
(1983) 02 MP CK 0027

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 1422 of 1982

Major K.D. Gupta

APPELLANT

Vs

Union of India and another

RESPONDENT

Date of Decision : 23-02-1983

Acts Referred:

Army Act, 1950 — Section 27
Constitution of India, 1950 — Article 14, 226, 32

Citation : (1983) JLJ 458 : (1983) MPLJ 527

Hon'ble Judges : M.L. Malik, J;J.S. Verma, J

Bench : Division Bench

Advocate : K.K. Adhikari, N.P. Mittal and Sanjay with K. Setfi, for the Respondent

Final Decision : Allowed

Judgement

J.S. Verma, J.

This petition was filed at the Gwalior Bench, where it was registered as Miscellaneous Petition No. 276 of 1981. Later, it was amended and vires of a statutory provision was challenged. Accordingly, the petition has come for hearing at the main seat of the High Court at Jabalpur and is now registered as Miscellaneous Petition No. 1422 of 1982.

The petitioner K. D. Gupta is an army officer. He held the rank of Lt. Col. but was demoted to the rank of Major in November 1976 and it is this rank which he continues to hold even now. Challenging his demotion as a Major, the petitioner filed a writ petition directly in the Supreme Court under Article 32 of the Constitution, which is still pending. In the present petition filed under Article 226 of the Constitution, the question of the petitioner's demotion to the rank of Major is not involved and the challenge is mainly to the posting and transfer order dated 31-8-1981 (Annexure 3), issued by the Military Secretary's Branch, Army Headquarters, transferring him from Gwalior to the North East Frontier Agency, and certain ancillary actions. In short, this challenge is made by the

petitioner on the ground of excess or abuse of the discretionary power by the authorities, rendering the order as well as the ancillary acts invalid. The facts subsequent to the demotion of the petitioner as Major and relevant for the purpose of the reliefs claimed in this petition are stated hereafter.

After the petitioner's demotion as a Major from the rank of Lt. Col. on medical grounds, he was placed in the low medical category, called S-2 (Permanent) which relates to psychological factor. The relevant extract from part I of Appendix "A" to Army Order 43 of 1978, relating to it, is as under :-

Appendix "A" to A. O. 43/78

Part I Elaboration of factors/grades under SHAPE Classification :- Definitions of the different factors under SHAPE Classification and the various grades under each factor to be awarded to officers depending upon their physical capacity are given below : -

(a) "S" (psychological).- This factor denotes psychological aspect and covers personality, mental faculty, emotional stability and psychiatric diseases.

Numerical grading Functional Capacity Employability limitations

S-1 X X X X X X X X

S-2 Can withstand moderate stresses. Had suffered from psychoneurosis, now fully stabilised likelihood of breakdown under severe mental stress cannot be ruled out. Fit for all duties in a peace or field area anywhere, except at high altitude and combat during active hostilities including counter insurgency. Not fit for independent Command at isolated locations.

S-3 XXX XXX

S-4 XXX XXX

S-5 XXX X X X

The above extract is material to indicate the functional capacity of an Army Officer placed in category S-2 (Permanent) as well as his limitations, which are relevant considerations to be kept in view, while ordering posting of such an officer.

The petitioner's case for promotion was reviewed in February 1979 but he was again found unfit in view of his being in the above low medical category. The petitioner was posted at Pathankot and in August 1979, an order (Annexure R-4) was issued posting him as GLO, GL Section Type "C" at Sagar. Later, the petitioner was transferred in the same capacity from Sagar to Gwalior, where he took over on 1-5-1981. The petitioner was, therefore, posted as 86-ground Liaison Section Type "C" at Gwalior, when the impugned posting order, Annexure 3 (same as Annexure R-5), dated 31-8-1981, was issued. This order is as follows:

ARMY MESSAGE

Rescedence Prededence Info Date Time

Action Routine GR

Priority

FROM INDARMY SECURITY CLASSIFICATION UNCLAS

TO ESTCOM 17 MTN DIV 174 MTH RECT

86 GL. SEC TYPE

INFO CANTCOM ORIGINATOR'S NUMBER

1 CORPS 4 CORPS 33 CORPS 36 INF DIV. 381893/MS 1C

89 GL SEC TYPE 5 MTN DIV "C

206 GL SEC TYPE "C

46 MTN ARTY BEE

Posting offrs 9.0 Maj. Suneal Malik (IC 21464)

ARTY posted GLO (Capt/Maj.) 86 GL Sec. Type *C* vide Mai. K. D. Gupta (IC 10492) 3 GR (.) report on Oct. 26 (.) Maj. K.D. Gupta posted GLO (Capt/Maj.) 89 GL Sec. Type "C vide Maj. C.K. Srinivasan (IC 14624) GRENADIERS (.) mov onx relief (.) Maj C. K. Srinivasan posted GLO (Capt/Maj.) 206 GL Sec. Type "C vice Maj V. N. Bhatia (IC 13367) ARTY for whom orders will follow (.) Comply AO 209/76 (.) ack.

Sd/- xxx

(Rahul Kar) Major DAMS IC

31 Aug. 81 TOR 1600 hrs.

Tele 374623

No. 26283/GL-54C/MS/IC (App) No. 28283/GL-86C/MS IC No. 28283/GL-89C/MS1 IC No. 28283 /GL-206C/MS IC

The order was to be effective on 26-10-1981, when the petitioner was to hand over charge to Maj. Suneal Malik and was to proceed to NEFA. It is mainly this order by which the petitioner is aggrieved, his other grievances in this petition being ancillary matters.

The policy laid down by the Army Head-quarters for representing against the posting order extracted from Army Hq. letter No. 31256/2/MS dated 27-2-1968, is as under:-

POSTING OFFICERS: ADDRESSING OF

X X X X

(a) x x x x

(b) x x x x

(c) Unit may represent direct to Army H. Q. in respect of posting order in accordance with the instructions contained in Army H. Q. letter No. 29580 /MS Coord dated 20 May 58 as clarified under letter No. 34455 /MS Coord dated 11 May 63. This must, however, be done within 7 days of the receipt of posting order.

(d) Where HQ Command wish to make a representation against any posting, this should be done within 15 days of the receipt of the " posting order. In such cases, instructions should be issued by HQ Command to the units concerned to withhold action on the posting order.

* * *

Sd /- * * for Military Secretary.

It appears that the representation is required to be made promptly within the period specified to enable decision being taken before the posting order is to become effective.

The petitioner made such a representation on 5-9-1981 (Annexure 4), mentioning his wife's illness and his inability to prosecute his writ petition pending in the Supreme Court from NEFA, as well as some other family difficulties as reasons to represent against his posting to NEFA. Soon thereafter, the petitioner's wife appears to have fallen seriously ill and hospitalised as a result of heart ailment and other complications, which led to another representation (Annexure 5) dated 23-9-1981 being sent by the petitioner to the Military Secretary, Army Headquarters. The petitioner also annexed to it a medical certificate (Annexure 6) of the specialist in the Military Hospital, Gwalior, certifying the serious illness, including malady of congestive cardiac failure of the petitioner's wife. This appears to have led to an order dated 14-10-1981, directing Maj. Suneal Malik to report at Gwalior on 26-12-1981 instead of 26-10-1981, to take over charge from the petitioner and an order dated 17-11-1981 (Annexure 9) approving the petitioner's attachment under Defence Services Regulations, para 92, from 26-10-1981 to 26-12-1981. It appears that Maj. Suneal Malik did not receive this intimation in time and he arrived at Gwalior on 26-10-1981, according to the earlier order. By virtue of these orders, the effect of earlier posting order requiring the petitioner to hand over charge to Maj. Suneal Malik, was deferred from 26-10-1981 to 26-12-1981, while maintaining the posting order itself. On 25-11-1981, by order (Annexure 11), the petitioner was directed to hand over charge to Maj. Suneal Malik and to report compliance on 27-11-1981. Reminders were also issued the next day. The petitioner replied on 27-11-1981 (vide Annexure R-14) that he had already preferred a statutory complaint u/s 27 of the Army Act on 20-11-1981 and, therefore, no question arose of his handing over charge till the same was decided. He also reiterated his request for an interview with the Chief of Army

Staff, for which he had prayed earlier. On 30-11-1981, the petitioner repeated his request to the Military Secretary's Branch, Army Headquarters. On 1-12-1981, the Divisional HQ directed maintenance of status quo till the decision on the statutory complaint filed by the petitioner.

It was at this stage that the petitioner filed this writ petition at Gwalior on 2-12-1981, praying mainly for quashing of his posting order to NEFA and some ancillary reliefs. The petitioner gave intimation of his writ petition and issuance of notice by the Court on 9-12-1981, to the local Army authorities. The petitioner then proceeded on sanctioned leave on 14-12-1981 till 25-12-1981. Notwithstanding these facts, on 23-12-1981, locks were broken and charge is said to have been taken from the petitioner during his absence on sanctioned leave and given to Maj. Suneal Malik on the same day. The petitioner alleges that even Maj. Suneal Malik was not present in Gwalior on 23-12-1981 and this action purporting to have been taken under DSR 866 was wholly unauthorised. It was in this situation that the petitioner rushed again to this Court for an interim order in his petition. On 5-1-1982, the Court directed that "the order of transfer of the petitioner dated 31 August 1981 is stayed until further orders". This interim order staying operation of the petitioner's posting and transfer order dated 31-8-1981 is continuing. Thereafter the authorities directed that the petitioner would continue on attachment to HQ 18 Infantry Brigade and remain at Gwalior during the pendency of the petition. This is how the petitioner still continues at Gwalior.

The respondents oppose the petition mainly on the ground that there is no basis to interfere with a mere transfer order passed by the competent authority in exercise of its discretion. All relevant factors are alleged to have been considered. It is contended that there is no infirmity to permit interference with such a discretionary order.

The petitioner argued his case in person. The reliefs claimed in the petition were summarised at the hearing as under:-

(1) Quashing of the posting and transfer order dated 31-8-1981 (Annexure 3 = Annexure R-5); the attachment order dated 17-11-1981 (Annexure 9); the order dated 20-1-1982, attaching the petitioner to HQ 18 Infantry Brigade; and taking over charge from the petitioner and handing over the same to Maj. Suneal Malik on 23-12-1981.

(2) A direction to the respondents to ensure that there is no break in the petitioner's service on account of non-compliance of the impugned order dated 31-8-1981.

(3) Reinstatement of the petitioner as GLO at Gwalior ever since his initial posting there, and a direction to continue him in that post till completion of the ordinary tenure of three years.

(4) A direction to post the petitioner at Delhi or Gwalior, taking into account the

relevant factors.

(5) A declaration that the Defence Services Regulation 866 is ultra vires.

(6) Costs of the petition.

We shall first take up the question of vires of D. S. R. 866. The only contention of the petitioner is that if D. S. R. 866 permits violation of a competent Court's order, which he alleged was done in the present case, when acting under that provision charge was forcibly taken from the petitioner on 23-12-1981, then D. S. R. 866 is alleged to be ultra vires. In our opinion, the question of vires of D. S. R. 866 does not at all arise. From the petitioner's argument, it is clear that he alleges contravention of this provision and does not really challenge its vires. There being no substantial ground urged to challenge the vires of D. S. R. 866 and the only contention being its contravention or misuse, no question arises for considering the vires of D. S. R. 866. This point has arisen only because of the same being mentioned without it being really involved. Accordingly, no such point really arises for decision. We may also mention that its needless reference in the petition has resulted in the case being unnecessarily transferred from Gwalior to Jabalpur for its hearing, causing further delay in disposal of the petition.

The next question is about the threat of break in service of the petitioner as a result of non-compliance of the impugned posting and transfer order dated 31-8-1981 by the petitioner. In view of the conclusion reached by us, as stated hereafter, that the transfer and posting order dated 31-8-1981 is invalid on account of which we are quashing the same, the order has to be ignored for all purposes. Accordingly, there can be no question of its non-compliance and any consequent adverse effect on the petitioner. Moreover, operation of that order was also stayed by this Court during pendency of this petition. There can thus be no break in the petitioner's service due to non-compliance of the order quashed by us herein. All the same, we direct the respondents to ensure by making suitable orders that there is no break in the petitioner's service for this reason, since the impugned posting and transfer order dated 31-8-1981 is being quashed by us and this Court had stayed operation of the same during the pendency of this petition, thereby permitting the petitioner's continuance at Gwalior. If necessary, suitable action be taken by the respondents to regularise the entire period of the petitioner's stay at Gwalior.

The petitioner's claim for continuance at Gwalior as GLD for the full tenure of three years from 1-5-1981 when he was posted to Gwalior also does not require much consideration. According to the petitioner, the ordinary tenure is of 2 to 3 years, while the respondents have shown that the ordinary tenure is of 2 to 2½ years. The petitioner having been posted at Gwalior on 1-5-1981, would be soon completing the period of 2 years. That apart fixation of such a tenure is merely directory and does not confer any right on an Army Officer to insist on his continuance at any station for a minimum of that period. The fixation of such a

tenure only means that ordinarily the officer's tenure at the station would be for that period, unless exigencies of the service and administrative convenience require him to be moved earlier. These are matters solely within the discretion of the higher authorities and if they think that the officer concerned should be transferred from any place before the expiry of this ordinary tenure, the same is not justiciable for this reason alone, the requirement being merely directory and not mandatory. The petitioner is, therefore, not entitled to continue at Gwalior for this reason alone. Similar is the position with regard to the petitioner's prayer for posting to Delhi. That once again is a matter for the competent authorities to decide, taking into account all the relevant factors and exercising the discretion impartially and dispassionately. No direction can be issued by the Court requiring the petitioner to be posted at a particular station, which is a matter within the discretion of the authorities.

We come now to the main grievance of the petitioner i. e., his transfer and posting to NEFA. The remaining matters pertaining to his attachment and taking over charge from him as GLO shall be discussed thereafter.

The question of posting and transfer is also a matter primarily within the discretion of the competent authorities and the scope for inter-ference with the same is very limited. It is, however, settled that excess or abuse of discretionary power renders its exercise invalid and open to judicial review. "In the proper exercise of its discretion it must not do what it has been forbidden to do nor trust it do what it has not been authorised to do. It must act under good faith, must have regard to all relevant considerations and must not act arbitrarily or capriciously". (de Smith's Judicial Review of Administrative Action, 4th Edn., P. 285). If the relevant considerations, which have not been taken into account are of such significance as to be decisive, the exercise of discretion ignoring the same would render the action invalid. A conduct that is so unreasonable as to be arbitrary or capricious can amount to an act done in bad faith. Thus an exercise of discretion may be struck down by the Court on the ground of excess or abuse of discretionary power or bad faith, where it is so unreasonable as to be arbitrary or capricious. It is now too well settled that arbitrariness is the antithesis of the right to equality enshrined in Article 14 of the Constitution and, therefore, an arbitrary exercise of discretion is liable to be struck down also as violative of Article 14. It has to be seen whether the impugned posting and transfer order dated 31-8-1981 is vitiated on any of these grounds.

In our opinion, if the impugned order dated 31-8-1981 posting the petitioner to NEFA on his transfer from Gwalior is forbidden by the "employability limitations" applicable to an Army Officer in the low medical category "S-2 (Permanent)" in which the petitioner has been placed, the order would be invalid for this reason alone. For the purpose of this petition we have to proceed on the basis that the petitioner belongs to the low medical category, known as "S-2 (Permanent)", on the basis of which he has been reverted from the rank of Lt. Col. to Major. This is the respondents' own case. For the same reason, the posting order would

also be arbitrary and capricious amounting to an act done in bad faith in the technical sense. We may here mention that the petitioner, during his entire address to us, made it very plain that he did not attribute personal malice to any superior officer and he had no grievance against any individual, but he relied on the plea of malafides in the legal or technical sense, appearing from the arbitrariness of the order passed contrary to the express prohibition.

The functional capacity of an Army Officer placed in the category S-2 (Permanent), mentions the likelihood of breakdown under severe mental stress and, therefore, this is a relevant factor to be taken into account while deciding the posting of such an officer. The serious illness of the petitioner's wife, which fact is supported by the certificate of the Army Doctors, itself was a relevant factor to be taken into account. That apart, the "employability limitations" mentioned for that category indicate that such an officer is not fit to be posted for duties "at high altitude and combat during active hostilities, including counter insurgency". The petitioner claims contravention of this prohibition in posting him to NEFA, on account of the fact that posting at NEFA requires performance of duties at high altitude and combat during active hostilities, including counter insurgency. The only reply of the respondents is that at present there are no active hostilities and of the two battalions deployed in the area, the petitioner would be attached to the one functioning at a lower altitude. The respondents also say that in the event of an outbreak of active hostilities, the petitioner would be deployed elsewhere and moved out. This denial of the respondents does not dispute that the field area in NEFA where the petitioner has been posted by the impugned order, does fall within this prohibited category. All that is suggested by the respondents is that his services would be utilised in that very area at a place where such a danger may not exist. This reply itself implies that the posting to NEFA does contravene the "employability limitations" of an officer in category "S-2 (Permanent)" and an attempt to justify the same is made by asserting that he will be attached to one of the two battalions functioning at a lower altitude and he would be shifted in the event of outbreak of active hostilities.

It is well known that counter insurgency operations are necessarily a continuous process in the NEFA area now for some years requiring deployment of military and para military forces. Recent events in areas even at lower altitudes adjoining NEFA clearly indicate a spread in the insurgency activities requiring intensification of counter insurgency operations. In such a situation, it is difficult to visualise how the petitioner can be posted in the NEFA area anywhere without requiring him to perform duties unconnected with at least counter insurgency operations. It is also not the respondents' case that there is no post anywhere else to enable the petitioner's posting without contravening these restrictions applicable to his low medical category. There being options available which would not contravene these restrictions, the posting of the petitioner to NEFA, while he is continuing in this low medical category, is clearly arbitrary and an act which is expressly forbidden. Accordingly, it must be held that the impugned order dated 31-8-1981 (Annexure 3 = Annexure R-5) posting the petitioner to NEFA is invalid being in

excess or abuse of the discretionary power.

The question for consideration now is of the petitioner's attachment and of taking charge from him on 23-12-1981 in the manner aforesaid. The petitioner claims that both are illegal and he should be restored charge of GLO with retrospective effect. It was after the charge was taken on 23-12-1981, purporting to act under DSR 866, that the petitioner's attachment became necessary to enable his continuance at Gwalior without holding the post of GLO. The respondents have placed reliance on DSR 866 (a) to support the action of taking forcible charge from the petitioner during his absence on leave on 23-12-1981. On the other hand, the petitioner contends that only in the events specified in DSR 866 (d) such an action could be taken and this provision is clearly inapplicable. In our opinion, it is unnecessary to examine which of the two contentions is correct. Admittedly, the petitioner was sanctioned leave from 14-12-1981 to 25-12-1981 and the earlier order directing him to hand over charge to Maj. Suneal Malik on 26-10-1981 was modified requiring him to hand over charge only on 26-12-1981.. Obviously, it was for this reason that the petitioner was continuing as GLO. In such a situation, there was no occasion on 23-12-1981 to take charge forcibly by breaking open the locks during the petitioner's absence when the charge could be legitimately taken on 26-12-1981 on his return from sanctioned leave, in accordance with the modified direction requiring the petitioner to hand over charge on 26-12-1981.

The occasion for the petitioner's attachment ultimately to HQ 18 Infantry Brigade arose only on account of charge being so taken from him on 23-12-1981. The question, however, is whether we should quash the taking over of charge as well as the consequent attachment. In spite of the infirmity indicated by us, we are not inclined to grant this relief claimed by the petitioner since it will lead to several complications which may not be desirable in the interest of administration. We prefer to leave this matter to be suitably dealt with by the Chief of the Army Staff after ascertaining who were the persons responsible for this indecent haste in taking charge forcibly during the petitioner's absence on sanctioned leave. This relief is, therefore, refused to the petitioner on the ground of expediency.

Before parting with the case, we would like to record our great reluctance in interfering with a mere posting and transfer order and that too relating to an officer of the armed forces. Our reluctance is greater because the petitioner during the entire hearing spread over two consecutive days, did not exhibit any deficiency to be normally associated with the low medical category "S-2 (Permanent)" as quoted above. This being the only ground for our decision to quash the posting order, our hesitation in doing so can be easily visualised. However, the doctors certifying the petitioner's low medical category being the best judge in this behalf, subject to decision of the writ petition in the Supreme Court, and the petitioner claiming the relief only on the stand taken by the respondents, there is no escape from the conclusion we have reached.

Consequently, the petition is allowed and the impugned posting and transfer order dated 31-3-1981 (Annexure 3 = Annexure R-5) in so far as it relates to the petitioner is quashed. The competent authorities shall decide afresh the question of the petitioner's posting, taking into account all the relevant factors including the "functional capacity" and "employability limitations" laid down for the medical category applicable to the petitioner. If necessary suitable orders shall be passed by the competent authorities to ensure that there is no break in the petitioner's service on account of his continuing at Gwalior after the posting and transfer order dated 31-8-1981 (Annexure 3 = Annexure R-5) which has been quashed and is to be considered "non est". The petitioner shall be continued at Gwalior in a suitable post to be determined by the competent authorities, till a fresh decision about his posting is taken. The petitioner shall get his costs from the respondents. The outstanding security amount be refunded to the petitioner.