

(2018) 04 CAT CK 0044

In the Central Administrative Tribunal

Case No : Original Application No. 3798 Of 2017

Om Prakash Bairwa

APPELLANT

Vs

Union Of India And Ors

RESPONDENT

Date of Decision : 19-04-2018

Acts Referred:

Administrative Tribunals Act, 1985 — Section 19
Central Civil Services (Leave) Rules, 1972 — Rule 53(4)
Constitution Of India, 1950 — Article 14, 16

Citation : (2018) 04 CAT CK 0044

Hon'ble Judges : Uday Kumar Varma, Member (A)

Bench : Single Bench

Advocate : K.K. Patel, V.K. Singh, Prachi Singh, Manogya Singh, N.D. Kaushik

Final Decision : Disposed Of

Judgement

1. The applicant in the instant Original Application filed under Section 19 of the Administrative Tribunals Act, 1985 seeking the following reliefs:-

(a) Call for the records of the case;

(b) Direct the Respondents No.2 & 3 to sanction the study leave of the applicant as sought vide his representation dated 24.10.2017 (Annexure A/) for two years to pursue M.Sc. Nursing Course for which he has been selected for admission by the respondent no.5 in the Academic Session 2017-18, along with relieving order, experience certificate and character certificate.

(c) Award exemplary costs of the proceedings.

(d) Pass such further order or orders which this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the present case."

2. Brief facts of the case as projected by the applicant are that after completing his B.Sc Nursing in December, 2008, the applicant was appointed as Staff Nurse on 17.09.2009 and was posted in Model Hospital, ESIC, Mumbai. Thereafter, he

was transferred to Delhi vide order dated 30.04.2010 and accordingly he joined ESIC, Model Hospital, Basaidarapur, New Delhi on 01.05.2010 and since then he has been working there as Sr. Staff Nurse in Ortho OT. It is the contention of the applicant that as he wanted to pursue M.Sc Nursing Course for the academic year 2017-18, he submitted a letter dated 21.06.2017 to the respondents for issuing him No Objection Certificate to appear in the entrance exam to be held by Rajasthan University of Health Sciences (RUHS). The applicant contends that the respondents kept silent over his representation and did not bother to respond to the same. In the meantime, the applicant appeared in the entrance exam scheduled to be held on 30.07.2017 and cleared the same. Thereafter, he also participated in the counseling held on 17.10.2017 and was allotted Jaiswal College of Nursing at Kota, Rajasthan. It is the contention of the applicant that he was issued provisional allotment letter with instruction to report to the respondent no.5 on 31.10.2017 along with original documents, namely, relieving order from the employer, character certificate, experience certificate and NOC granting permission to complete the course of two years duration. The applicant further submits that his aim to pursue the aforesaid course was in public interest as by doing that he was keen to develop higher skills and level of knowledge in nursing practice to provide a higher standard of nursing care to the patients as well as better guidance, teaching and supervising his colleagues and subordinates which will enhance the quality of ESI Corporation. The applicant, however, submits that his request dated 21.06.2017 for grant of NOC was rejected vide order dated 30.08.2017. Further, the applicant contends that he submitted a letter dated 24.10.2017 (Annexure A-3) to the respondent no.4 for grant of study leave for two years to pursue M.Sc Nursing Regular Course, NOC for study leave, Experience Certificate and Character Certificate which was, in turn, forwarded to the respondent no.2 vide letter dated 26.10.2017 (Annexure A-4). The applicant submits that when his representation was not decided by the respondents, he was compelled to file the present OA. It is the contention of the applicant that as he was required to appear in the 2nd counseling scheduled to be held on 08.11.2017, he was allowed to appear in the said counseling by the Tribunal, vide order dated 06.11.2017. The applicant also contended that the guidelines dated 15.03.2011 issued by the ESIC Headquarters Office on the subject 'Grant of Study Leave-guidelines regarding' provide as under:-

"(1). The course of study consisting of higher studies or specialized training should have a direct and close connection with the sphere of his/her duty and it should be beneficial for beneficiaries and the organization. It is to be certified by the leave recommending authority.

(2) The applicant should have satisfactory completed period of probation and has rendered not less than five years regular continuous service including the period of probation. The applicant is not due to reach the age of superannuation from the service within three years from the date on which he/she is expected to return to duty after the expiry of leave.

(3) The applicant will execute a Bond as laid down in Rules 53(4) of Central Civil Services (Leave) Rules, 1972.

(4) For undergoing Nursing Courses preference may be given to the Govt. Nursing College for M.Sc Nursing Course. The college should be recognized by the Nursing Council of India/State Nursing Council of India."

3. The applicant also submits that the information furnished to him under the Right to Information Act, 2005 clearly provides that 4% nursing personnel of effective strength, who are working in ESIC hospitals and have completed five years of regular service, may be granted permission for higher studies. Therefore, contends the applicant, that as he fulfills all the criteria for grant of study leave, he should have been granted the same with all the requisite documents required for admission in M.Sc Nursing Course. The applicant has also mentioned in the OA names of several similarly situated employees/staff nurses, namely, Ms. Anita Krishnan; Ms. Meenakashi; Ms. Neha Prakash Desai; Farrah Khan; Dipannita Hazara (Ghosh), who had been granted NOC and study leave to pursue M.Sc. Nursing Course though by the intervention of the various Benches of this Tribunal. In this view of the matter, the applicant submits that he cannot be discriminated by the respondents qua grant of NOC and study leave to pursue M.Sc. Nursing Course and, therefore, vehemently argues that the present OA be allowed. The applicant has relied upon the decision of the Jaipur Bench of this Tribunal in the case of Deepika Patel vs. Union of India & Ors. [OA No.291/549/2017 decided on 02.11.2017]. The applicant has also relied upon certain decisions of the Hon'ble Supreme Court on the issue of discretion for grant of study leave which are -

1. Mahesh Chandra vs. Regional Manager, U.P. Financial Corporation & Ors. [1993 (2) SCC 279];
2. Management of M.S. Nalley Bharat Engineering Co. Ltd. vs. State of Bihar [1990 (2) SCC 48];
3. Tandon Bros. Vs. State of West Bengal & Ors. [2001 (5) SCC 664];
4. Ramanna D. Setty vs. International Air Authority of India [AIR 1979 (SC) 1628];
5. E.P. Royappa vs. State of Tamil Nadu [AIR 1974 (SC) 555];
6. Menaka Gandhi's case [AIR 1978 (SC) 597].

The applicant has also relied upon the following decisions of the Hon'ble Supreme Court on the issue of violation of Articles 14 & 16 of the Constitution of India:-

1. All India Station Masters & Assistant Station Masters Stations Vs. G.M. Railway [AIR 1960 (SC) 384];
2. Jagannath Prasad Sharma vs. The State of U.P. [AIR 1966 (1) SCC 1245];
3. The State of Mysore vs. P. Narsingha Rao [AIR 1968 (SC) 3349]; and

4. Indian Railway SAS Staff Association vs. Union of India [1998 (2) SCC 651].

4. The respondents have filed their counter reply denying the averments made by the applicant in the OA. They have submitted that the applicant, despite rejection of his representation dated 21.06.2017 for granting NOC by the respondents vide order dated 30.08.2010, appeared in the entrance exam without their permission. The contention of the respondents is that the applicant applied for study leave for the first time on 24.10.2017 only, however, the same was forwarded to Headquarters Office without recommendation and as of today the application stands refused. The respondents, however, submit that grant or refusal of study leave is the discretion of the ESIC based on facts and circumstances of each case. They further emphatically submit that as the respondents' organization was facing shortage of staff, they were within their right to refuse study leave to the applicant and, therefore, no fault can be fastened upon the respondents. The respondents further submit that even if an individual wishes to pursue M.Sc. Nursing Course for his/her personal growth, he/she may be allowed to do so by availing EL/EOL due in his/her credit. In so far as the question of granting study leave to only 4% of the medical staff of effective strength is concerned, the respondents aver that as several nurses have already availed study leave and the ESIC hospitals are running short of nurses, the applicant has rightly been declined the study leave. It is the contention of the respondents that it is the applicant's own admission that he wishes to pursue the M.Sc. Nursing Course for prospective post of Nursing Superintendent and not in the interest of beneficiaries or the ESIC and, therefore, on this count alone the applicant is not entitled to grant of study leave.

5. To meet out the contention of the applicant qua grant of study leave to various Nurses mentioned by him in the OA and being discriminated against by refusal of such a leave, the respondents contend that any kind of leave granted by the Corporation is the discretion of the respondents and the applicant cannot claim leave of any kind as a matter of right. To buttress his argument, learned counsel for the respondents argued that as per letter dated 15.10.2017 issued by the Joint Director (MA) to the Director (Med.) Delhi/Noida and all M.Ss/SSMCs/SMCs, ESIC has full right to sanction or refuse leave in the exigency of services and the medical officer has to give an undertaking that he/she will not leave the office without prior approval of the competent authority to pursue PG Course. To rebut the averment of the applicant that the Guidelines dated 15.03.2011 provide for grant of study leave to pursue higher studies, the respondents submit that these guidelines are directive in nature and not mandatory in deciding the grant of study leave. Moreover, to grant or refuse the study leave is the discretion of the respondents, and in this regard they have relied upon the decision of the Hon'ble High Court in Anita Malik vs. A.I.I.M.S. & Anr. [129 (2006) DLT 136] and of this Tribunal in Teekam Singh Yadav s. Govt. of NCT of Delhi.

6. The applicant has filed the rejoinder reiterating the averments made in the OA. The applicant has also rebutted the contention of the respondents about

shortage of staff in their organization by showing a document dated 21.11.2017 annexed by the respondents with their reply as Annexure RA which reveals that out of 87 sanctioned strength of Sr. Staff Nurse, 77 are working which comes to 88.5% and in the case of Staff Nurse, out of 146 sanctioned strength 72 are working and 91 have been engaged on contract basis totaling in all 163 staff nurses are occupying the posts. Therefore, to say that the respondents organization is facing shortage of staff is nothing but a plea taken to defeat the dream of the applicant of pursuing M.Sc. Nursing Course. Moreover, it is the respondents who, despite several representations from the Unions to fill up the sanctioned posts of various discipline, are themselves reluctant to fill the posts. Hence, their stand to deny the study leave on the ground of shortage of staff has no legs to stand.

7. Heard the learned counsel for the parties and perused the material on record.

8. It is seen that along with the counter reply, the respondents have annexed a letter dated 03.11.2017 issued by the Headquarters of ESIC, New Delhi to the respondent no.4, which is reproduced as under:-

"Subject: Application for NOC, Experience and Character Certificate and Study Leave in r/o Sh. Om Prakash Bairwa, Staff Nurse - reg.

Sir,

This is in reference to your office letter no. ESI/BSH/Esstt./2215/E-II(H) dated 26.10.2017 on the subject cited above. In this connection, I am directed to inform as under:-

- i) There is an overall shortage of Nurses in ESIC Health Institutions.
- ii) As such, M.Sc. Nursing is not required for delivery of Medical Care.
- iii) If an individual is willing to pursue M.Sc. Nursing for his/her personal growth, then he/she may be allowed on EL/EOL due in their account for study leave."

9. It is on this basis that the applicant has argued before me that denial of study leave to him to pursue M.Sc. Nursing Course is unlawful and, therefore, this order deserves to be quashed and the respondents be directed to grant him study leave. But this order purportedly refusing study leave to the applicant to pursue M.Sc. Nursing Course is not impugned in the OA. Further, the applicant has also not moved any application for amendment in the OA by enlarging the prayer clause and including the refusal of study leave to him to be considered and adjudicated by the Tribunal. It is also seen that even the order dated 30.08.2017 refusing NOC to appear in the entrance examination is also not sought to be quashed without which relief of granting study leave becomes meaningless. Nevertheless, the fact, as is evident, is that his appearance in the entrance examination is a fait accompli. The applicant had appeared in the entrance test even before approaching the Tribunal and has also attended the first counseling session. He approached the Tribunal only when his second

counseling could not have been allowed without the NOC of the respondents. The Tribunal, based on his prayer, has only given him protection to the extent of provisionally appearing in second counseling session and for provisionally joining the M.Sc. Nursing Course but also made it clear that this interim direction would not confer any legal right upon him with regard to his claim.

10. It is seen from the record that the applicant approached the respondents for the first time for grant of study leave by submitting an application dated 24.10.2017 i.e. after he had appeared in the entrance examination on 30.07.2017 and after attending the first counselling session on 17.10.2017. This counselling he attended notwithstanding the fact that NOC was refused to him almost 1½ months ago on 30.08.2017 by the respondents. He moved an application for study leave on 24.10.2017 and immediately afterwards on 30.10.2017 approached the Tribunal stating that his request for NOC has not been accepted. It is not clear to me as to why did the applicant choose to seek study leave soon after the result in the entrance examination was declared. The logical action on his part was to firstly inform the respondents about his intention to appear in the entrance examination giving all the details including the date fixed for entrance examination and seek NOC. A proper conduct on his part also required that he should have informed the respondents truthfully about his sitting in the entrance examination without NOC as also attending the first counseling session even after being refused the NOC to appear in the entrance examination. The applicant did not follow this fair and proper process for the reasons best known to him. He, rather waited till 24.10.2017 to move an application for study leave. As is clear from letter dated 03.11.2017 (Annexure-RB of the counter reply submitted by the respondents), it does not state that his study leave has been rejected. What it states is that if the applicant is willing to pursue M.Sc. Nursing Course for his personal growth, then he may be allowed EL/ EOL due in his account for study leave. The implication, it may be argued, of this letter amounts to denial of study leave. If we look closely at the application of the applicant dated 21.06.2017, it mentions that he is applying for M.Sc. Nursing Entrance Examination to be held by Rajasthan University of Health Sciences (RUHS). Therefore, he may be granted NOC in this regard. Meaning thereby, he was seeking NOC only to seek permission to apply for the entrance examination. His application dated 24.10.2017 (Annexure A-3) refers to his earlier application informing the respondents that he appeared in entrance examination on 30.07.2017, got selected and participated in first counseling held on 17.10.2017, and he has to report to College on 31.10.2017 else seat will be allotted to other candidates. He, therefore, requested the respondents to grant NOC, Experience Certificate and Character Certificate and forward his study leave application to Headquarters office as per guidelines. In this application, there is no mention of refusal of NOC to the applicant which was communicated to him by letter dated 30.08.2017 by the respondents.

11. It is true that the issue of study leave should be dealt with a great deal of sensitivity. The administration facilitates in a very significant manner the efforts

of a government employee to acquire higher study and to grant him study leave in this regard. However, the same has to be done within the ambit of proper procedure and rules. It cannot be taken for granted, which seems to be the case in the instant OA. The attitude of the applicant, as is reflected in his two applications, suggests that he had taken it for granted that the respondents are duty bound to grant the study leave, which is not the actual situation if we apply the rules to this sphere. It is implicit in all such processes that a proper application within time is made and is sincerely pursued with the authorities. In the instant case, the applicant made an application to the respondents for study leave on 24.10.2017 and within a week thereafter approached the Tribunal. There is nothing on record to suggest that barring these two applications/letters dated 21.06.2017 and 24.10.2017, the applicant, at any stage, made any effort to get the clearance from the respondents. Such a conduct speaks volumes about the attitude of the applicant.

12. There is considerable weightage in the argument of the respondents that the study leave cannot be claimed as a matter of right. They have placed before the two judgments, namely, Anita Malik vs. A.I.I.M.S. & Anr. (supra) and Teekam Singh Yadav s. Govt. of NCT of Delhi (supra). It has been held in both the judgments that granting of study leave is a discretionary provision and cannot be claimed as a matter of right and if the respondents have justifiable reasons to deny the study leave, they are well within their right to deny the same.

13. I have also considered the judgments cited by the applicant. One of such citations is of the Jaipur Bench of this Tribunal in the case of Deepika Patel vs. Union of India & Ors. (supra) wherein the study leave was denied to the applicant after issuance of the NOC by the respondents. Such a situation is materially different from the one obtaining in this OA. In the instant case, the NOC was denied to the applicant and, therefore, the two cases are not comparable.

14. At the time of oral hearing, a great deal of emphasis was placed on the argument that the applicant fulfills the requirements as contained in the guidelines and that shortage of staff is not a ground mentioned in the guidelines for refusal of study leave.

15. First of all, it needs to be understood that the guidelines do not have the force of law or rules and they are merely a set of requirements or practices that ought to be adhered to while considering the study leave. We cannot altogether dismiss the plea of shortage of staff. Imagine a situation where if an organization has, let's say, 10 male Nurses and 8 of them decide to appear in the entrance examination to pursue M.Sc. Nursing Course without permission and all of them get selected, and an argument is made that all of them should be sanctioned study leave irrespective of the fact whether the organization will be able to carry out its basic functions with such a depleted strength I wonder if it could be argued that the organization is duty bound to grant all of them study leave because the guidelines do not mention such a requirement for grant of study

leave. The shortage or otherwise of the staff is to be determined by the organization and one must not get into the question of finding justification and questioning the stand of the organization on this issue. After all, the employee, who is serving an organization, has the first responsibility towards his organization. A provision to pursue higher studies is always a desirable thing but the same cannot happen at the cost of the activities and responsibilities of the organization.

16. Given these facts, while I am inclined to hold the denial of NOC to the applicant as unjustified, I am unable to persuade myself to agree to the proposition of the applicant that refusal of study leave to him is against the law and rules. The study of various judgments placed before me suggest that one common thread running in these orders is the fact that the Tribunals and courts have been reluctant to cause termination of the employees' higher studies either on the ground of refusal of permission to pursue this course or denial of study leave once the applicant has already joined the Course.

17. Keeping this in mind, I am of the considered view that the denial of NOC to the applicant will neither be justified in terms of law nor would it lead to a healthy situation where an employee is denied the opportunity to pursue higher studies - an opportunity which he has acquired on strength of his merit. Therefore, the order dated 30.08.2018 refusing NOC to the applicant to appear in entrance test at a belated stage, in my view, has lost its significance. The prayer of the applicant for grant of study leave is, however, declined for the reasons stated in the preceding paragraphs.

18. In terms of the above discussion, the instant OA stands disposed of. No costs.