

(2019) 01 DEL CK 0101

In the Delhi High Court

Case No : Civil Writ Petition No. 3620 Of 2017

Vijay Pal Singh Yadav

APPELLANT

Vs

Union Of India & Anr

RESPONDENT

Date of Decision : 15-01-2019

Acts Referred:

Citation : (2019) 01 DEL CK 0101

Hon'ble Judges : S.Muralidhar, J;Sanjeev Narula, J

Bench : Division Bench

Advocate : Naveen R. Nath, Dinesh Yadav, Ajay Digpaul, Madhuri Dhingra

Final Decision : Dismissed

Judgement

Dr. S. Muralidhar, J

1. The Petitioner seeks a writ of certiorari for quashing the impugned communication dated 7th October 2016 of the Commandant (Personnel), Border Security Force (BSF) rejecting the Petitioner's representation dated 22nd September 2016 whereby inter alia he requested that his period of posting at Silchar be treated as a field posting for the purposes of completion of the Mandatory Field Service (MFS) requirement for promotion to the post of Commandant from Second-in-Command (2IC).

2. The background facts are that the Petitioner was commissioned in the Indian Army as a Short Service Commissioned Officer on 24th August 1985.

The Petitioner sought release and on 19th April 1982 he was released from the Army. On 16th July, 1993 he joined the BSF as an Assistant Commandant (AC) and was promoted as Deputy Commandant (DC) on 4th August 2000. On 13th October, 2009 he was promoted to the Rank of Second-in-Command (2IC).

3. The Petitioner was selected for deputation as Joint Director (Security) with the Rajya Sabha Secretariat with effect from 1st February 2011, initially for a period of three years. On 31st July 2012 the Petitioner submitted an application for

treating the period served in the Rajya Sabha Secretariat as "operational duty". The Petitioner's deputation with Rajya Sabha was subsequently extended by the Competent Authority till 1st February 2016 when he was repatriated to the BSF and posted to Mahatpur (West Bengal).

4. Pursuant to a cadre review, additional posts in the Rank of Commandant in the BSF were created. A Departmental Promotion Committee (DPC) was organized for considering the promotions. The cut-off date for eligibility was kept as 1st April 2016. On account of his deputation to the Rajya Sabha, the Petitioner was short of the MFS by one month and five days. He completed his MFS in August 2016. As such he was not considered for promotion to the post of Commandant during the DPCs held.

5. The Petitioner submitted representations on 22nd September and 5th October 2016 requesting the Respondents to consider him for promotion to the rank of Commandant. These were rejected by the impugned communication dated 7th October 2016. Further representations also met with rejection and thereafter the Petitioner filed the present petition.

6. In response to the notice issued in the petition, the Respondents have filed a counter affidavit inter alia taking the stand that prior to proceeding on deputation with the Rajya Sabha, the Petitioner had given an undertaking in which it was clearly mentioned that he had to undergo mandatory course and had to complete duty battalion tenure failing which he would not be able to claim promotional benefits. Copy of the said undertaking has been enclosed with the counter affidavit.

7. Mr. Naveen Nath, learned counsel appearing on behalf of the Petitioner, first pointed out that the Petitioner on 7th May 2009 made a representation against an order posting him to the 131st Battalion located at Ramkhet, Punjab. While requesting cancellation of that order on account of his domestic compulsions, he requested that he may be "kindly be posted to Panthachowk (J & K), Guwahati/Shillong in any, or to FHQ, Delhi." It is submitted that pursuant to this request, the Respondents issued an order on 21st May 2009 posting the Petitioner from the 58th Battalion to SHQ Silchar in Assam.

8. The Petitioner was further posted from Silchar to the 56th Battalion and whilst there, he was granted the permission to go on deputation to the Rajya Sabha. On 22nd April 2010, while at Silchar SHQ, he gave a "willingness certificate". Para 5 of the said certificate reads as under:

"5. I am also aware that for my next promotion, I have to undergo mandatory courses and complete duty Bn tenure as per RRs for which, if I don't complete, I shall not claim any such promotional benefit and shall myself be responsible."

9. According to Mr. Nath, all the transfers, including those upon the representations of the Petitioner were in "public interest". He pointed out that even if the posting at Silchar SHQ was to be considered as a "static posting", the

duties and responsibilities of the Petitioner were such that it was in effect a field posting. He submitted that once the transfer was in "public interest", it was expected that the said posting, although technically a static posting, would for the purposes of Petitioner's promotional prospects be treated as "field posting". In support of this proposition, he relied upon the decision of this Court in *Ashok Kumar v. Union of India* (decision dated 27th October 2009 in W.P.(C) 21900/2005) which was subsequently followed by another Division Bench of this Court in a decision dated 21st August 2015 in W.P.(C) 3778/2015 (*Commandant Rakesh Sethi v. Union of India*).

10. Mr. Nath also referred to the relaxation policy issued by the Ministry of Home Affairs (MHA), OU/2 Division (Pers.II) dated 2nd June 2012 and submitted that there was a discretion vested in the Respondents to grant relaxation of the fulfillment of the MFS by the Petitioner for the purposes of being promoted from 2IC to Commandant.

11. Mr. Ajay Diggpaul, learned Standing Counsel for the Respondents on the other hand referred to the declaration given by the Petitioner at the time of his request to go on deputation to the Rajya Sabha being considered, that he was aware that for his next promotion he would have to undergo the MFS and complete "duty battalion tenure as per RRs" and that if he did not complete the same, he would not claim any promotional benefits and would be solely responsible for the same. He also sought to distinguish the decision of this Court in *Ashok Kumar v. Union of India* (supra) as well as *Commandant Rakesh Sethi v. Union of India* (supra).

12. The above submissions have been considered. This Court finds that in his letter dated 7th May 2009, while seeking cancellation of his posting to 131st Battalion, BSF Ramkhet, Punjab the Petitioner requested that he may be posted to three alternative places. One of them i.e. the FHQ, Delhi was only a static posting. At both the other places i.e. Panthachowk, J & K and Guwahati/Shillong, there were both field battalions and static postings. The Petitioner was not explicit that he should be posted only to a field battalion in these two places and not at a static posting. It appears that in view of the wording of the letter, the Respondents treated it as a request by the Petitioner to be posted to a static posting. This resulted in the movement order dated 21st May 2009 whereby he was posted to SHQ, Silchar which admittedly is a static posting.

13. The Court is not inclined to accept the submission on behalf of the Petitioner that in view of the nature of the responsibilities of the Petitioner at SHQ, Silchar, his period of service there should be treated as a field posting. The Court also finds that in order to process his request for proceeding on deputation to the Rajya Sabha, the Petitioner was required to give a "willingness certificate", para 5 of which has been already extracted hereinbefore. Therefore, even before proceeding on deputation to the Rajya Sabha with effect from 1st February 2011, the Petitioner knew as early as 22nd April 2010 that without completing the MFS, he would have to forego his promotions and that he himself would be responsible for that consequence. Therefore, the Petitioner cannot claim that he was

unaware of the consequences of proceeding from the static posting on deputation to the Rajya Sabha.

14. These facts distinguish the Petitioner's case from the two cases cited i.e. Ashok Kumar v. Union of India (supra) and Commandant Rakesh Sethi v. Union of India (supra). In Ashok Kumar v. Union of India (supra), no doubt this Court was willing to consider the transfer in public interest to static postings or "non duty posts", where the incumbent had no control over such postings, as part of MFS for the purposes of promotion. However, in the present case, the Petitioner's posting to Silchar SHQ was subsequent to a representation made by him in which he was not categorical that he must be sent to a field posting. He accepted the static posting and even went to the extent of giving the aforementioned "willingness certificate", for the purposes of proceeding on deputation to the Rajya Sabha, that he would be responsible for the consequence of not completing the MFS under the RRs for the purposes of promotion.

15. As far as the decision in Commandant Rakesh Sethi v. Union of India (supra) is concerned, the facts as discussed in the judgment reveal that the Petitioner in that case was not made aware at any point in time that "the period of deputation spend by him would be treated as his unwillingness for being given field posting". The facts here are completely different as already noticed hereinbefore.

16. Turning now to the discretion spelt out under the policy document of the MHA, para 5 (ii & iii) which are relevant for that purpose read as under:

"(ii) As regards the CAPFs & ARs personnel who have not completed the MFS owing to their own request for being posted in static postings/offices where service rendered by them is not counted towards MFS or wherever such personnel have expressed, their unwillingness for posting to field units/ops areas and get posted/attached, on their own volition, to static offices, their cases will not be considered for granting relaxation in MFS.

(iii) While posting such CAPFs & ARs personnel to the static postings, the CAPF concerned may inform the Force personnel concerned regarding the consequences of such postings with regard to their not meeting the eligibility criteria for next promotion as per RRs. While posting personnel to any of such static postings, It , may be categorically intimated to the personnel that his tenure will not be counted towards Mandatory Field Service and no representation will be ,entertained for claiming promotion to next rank in relaxation to the prescribed MFS. Therefore, such personnel shall not be considered for promotion by the DPCs till they complete the requisite Mandatory Field Service as laid down in the Recruitment Rules. In case, of such personnel, who have been left out by DPC, due to his being declared UNFIT by the DPC for not completing MFS, his seniority will depreciate and he would be considered by the subsequent DCPs for next vacancy year."

17. In the considered view of the Court, the Petitioner's prayer gets knocked down either on para 5 (ii) or (iii) above. On his volition, the Petitioner opted for a

static posting and not a field posting. He knew this would disentitle him for being considered for the purposes of promotion. Therefore, in terms of para 5 (ii) no discretion to relax the period of MFS could be exercised in the Petitioner's favour. Even in terms of para 5 (iii) above, this was a case where it was categorically intimated to the Petitioner that his tenure will not be counted towards MFS. In such cases, the question of exercising discretion to relax the MFS criteria would not arise.

18. From any angle, therefore, the Court is unable to find any error in the impugned decision dated 7th October 2016 of the Respondents rejecting the Petitioner's representation dated 22nd September 2016.

19. The writ petition is accordingly dismissed.