to the person concerned.

15. In Bachhittar Singh v. State of Punjab³ AIR 1963 SC 395, a Constitution Bench of this Court had the occasion to consider the effect of an order passed by a Minister on a file, which order was not communicated to the person concerned. Referring to Article 166(1) of the Constitution, the Court held that order of the Minister could not amount to an order by the State Government unless it was expressed in the name of the Rajpramukh, as required by the said article and was then communicated to the party concerned. The Court observed that business of State is a complicated one and has necessarily to be conducted through the agency of a large number of officials and authorities. Before an action is taken by the authority concerned in the name of the Rajpramukh, which formality is a constitutional necessity, nothing done would amount to an order creating rights or casting liabilities to third parties. It is possible, observed the Court,

that after expressing one opinion about a particular matter at a particular stage a Minister or the Council of Ministers may express quite a

different opinion which may be opposed to the earlier opinion. In such cases, which of the two opinions can be regarded as the 'order' of

the State Government? It was held that opinion becomes a decision of the Government only when it is communicated to the person

concerned.

18. Secondly, the impugned letter dated 19.02.2020 appears to be wholly inconsistent with the contemporaneous materials which includes the letter

dated 07.02.2020 whereby the application of the petitioner was forwarded and the fact that the petitioner could participate in the selection only on

fulfillment of clause 11 (xi) of the advertisement dated 21.01.2020 which requires not only forwarding of the application but also enclosing copies of

ACRs / APARs etc. by the authorities.

19. Even if the reasons assigned in the impugned rejection letter dated 19.02.2020 are examined, prima facie, the same appear to be superfluous and

artificial as would be evident from the subsequent conduct of the respondent authorities. As discussed above, vide communication dated 23.07.2020,

the BRO had granted NOC to 15 numbers of officers out of which 10 were not even selected and even out of the 5 selected officers, few of them did

not fulfill the requirement of having stints in HAA. The rejection of another officer on identical grounds followed by transferring the said officer to a

non- HAA location also fortifies the case of the petitioner.

20. Though Shri Dev Choudhury, the learned A.S.G.I. had strenuously argued that permission, as such was not granted to the petitioner to even

participate in the selection, the materials placed before this Court do not support such submission and rather, as observed above, there are

contemporaneous materials to indicate that such permission was all along granted by the authorities. Though a statement has been made in paragraph

15 of the affidavit-inopposition dated 11.12.2020 filed by the BRO, to the effect that 'no sanction / permission was given to the petitioner to attend

the interview as his case was not recommended for deputation', such improvement / explanation in the affidavit in absence of such reasons in the

impugned order cannot be accepted by this Court. In this regard, the law has been well settled by the Hon'ble Supreme Court and in this

connection it would be relevant to cite the decision rendered in the case of M.S. Gill vs. Chief Election Commission of India reported in (1978) 1 SCC

405. The Honâ??ble Supreme Court, after citing the case of Commission of Police vs. Gordhandas Bhanji reported in AIR 1952 SC 16 laid down as

follows:-

â??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 Bhanji²: AIR 1952 SC 16

â??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 actings and conduct of those to whom they are addressed and must

be construed objectively with reference to the language used in the order itself.â??

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

21. Further as already observed above, the requirement of NOC having arisen only after issuance of the offer of appointment dated 09.06.2020, the

BRO authorities could not have fallen back on a prior letter of 19.02.2020 which was not even communicated to the petitioner.

22. In view of the aforesaid discussions, this Court is of the unhesitant opinion that the petitioner has made out a case for interference in exercise of

the extraordinary jurisdiction conferred by Article 226 of the Constitution of India. Accordingly, the impugned order dated 19.02.2020 issued by the

BRO and the entire action of rejection of the permission for deputation is set aside and quashed and the BRO authorities are directed to accord

necessary permission / issue and NOC to the petitioner so as to enable him to appear in the interview as the final stage for his deputation in the NHAI

immediately and not later than 15 days from the date of receipt of certified copy

of this order. It is further directed that after issuance of the said

NOC, the NHAI would take necessary steps for posting the petitioner on deputation in the post of General Manager (Technical) for which he was

duly selected as per the offer of appointment dated 09.06.2020.

23. The Writ Petition is accordingly allowed. The connected I.A.(C) No. 2023 of 2020 also stands disposed of in the above terms.

24. No order as to cost.