

Sanjay Kumar and anr. Vs. Union of India (Uoi) and ors.

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Court : Guwahati

Decided On : Dec-05-2006

Judge : Amitava Roy, J.

Appellant : Sanjay Kumar and anr.

Respondent : Union of India (Uoi) and ors.

Advocate for Pet/Ap. : Dr. B. Ahmed

Disposition : Appeal allowed

Judgement :

Amitava Roy, J.

1. The common grievance expressed in both the petitions is against the respondents' refusal to release the petitioners to take up employment as a Lower Division Clerk with the Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as the Tribunal) following their selection therefor.

2. I have heard Dr. B. Ahmed, learned Counsel for the petitioners and Mr. N. Borah, learned Central Govt. Standing Counsel, appearing for the respondent Nos. 1 to 5.

3. As the facts are identical and the legal issues raised the same, the petitions were heard analogously and are being disposed of by this judgment and order.

4. The petitioners while serving as Lower Division Clerks with the Border Roads Organization (hereinafter referred to as the BRO/Organisation) and posted at 92 RCC of the GREF under 44 BRTF - 99 APO, came across an advertisement published by the Tribunal inviting applications, amongst others, for appointment to the post of Lower Division Clerk on deputation/absorption basis. This was in the month of January 2006. The petitioners being interested decided to respond thereto and accordingly on 3.2.2006 the petitioner in W.P.(C) No. 2453/2006 and on 13.2.2006 the petitioner in WP(C) No. 2454/2006 submitted applications before their immediate superior officer i.e. the Commander, HQ 44 BRTF (GREF), C/o 99 APO, with filled up forms addressed to the Assistant Registrar (Administration) of the Tribunal furnishing their biodata in support of their candidature. The petitioners requested the aforementioned authority to forward, their applications to the Tribunal. Their applications along with those of two others were processed thereafter at different levels and following a scrutiny thereof, were forwarded to the Tribunal by letter No. 10910/Deput/I 5 I/ELG dated 17.3.2006. In the meantime, on 16.3.2006 the concerned authority also issued 'no objection' certificates in favour of the petitioners tacitly approving their endeavour to take up the new assignment with the Tribunal in the event of their selection. The petitioners were eventually selected and the Registrar of the Tribunal by his communication dated 12.4.2006 intimated the said decision. The petitioners were offered the post of Lower Division Clerks on absorption basis permitting them to retain their lien in the parent department for a period of two years where after they were either to revert to the parent department or resign there from. The petitioners were thereby asked to report for duty on or before 15.5.2006. By a communication of the same date the Assistant Registrar of the Tribunal also apprised the Senior Administrative Officer, SO 2, (Pers.) Headquarters Chief Engineer, Project Vartak, C/o 99 APO of the above facts. Thereby the authority concerned was requested to release the petitioners so as to enable them to join their duties in the Tribunal by the appointed date i.e. 15.5.2006. It was thereafter that by a W.T. Message dated 28.4.2006 that the above authority sought a clarification from the BRO Headquarters as to whether the petitioners could be relieved. The W.T. Message also referred to a letter No. 12318/DEPUT/POL/DGBR/305/EG2 dated 17.3.2006 in the context of which the clarification was sought for.

5. While the respondent-authorities lingered on the issue it came to light that by the aforementioned communication dated 17.3.2006 a ban had been imposed on the forwarding of applications for outside employment, permanent absorption, inter departmental transfer/deputation etc. of all categories following restrictions imposed by the Government on recruitment vis-a-vis annual wastage resulting in reduction on roll strength of the Organization. Thereby the Commander, Task Force/Officer-in-charge of the Units, were asked not to forward applications for the aforementioned purposes in respect of any trade/ category. Situated thus, the petitioners approached this Court for redress.

6. In their affidavit, the respondents pleaded that though the petitioners applications for outside employment had been forwarded by Project vartak located in Assam on 17.3.2006, a ban, in the meantime, had already been imposed on the very same date. However, in view of postal delay the decision imposing such ban had remained uncommunicated to the Project Vartak at the relevant time. According to the respondents, due to acute shortage of staff in the Organization the petitioners could not be relieved and that to allay any confusion with regard to the applications already forwarded the department issued the communication/letter bearing No. 12318/Deput. Pol/DGBR/313/EG2 dated 9.5.2006 extending the ban thereto as well. In other words, by the said communication the ban on release of the applicants for outside employment was made applicable also to cases where the applications had, in the meantime, been forwarded by the Organization. The respondents reiterated that such a ban has been uniformly applied as the Organization suffered from severe staff deficiency in view of the restrictions imposed by the Central Government on fresh recruitments.

7. The petitioners in their affidavit-in-reply have, amongst others, brought on record the fact that similarly situated applicants else where had been released in spite of the pleaded assertion of existing insufficient staff strength.

8. Dr. Ahmed has urged that in terms of Regulations 26 and 27 of the Border Roads Regulations (hereinafter referred to as the Regulations) as well as the relevant provisions amongst others, of the Civil Service Regulations and the service conditions contained in various office memoranda meant for the Central

Govt. employees made applicable to the members of the General Reserve Engineer Force (hereinafter referred to as the GREF) of the BRO, the petitioners, in the facts and circumstances of the case, have an enforceable right to be released to join the services of the Tribunal. According to the learned Counsel, as at the relevant time when the petitioners application for employment under the Tribunal had been forwarded the ban hitherto existing had been lifted by the communication bearing No. 12318/Deput. Pol/DGBR/289/EG 2 dated 12.4.2004, the respondent authorities having processed the same without any demur favouring their pursuit therefor, they are estopped in law from taking a contrary view subsequent thereto. As the petitioners' applications seeking outside employment had been forwarded following due scrutiny thereof before the decision to reimpose the ban was effected, the communications dated 17.3.2006 and 9.5.2006 vis-a-vis them are of no consequence, he urged. The decision to reimpose the ban envisaged in the above two letters can by no means be given a retrospective effect and therefore, the refusal of the respondent authorities to release the petitioners on the basis thereof is wholly arbitrary, unreasonable and unjust, he contended. As the impugned communications on the issue of release of the departmental personnel for outside employment demonstrate a policy decision, the same, in any view of the matter, cannot be accorded a retrospective effect so as to prejudicially affect the petitioners vested right to join the services of the Tribunal following their selection. In this regard, Dr. Ahmed has drawn the attention of the Court to Chapter 45 of the Swamy's Complete Manual on Establishment and Administration (hereinafter referred to as the Manual) with particular reference to Clauses 1, 2 and 11 thereof. He has further urged that having regard to the posts held by the petitioners the plea of public interest or the exigency of the administration is frivolous, they being not required to man any post of strategic importance. Inviting the attention of the Court to Chapter 60 of the aforementioned Manual Dr. Ahmed has further argued that as Govt. servants executing a bond to serve an executive department as well is permitted to take up employment elsewhere, the rigour applied to the petitioners considering the post which they hold without any such bond is not only unwarranted but lacks bona fide as well. According to Dr. Ahmed, the petitioners have been meted out a discriminatory treatment on irrelevant considerations inasmuch as persons equally

situated had in the meantime been released by the same Organization to join other services. Referring to Article 19 of the Constitution of India the learned Counsel maintained that the impugned action is liable to be adjudged unconstitutional. In support of his submissions the learned Counsel has placed reliance on the decisions of the Apex Court in R.R. Venna and Ors. v. Union of India and Ors. : (1980)11LLJ152SC , C.C. Padmanabhan and Ors. v. Director of Public Instructions and Ors. : [1981]1SCR128 , Sukhdarshan Singh etc. v. State of Rajasthan : AIR 1990 SC404 , State of Gujrat and Anr. v. Patel Naranbhai Nathubai and Ors. : AIR 1990 SC1232 . Nirmal Chandra Bhattacharjee and Ors. v. Union of India and Ors. 1991 Supp (2) SCC 363 and R. Tamilmani v. Union of India and Anr. : (1992)11LLJ615SC .

The decisions of this Court in Shri Johnson Chacke v. Union of India and Ors. W.P.(C) No. 123(K) 2006, D/D 5.9.2006 and in Shri P. Raja Pandian v. Union of India and Ors. W.P.(C) No. 57 of 2006, 6/D 17.11.2006 have also been pressed into service.

9. Mr. Borah, learned Central Govt. Standing Counsel, in reply, has contended that the petitioners have no unassailable right to claim their release from the BRO on the basis of their selection in a different organization simply because their applications had been forwarded at an earlier point of time. According to him, on the date on which the applications were forwarded the decision to reimpose the ban therefor had already been taken. However, in view of a communication gap the same remained unconveyed to the concerned respondent authorities. In that view of the matter the petitioners, according to the learned Counsel, have no vested right to claim release from the rolls of the Organisation. He stood by the pleaded stand of the respondents that in view of the depleted staff strength of the Organisation, the release of the petitioners would not be in its interest. Mr. Borah, however, admitted that the provisions with regard to forwarding of applications for outside employment as applicable to the employees of the Central Government offices have been adopted by the BRO and therefore, the petitioners were squarely covered thereby.

10. Though Mr. Borah had, in course of the arguments, produced skeletal records containing the documents referred to above, the same did not contain the note-sheets in order to ascertain the process leading to the decision of reimposition of the ban on outside employment as communicated by the letters dated 17.3.2006 and 9.5.2006.

11. The rival submissions have been closely evaluated. That the petitioners' applications for employment under the Tribunal had been forwarded to it after due scrutiny at the different administrative levels of BRO on 17.3.2006 is not in dispute. The concerned authorities had also issued no objection certificates in favour of the petitioners on 16.3.2006 for the said purpose. The communication bearing No. 12318/deputy. Pol/DGBR/305/EG2 dated 17.3.2006 came to light only on a query made by the Senior Administrative Officer, SO 2 (Pers), Headquarters Chief Engineer, Project Vartak, following the petitioners selection by the Tribunal and the intimation thereof to the BRO. The materials on record lack to indicate with certainty that the decision to reimpose the ban as conveyed by the aforementioned letter dated 17.3.2006 had been taken before the petitioners' applications had been forwarded to the Tribunal. This is more so in absence of the relevant official records to the said effect. The background of facts pertaining to the processing and forwarding of the petitioners' applications and the issuance of the no objection certificates in this context is of considerable significance.

12. Admittedly between 12.4.2004 and 17.3.2006 no ban on forwarding of applications for outside employment and permanent absorption was in force. That the petitioners have been selected by the Tribunal is also an admitted fact. The facts on record do not disclose that the decision to reimpose the ban as contained in the letter dated 17.3.2006 had been communicated to the petitioners before the intimation of their selection had reached the respondent-authorities. Nor the petitioners had been informed that in the event of their selection as well they would not be spared in the interest of the administration as the roll strength did not permit the same.

13. Chapter 45 of the Manual deals with forwarding of applications for other employment vis-a-vis Central Govt. employees. The guidelines therefor are

contained in various office memoranda referred to therein. When the same have been adopted by the BRO, logically the same are invocable for the personnel of the GREF including the petitioners. While Clause 1 thereof underlines that no hard and fast rule could be laid down in the matter and that the final decision as to whether a particular application should be forwarded has to rest with the authority through whom the same has to be rewarded, a balance of the interest of the State and the individual concerned has to be maintained. Under Clause 2, the administrative authorities are required to ordinarily forward such applications submitted either in response to an advertisement issued by the Union Public Service Commission (hereinafter referred to as the UPSC) or by temporary Govt. servants for permanent post in response to requests officially received from other Departments, unless public interest otherwise demand. The competent authority is required to weigh the interest of the State against the necessity of avoiding hardship to the individual concerned. The related office memorandum referred to in the said clause emphasizes that forwarding of applications should be the rule, rather an exception. The course to be adopted once an application is forwarded and the individual is selected is enumerated in Clause 11. In the office Memorandum No. 60/43/64-Estt. (A), dated 24th August 1965 referred to in the said clause the obligation of the Government to release the officer concerned in the event of his selection by the Commission (UPSC) has been recorded. The administrative authority is required thereby to intimate the Commission as well as the officer concerned the inability to spare him only in exceptional circumstances inhibiting such release.

14. A conjoint reading of the above Clauses of the guidelines demonstrate that barring the demand of public interest to the contrary an application filed by an individual in Central Government services in response to advertisement(s) issued by the UPSC for appointment elsewhere ought to be forwarded as a matter of rule. Further, in the event of selection of the person concerned he ought to be released as well unless exceptional circumstances do not justify the same. These guidelines having been adopted by the BRO, in my view, would be equally applicable to the GREF personnel including the petitioners. The reference of the UPSC in the guidelines is understandable as the same have been comprehended for the Central Govt. employees.

15. The essence of the above guidelines is that though while dealing with the application of any employee seeking leave to apply for post(s) and appointment elsewhere, the demand of public interest has to borne in mind, the administrative authorities are required to be alive to the interest of the State as well as the possible hardship that would visit him in case the prayer is refused. Once such an application is forwarded to the outside agency involved and the employee concerned is selected, he ought to be released unless very exceptional circumstances exist to the contrary. The guidelines in such an eventuality make it incumbent on the executive authorities to make their decision known both to the employee as well as the establishment where under he seeks appointment. The reference of Union Public Service Commission only in Clause 11, in my considered opinion, having regard to the letter and spirit of the guiding norms, is inconsequential and per se does not exclude its applicability to a selection conducted by any agency other than the Commission. The guidelines, as above, therefore, are applicable to the parties in the instant proceedings. It, therefore, logically follows, having regard to the sequence of events, that the petitioners sans exceptional circumstances are, in terms thereof, entitled to be released to join the Tribunal.

16. The fundamental right of a citizen to profess any profession or to carry on any occupation, trade or business envisaged in Article 19 of the Constitution of India is subject to reasonable restrictions as may be imposed by the State by making any law in furtherance of public interest. The attention of this Court has not been drawn to any other provision with more rigorous constraints on the process. The guidelines alluded hereinabove, therefore, essentially govern the exercise. Clauses 2 and 11 thereof recite the restrictions on the entertain ability of the applications submitted for seeking employment elsewhere. No other consideration, therefore, can be imported beyond the same. The restrictions, to say the least, as comprehended in the guidelines referred to hereinabove are reasonable and logical.

17. Adverting to the facts, the petitioners' applications dated 3.2.2006 [WP (c) No. 2453/2006] and 13.2.2006 [WP(C) No. 2454/2006] were entertained by the concerned respondent authorities and were intensely scrutinized at different levels

before the same were finally dispatched to the Tribunal on 17.3.2006. This process, admittedly, had been undertaken at a point of time when there was no ban on forwarding of such applications. The pleaded facts narrated in the writ petitions and the documents supporting the same demonstrate that, at all relevant times, the concerned respondent authorities were favourably disposed in transmitting the applications as sought for. 'No objection' certificates were also issued on 16.3.2006 to the said effect. The letter dated 17.3.2006 [Annexure-8 to the writ petition] while referring to the earlier communication dated 2.12.2003 whereby a ban had been imposed on the issue, refers to reduction of roll strength in the Organisation consequent upon restrictions imposed by the Government on recruitment as well as annual wastage. Thereby the decision to impose the ban on forwarding of applications for outside employment on all categories was conveyed. Though the Chief Engineers were requested to advise the Commander, Task Force/Officer-in-charge of the Units not to forward such applications, the communication do not bear a whisper that the ban had been decided to be made effective qua the applications finally approved and/or transmitted to the outside agencies. The letter dated 9.5.2006 [Annexure-III to the affidavit] extended the ban even if the applications/no objection certificates, in the meantime, had been forwarded and the employees concerned had been selected. In substance, therefore, the decision to impose the ban as conveyed by the letter dated 17.3.2006 was sought to be given a retrospective effect thereby. The letter dated 9.5.2006 is an apparent improvement on the one dated 17.3.2006.

18. As noticed hereinabove, the manner in which the respondent authorities dealt with the petitioners' applications at all times indicated that they (petitioners) were sparable from the Organisation. While the ground cited to refuse their applications as evident from the letters dated 17.3.2006 and 9.5.2006 cannot be dismissed as irrelevant, the resultant inability of the respondent authorities to release the petitioners because of the administrative exigency could not have surfaced over night. Admittedly, the ban had been withdrawn on 12.4.2004 vis-a-vis applications for outside employment. This decision had been taken consciously being satisfied that the staff on the rolls of the BRO could be spared for outside employment. The need to prohibit their release on the ground of diminishing roll strength, therefore, could not have been experienced on the eve of their applications being forwarded

to the Tribunal. While it is true that the administrative authorities would be within their power to refuse any application from being forwarded for outside employment on an estimate of the relevant considerations bearing on public interest or the exigencies of service, their approach nevertheless, has to be fair, transparent, reasonable and just. While the tenability of the ground mentioned in the above communications dated 17.3.2006 and 9.5.2006 cannot be undermined, in my view, in the background of facts and circumstances as well as the manner in which the respondent authorities had processed the petitioners' applications, the same could not have been enforced to deny their release, more particularly after their selection. The impugned action of the respondents in the given fact situation if sustained, in my opinion, would amount to approving the exercise of a superior executive power in disregard of the guidelines governing the process and the bona fide expectation generated by their favourable disposition to the petitioners' applications. The materials on record do not justify the impugned action of the respondents vis-a-vis the petitioners whose applications had, as noticed hereinabove, been forwarded on 17.3.2006 following which they were selected by the Tribunal. Incidentally, the letter dated 9.5.2006 is after the intimation by the Tribunal of the petitioner's selection for its services. On the basis of the guidelines referred to hereinabove, the petitioners had acquired a semblance of right to be released of which they cannot be permissibly divested by casting the ban on them with retrospective effect. In my view the impugned action is not in consonance with the constitutional imperatives of fair play in State action.

19. Though a discriminatory treatment has been alleged on behalf of the petitioners contending that similarly situated persons have been favoured with orders of release while they have been denied the same, in view of the above determination and want of cogent and convincing facts on record on this Court I refrain from dilating thereon. It is inessential to elaborate on the cited authorities as well.

20. The petitions, therefore, succeed. As a corollary the respondents are hereby directed to release the petitioners from their establishment forthwith so as to enable them to join the Tribunal. It is made clear that the findings and conclusions recorded in the judgment are fact oriented and are limited to the petitioners before

this Court.

21. The writ petitions are allowed in the above terms. No costs.

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