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* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment reserved on : 30th March, 2009
Judgment delivered on: 20th April, 2009

+ WP(C) No.1098/2007

Udai Pal Singh

..... Petitioner

Through: Mr. K.C. Mittal with
Mr. Surjeet Kr. Singh, Advocates

Versus

UOI & Ors.

..... Respondents

Through: Mr. A.K. Bhardwaj, Advocate for
UOI.

AND

+ WP(C) No.1476/2007

Virender Kumar Sharma

..... Petitioner

Through: Mr. K.C. Mittal with
Mr. Surjeet Kr. Singh, Advocates

Versus

UOI & Ors.

..... Respondents

Through: Mr. Dalip Mehra with Mr. Rajiv
Ranjan Mishra, Advocate for UOI.

CORAM:

HON'BLE MR. JUSTICE A.K.SIKRI

HON'BLE MR. JUSTICE SURESH KAIT

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

Yes

SURESH KAIT, J.

As the issue raised in these two writ petitions is common in nature, the same will be dealt with by the present common order.

2 Vide order dated 19.02.2007 status quo was directed to be maintained in the WP(C) No.1098/2007. Thereafter, vide order dated 04.08.2008, this court decided to take up the WP(C) No.1476/2007 along with the present writ petition and also decided by the same order that this case (Udai Pal Singh's case) will be the lead case. Therefore, we will mention most of the facts of this case only in this common judgment.

The facts of the case are as under:-

3 The petitioners herein joined Border Security Force (BSF, for short) as Constables on 10.04.1987 vide orders dated 06.07.1999 and 25.08.1999. The petitioners, herein, in this writ petition, was placed among other officers at the disposal of the Intelligence Bureau (IB for short) on deputation. The petitioners joined IB on 24.09.1999. Vide order dated 08.07.2005. IB, repatriated the petitioner to BSF w.e.f. 31.07.2005. By challenging the aforesaid repatriation order, the petitioner filed OA No.1565/2005. During the pendency of the aforesaid OA, the repatriation order dated 31.07.2005 issued by the IB was stayed by the Tribunal vide order dated 22.07.2005. While

disposing the aforesaid OA, the Tribunal gave following direction to the respondents:

"11. In the result, for the foregoing reasons, we dispose of this OA with a direction that the claim of the applicant for permanent absorption be re-examined and also to be taken up and processed in accordance with rules and suitability of the applicant and thereafter a final decision shall be taken on consultation with the parent department within a period of three months from the date of receipt of copy of this order. It goes without saying that status quo of the applicant as of date shall be maintained till then. No costs."

4 In compliance of the aforesaid order of the Tribunal, the respondent No.2 herein passed order dated 27.10.2006, which is as under:-

"ORDER

In compliance with CAT, PB, New Delhi Order dated 28.07.2006 delivered on OA No.1565/2005 Shri Udai Pal Singh, SA/G, PIS No.109304, a deputationist Constable (No.434031), BSF is repatriated to his parent department and stands relieved of his duties from the Intelligence Bureau Hqrs. New Delhi with effect from the afternoon of 31.10.2006, with the direction to report to the Deputy Commandant/Estt. Directorate General, BSF, Block No.10, CGO Complex, Lodhi Road, New Delhi-03."

Sd/-

JOINT DIRECTOR/E"

5 Being aggrieved, the petitioner filed an application in the same aforesaid OA. The Tribunal stayed the impugned order vide order

dated 31.10.2006 which continued till the disposal of the OA. The petitioner stated before the Tribunal that Rule 6 of the IB (Non-Gazetted Executive Posts) Recruitment Rules, 1982 [Recruitment Rules, for short], empowers Central Government to relax any of the provisions of the Recruitment Rules *ibid*. He further submitted that the mode of appointment of Security Assistant is 75% by direct recruitment from open market and, 25% by deputation/transfer. However, as per OM dated 13.01.1992 issued by IB, subject to certain conditions, i.e. good service record, officers from these organizations can be absorbed. As per these instructions, read with instructions on deputation, issued through DOPT's OM dated 05.01.1994, which supplement the rules and are in no manner inconsistent with it, provision for absorption of deputationists shall be deemed to exist in the Rules.

6 The petitioners further stated that as per the Recruitment Rules of Security Assistants in the IB, it is open to take on deputation/transfer suitable persons of State Police or Central Police Organization and the period of deputation should not ordinarily exceed 5 years, but may be curtailed or extended as per the Government of India's instructions contained in the OM dated 05.01.1994 (*supra*). These instructions, which are part of the Statutory Rules and supplement them,

are not contrary to the same. As the Rules are silent on absorption of these instructions are to be treated as Rules for absorption.

7 It is further submitted that as per para 4 (iv) of OM dated 13.01.1992, the cases of absorption should be processed, six months in advance, of the expiry of the deputation period and if the officer is not willing to be absorbed, he should be repatriated immediately on the expiry of his deputation period. But, in the present case no such process was initiated prior to six months of the end of deputation period of five years and the petitioners were allowed to continue despite non-concurrence by the parent department. Therefore, the petitioners deemed to have been absorbed as per the provision of DOP & T's OM dated 05.01.1994.

8 During arguments before the Tribunal, the petitioners pointed out that the respondent No.2 (IB) had, time and again, recommended the case of the petitioner for extension but the parent department (BSF) did not give its consent for absorption in IB inspite of the IB has recommended the case of the petitioners for extension on 15.03.2004 and on 11.04.2005.

9 It is pertinent to mention here that, on the other hand, the BSF, i.e. respondent No.3, had given NOC to the applicant's juniors,

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namely Satish Chander, Virender Singh, Anil Kumar and Pradeep Bhattacharya on 30.04.2001, 28.08.2001, 20.09.2001 and 28.08.2001 respectively, in terms of Standing Operating Procedure (SOP, for short) dated 17.07.2000. It has been pointed out by the petitioners, recently, respondent No.3 had given NOC to Dinesh Kumar on 01.02.2005, to three other persons, namely, Amar Singh, Rajinder Kumar and Kalwa Khan, vide order dated 01.08.2006, to Satish Rathi, Assistant Commandant vide order dated 12.05.2006 and to Naresh Kumar, Dhanpat Rai and Desh Raj, vide order dated 17.03.2006.

10 The petitioners, herein, have averred that after completion of five years of deputation and on stoppage of deputation allowance, the services of the applicant had been continued and no orders for repatriation were issued immediately on completion of five years of service, i.e. maximum period of deputation. Persons, who were, in all respect, fit and eligible as per the rules, could not have been continued on deputation and they should have been given deemed absorption status. Respondent No.2 has absorbed many such persons permanently. The case of the petitioners is similar insofar as he has continued with IB beyond the period of five years and is not drawing deputation allowance. Stoppage of deputation allowance is one of the conditions,

as per the law laid down by the Supreme Court in the matter of *Rameshwar Prasad v. Managing Director, UP, Rajkiya Nirman Limited & Ors., JT 1999 (7) SC 44*, for being absorbed in the office of respondent No.2. Hence, the petitioners have to be declared as deemed absorbed in IB.

11 It is necessary to mention here that similar situated persons, who were on deputation with respondent No.2, filed OA No.3202/2001, which was dismissed by the Tribunal, vide order dated 11.11.2002 on the ground that the Tribunal had no jurisdiction to issue directions to respondent No.3, an Armed Force. The petitioner, in that case namely Satender Pal & Ors. challenged the aforesaid order and filed the writ petition being WP(C) No.7406/2002 before this court. While disposing of the aforesaid writ petition, this court has set aside the order of the Tribunal and held that the order of the repatriation under challenge before the Tribunal was passed by IB and any challenge to it squarely fell within the jurisdiction of the Tribunal. This court further directed the revival of OA No.3202/2001 and disposal of the same. The Tribunal vide order dated 16.01.2003 disposed of the aforesaid OA with the following directions:-

“24. In the result, for the foregoing reasons, the impugned order cannot be sustained in law

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and the same is quashed and set aside. Respondents are directed to take steps to seek relaxation with regard to no objection certificate by the parent department as per Clause 10 of the DOP&T's OM dated 5.1.1994 for permanent absorption of the applicants in respect of grades/posts from DOP&T. Till then they shall continue the applicants except retiree on deputation. With these observations, OA is partly allowed. No costs."

12 The petitioners aver that their work and conduct have been to the maximum satisfaction of the senior officers and there is nothing adverse against him. More so, the petitioners have earned appreciations for his work and conduct while on deputation with IB.

13 On the other hand, the respondent stated in their counter reply that while posted in STS-II, BSF, Bangalore, the petitioners were sent on deputation of IB for a period of three years w.e.f. 24.09.1999 to 23.09.2002, vide orders dated 06.07.1999 and 25.08.1999. On completion of his prescribed period of deputation, BSF approached IB to repatriate the petitioners to report to his parent organization, i.e. BSF, vide letters dated 14.07.2003, 04.11.2003, 30.12.2004 & 14.03.2005, but the petitioners were not relieved inspite of repeated requests from BSF. Instead, IB had approached BSF for conveying concurrence for extension of deputation of the applicant upto 23.09.2005, i.e. for sixth

year, vide letters dated 11.04.2005 & 26.05.2005. Thereafter the matter was examined by BSF and the competent authority took a decision not to convey NOC for the purpose, as requested by borrowing department for extension of deputation of the petitioners, due to administrative as well as operational reasons. Accordingly, IB was informed and requested, vide letters dated 21.04.2005 and 02.06.2005, respectively, to repatriate the petitioners immediately as the prescribed period of deputation had already expired on 23.09.2002.

14 The respondents further submitted that IB, vide order dated 08.07.2005, repatriated the petitioner w.e.f. 31.07.2005. However, the applicant filed OA No.1565/2005 before the Tribunal, which was disposed of vide order dated 28.07.2006 with the direction that the claim of the petitioner for permanent absorption be re-examined and a final decision should be taken in consultation with the parent department within a period of three months. The Tribunal further directed that the *status quo* of the petitioner, as of date, should be maintained till then. The IB vide their letter dated 10.10.2006 proposed to repatriate the petitioner and asked for the comments of BSF.

15 Case of the respondents is that since, the petitioner had already completed his prescribed tenure of deputation from 24.09.1999

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to 23.09.2002, he was not eligible for any further extension in terms of the BSF (Tenure of Posting & Deputation) Rules, 2000 or for issue of NOC for permanent absorption, as he had not completed required 20 years' of service in terms of Standard Operating Procedure (SOP, for short) dated 17.07.2000. IB was apprised of the rule position vide BSF letter dated 21.10.2006 with a request to decide the case in accordance with the existing provisions. Accordingly, IB, issued order dated 27.10.2006 repatriating the applicant w.e.f 31.10.2006.

16 The respondents, in this context, have further submitted that the petitioner is a member of the BSF, which is governed by BSF Act, 1968 and BSF Rules, 1969. BSF is an Armed Force of the Union and, in terms of Section 2 of the Administrative Tribunals Act, 1985, the provisions of the said Act shall not apply to any member of the Naval, Military or Air Force or any other Armed Forces of the Union. Therefore, this Tribunal has no jurisdiction to entertain the present OA. They further relied upon an identical case, in OA 1721, 1889 and 1895/97 titled *Union of India v. Shri Mathura Dutt*, the High Court in its judgment dated 30.05.1997, quashed and set aside the orders passed by the Tribunal and resultantly the applications of the respondents were dismissed. In the aforesaid writ petition, 157 constables, who were on

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deputation to CBI from various Central Police Organization, approached the Tribunal seeking directions against respondent (CBI) that the Constable deputationists in CBI shall not be repatriated before they are considered by the appropriate Selection Committee for absorption against 60% quota available to those appointed against transfer on deputation/transfer. In the said judgment the Division Bench of this court has held as under:-

“The entire basis of the impugned order of the Tribunal being erroneous that the respondents had a valuable right, which in fact is not there, the impugned order cannot be sustained. The same is vitiated in as much as the respondent deputationists had no vested right to be considered for absorption in accordance with the Recruitment Rules and now a Policy decision has been taken not to absorb any person unless he is totally indispensable to the working of CBI. In such like policy decision, in the absence of any right, no challenge could have been made thereto. The impugned decision of the Tribunal, thus, being bad in law and on totally erroneous assumption of the supposed right of the respondents, is liable to be quashed and set aside.”

17 The respondents have further relied upon the judgment delivered by Division Bench of this court on 17.03.2006 in WP(C) Nos.17343, 11278, 17412 & 13037 of 2004 titled as Shyam Singh & Ors. v. Union of India & Ors., 2006 (2) ATJ 569. It has been held that deputationist cannot assert any right to claim absorption. Absorption can

only be claimed as a matter of right if it is based upon any Statutory Rules or some provisions having the force of law.

18 The counsel for the respondents pointed out that the orders passed by the respondents on repatriation and challenged by the petitioner before the Tribunal were disposed of with the directions to the Department to examine the claim of the petitioner for absorption and process his case in accordance with rules and suitability of the petitioner and take final decision in consultation with the parent department within a period of three months. Accordingly, the said order of the Tribunal was complied with by the respondents. The suitability of the petitioner for absorption in IB was assessed through his Controlling Officer, who opined that the petitioner was not suitable for absorption in IB as the petitioner has not completed 20 years' of service.

19 Mr. K.C. Mittal, learned counsel for the petitioner, during the course of arguments before the Tribunal, inter alia, made the following averments:-

- (i) *"A composite reading of columns 11 to 13 of the Schedule attached to the Recruitment Rules (Annexure-A-7) for the post of Security Assistant in IB, would imply that there is a specific 25% quota for recruitment to the post by deputation/transfer. Thus, a person on deputation against this post does not join on deputation simpliciter, as prescribed in DOP&T OM dated 05.01.1994.*

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After initial deputation, he has to be considered on transfer/deputation.

- (ii) (a) *The condition precedent relating to 20 years of service before BSF deputationist can be issued NOC for absorption in the borrowing organization, has been prescribed through an executive instruction, i.e. SOP dated 17.07.2000 (Annexure A-5). It cannot overrule the provisions of statutory Recruitment Rules ibid.*
(b) *Similarly, fixing a quota of 12½% (vide OM dated 13.01.1992) for absorption through executive instruction is also ultra vires of the Recruitment Rules.*
- (iii) *The ceiling of 3 years for deputation and the condition of 20 years of service before issue of NOC for absorption are only instructions not rules. In any case, they are not relevant since the applicant is governed by the Recruitment Rules of IB.*
- (iv) *Several juniors of the applicant, who too had not completed 20 years of service, were issued NOC for absorption in IB (respondent No.3). In one case, an Assistant Commandant of BSF has been absorbed by respondent No.2, inspite of the fact that there are no rules for his deputation or absorption [Annexure A-6 (Colly)].*
- (v) *The impugned order is a non-speaking order and does not comply with the direction of this Tribunal issued in OA No.1565/2005 dated 28.07.2005. It does not deal with all the issues raised in the said order of this Tribunal.*
- (vi) *Respondent No.2, in his counter (para-6), has stated that the applicant was not found suitable for absorption in IB as he did not possess mental ability required for intelligence work nor did he display eagerness to learn intelligence traits. Such grounds have been mentioned to deny absorption to the applicant, without giving him opportunity of being heard. On the other hand, an officer of the respondents' organization, while forwarding the applicant's request for extension of deputation, vide letter dated 15.03.2005 (Annexure A-12) stated that the applicant is a*

sincere dedicated and committed worker who has discharged his responsibilities satisfactorily.

- (vii) *The pick and choose policy of respondent No.2 in granting NOC for absorption in the borrowing organization is arbitrary and without transparency and is violative of the direction of the Hon'ble Supreme Court given in the case of Shyam Singh & Ors. v. Union of India & Ors. (supra)."*

20 We have gone through all the directions given by the Tribunal in different OAs from time to time on the present issue. We are of the opinion that the directions given by the Tribunal have not been complied with by the respondents in a true letter and spirit. Without application of mind and without valid reasons they have rejected the claim of the petitioner in an arbitrary manner. Simultaneously, we have also seen the communication dated 15.03.2005, which is reproduced as under:

"Enclosed is the request for extension of deputation for a period of one year from Shri Udai Pal Singh, SA/G, on deputation from BSF since 24.9.1999.

2. Shri Udai Pal is a sincere, dedicated and committed worker who has discharged his responsibilities satisfactorily in the one half years that he has been attached to the undersigned. His request for extension of his deputation to IB for one year w.e.f. 24.09.2004 is strongly recommended.

*Sd/-
JD/W
15.3.2004"*

21 We have also perused order dated 27.10.2006, which is annexed as Annexure A-I at page 80 of the paper book and the same is reproduced here under:

"ORDER

In compliance with CAT, PB, New Delhi Order dated 28.07.2006 delivered on OA No.5/2005, Shri Udai Pal Singh, SA/G, PIS No.109304, a deputationist Constable (No.34031), BSF is repatriated to his parent department and stands relieved of his duties from Intelligence Bureau Hqrs. New Delhi with effect from the afternoon of 31.10.2006, with direction to report for duty to the Deputy Commandant/Estt. Directorate General, BSF, K.No.10, CGO Complex, Lodhi Road, New Delhi-03.

*Sd/-
JOINT DIRECTOR/E*

*No.28/Estt. (G-1)/2005 (9) – 10728-48
Intelligence Bureau,
(Ministry of Home Affairs)
Government of India.*

*27th October, 2007
New Delhi*

The Addl. DIG (Estt.), Directorate General, BSF, Block No.10, CGO Complex, Lodhi Road, New Delhi-03.

The Deputy Commandant/Estt., Directorate General, BSF, Block No.10, CGO Complex, Lodhi Road, New Delhi-03.

Sh. Udai Pal Singh, SA/G (PIS No.109304), IB Hqrs, New Delhi.

*Sd/-
ASSISTANT DIRECTOR*

22 We are not convinced with the reply filed by the respondents in the present case before the Tribunal in OA No.2250/2006 which is reproduced as under:-

"4. In compliance with the CAT, PB, New Delhi order, suitability of the applicant for absorption in IB was adjudged and his Controlling Officer under whom the applicant is presently posted did not found him fit to be considered in IB for absorption for the reason that, he does not possess the mental ability to perform as an intelligence operative nor has he displayed any eagerness to learn intelligence traits to enhance his skills for use in IB. Thereafter, BSF authorities vide letter dated 10.10.2006 (copy enclosed) were requested for their comments. In response BSF authorities vide their letter dated 21.10.2006 (copy enclosed) have intimated that as per BSF standing operating procedure for issue of 'NOC' for absorption in Borrowing organization, the proposed individual should have completed 20 years of service....."

23 The allegations made against the petitioner is that he doesn't possess the mental ability to perform as an intelligence operative nor has he displayed eagerness to learn intelligence traits to enhance his skills for use in IB. As pointed out by Mr. K.C. Mittal, learned counsel appearing for the petitioners that this type of allegation has come for the first time, which is an afterthought and illegal. The second disqualification which, in the same reply, has been mentioned by the respondents is that the petitioner doesn't possess the service of 20 years. As far as age of 20

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years is concerned, we have perused the eligibility criteria for direct recruitment as Security Assistant which annexed as page 126 of writ petition being WP(C) No.1098/2007. The age limit for direct recruits under Column 7 (age) is mentioned as "Not exceeding 25 years" and the essential qualifications under Column 8 is mentioned as "*Matriculation or equivalent*" and "*Desirable field experience in intelligence work*", therefore, both the aforesaid disqualifications shown by the respondents are baseless and arbitrary.

24 It is not in dispute that the recruitment to the post of Security Assistant is 75% by direct recruits from the open market and 25% by deputation/transfer. In addition to the above said 25% quota, the Department of DOP&T vide its OM dated 05.01.1994 tried to resolve the entire issue in the following manner:-

*"No.2/29/91-Estt (Pay.II)
Government of India
Ministry of Personnel, P.G. & Pensions
(Department of Personnel & Trg.)*

New Delhi, the 05th Jan, 1994

OFFICE MEMORANDUM

Subject : Transfer on deputation/foreign service of Central Govt. Employees to ex-cadre posts under the Central Govt. /State Govts./Public Sector Undertakings/Autonomous Bodies/Universities/UT Administration, Local Bodies etc. And vice versa -Regulation of pay, deputation (duty) allowance, tenure of deputation/foreign service and other terms and conditions regarding.

M/o Finance
OM No.19 (24)/E.III/60
Dt. 4.5.61
M/o Finance OM
No.1(11)/E.III (B)/75
Dt.4.5.61
DOP&T OM No.2/12/87-
Estt. (Pay.II) dt.29.4.88
DOP&T OM No.2/12/87-
Estt. (Pay.II) dt.29.4.88
DOP&T OM No.6/30/86-
Estt. (Pay.II)Dt.9.12.86
DOP&T OM
No.6/30/86-Estt. (Pay.II)
Dt.9.12.86

A need has been felt for some time past to consolidate at on place the various instructions/orders that have been issued from time to time and are still in force on the above mentioned subject. It was also felt necessary to review the entire matter and bring about rationalization and uniformity in the instructions/orders. Accordingly, it has been decided to bring out a self-contained OM, on the subject incorporating the provisions of various orders quoted in the margin, with suitable modification, where margin, with suitable modification, where necessary. The Ministry of Finance etc. are requested to bring to the notice of all administrative Ministries concerned with the contents of this OM for information, guidance and compliance."

25 Inspite of the aforesaid OM, the respondents have not come forward to resolve the issue. We may clarify that in exercise of our powers of judicial review, we are concerned with decision making process and not the merits of the decision. In view of our aforesaid discussion, we are of the view that the matter is not considered properly and extraneous considerations weighed with the respondents. The orders dated 27.10.2006 & 08.07.2005 passed by the respondents in the case of the petitioners are without application of mind to the relevant considerations and even without the compliance of the directions issued by the Tribunal. Instead, evolving the transparent and clear cut policy, preferably Statutory Rules regarding the absorption of deputationists, the

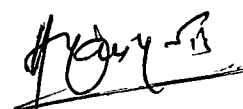
respondents are still insisting on the method, which, in our opinion, is full of allegations of favouritism, arbitrariness and pick & choose.

26 In view of the aforesaid reasons and discussions enumerated hereinabove, we allow these writ petitions and quash the orders dated 01.02.2007 passed in OA No.2250/2006 and order dated 12.02.2007 passed in OA No.1859/2005 to the extent, to consider the request of the petitioner appropriately within two months keeping in view the earlier mandates as noted above.

27 We, further, direct that to avoid such type of situation in future, the respondents would formulate such a policy where no such type of issue raises again and again. Therefore, we direct the respondents to formulate such a policy within three months from today and thereafter compliance report in respect of the same be sent to this court.

28 These writ petitions stand disposed of accordingly. There shall be no order as to costs.


SURESH KAIT
(JUDGE)


A.K.SIKRI
(JUDGE)

APRIL 20 , 2009
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