

GAHC010201702023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : I.A.(Civil)/2733/2023

THE UNION OF INDIA AND 3 ORS
REPRESENTED BY THE DEFENCE SECRETARY,
MINISTRY OF DEFENCE,
101-A, SOUTH BLOCK,
NEW DELHI- 110001.

2: JOINT SECRETARY (BORDER ROADS)
MINISTRY OF DEFENCE (EARLIER DESIGNATED AS SECRETARY (BRDB))

ROOM NO. 418
B WING 4TH FLOOR

SENA BHAWAN
NEW DELHI- 110010.

3: DIRECTOR GENERAL
BORDER ROADS ORGANISATION

SEEMA SADAK BHAWAN

RING ROAD
DELHI CANTT.

NEW DELHI- 110010.

4: ADDITIONAL DIRECTOR GENERAL (EAST)
BORDER ROADS ORGANISATION

HQ ADGBR (EAST)
JALUKBARI

LANKESWAR
GUWAHATI

ASSAM
PIN- 781014

VERSUS

GO 3006M SRI RAM ASRA KHURAL
S/O. SRI CHURA RAM, EXECUTIVE ENGINEER (CIVIL) AND PRESENTLY
POSTED AND WORKING AS GM (TECH)/PD, PIU SHIMLA, HOUSE NO. 1,
RISHIKESH SADAN, SHANTI KUTIA, UPPER CHAKKAR, SHIMLA DISTRICT,
HIMACHAL PRADESH- 171005.

Advocate for the Petitioner : MRS. R DEVI

Advocate for the Respondent : MR. D BORA

**BEFORE
HONOURABLE MR. JUSTICE SOUMITRA SAIKIA**

ORDER

09.11.2023

Heard Ms. R. Devi, learned CGC for the applicants/respondents in the writ petition. Also heard Mr. D. Bora, learned counsel for the opposite party/petitioner in the writ petition.

This IA has been filed by the Union of India seeking vacation, modification of the interim order dated 18.11.2022 passed by a Coordinate Bench of this Court in WP(C) No.7373/2022, whereby the following order was passed:

“.....

In the interim, the memorandum dated 29-09-2022, issued by the Under Secretary to the

Government of India, Ministry of Defence, shall remain suspended till the next returnable date.”

The petitioner was an Executive Engineer (Civil) in Border Roads Engineering Service of Border Roads Organization (BRO) and after his selection to the post of General Manager (Technical), in National Highways Authority of India (NHAI), he is working in as a General Manager (Technical)/Project Director in NHAI on deputation. At the relevant point in time, after his selection he applied for No Objection Certificate (NOC) from the BRO (his parent organization). But the said NOC was rejected by the authorities by order dated 19.02.2020 and by the said communication, his request for deputation was negated on the grounds and reasons mentioned in the said communication. However, this communication was ultimately served on the petitioner only on 09.06.2020. This fact is not disputed by the parties. The petitioner having not been communicated with the rejection order of his NOC dated 19.02.2020, he appeared before the authorities of the NHAI and was selected for being absorbed as a General Manager (Technical) in NHAI on deputation.

Subsequently, when the petitioner received the communication on 09.06.2020, he approached his court by filing WP(C) no. 2804/2020. This Court by judgment and order dated 19.07.2021, allowed the writ petition and interfered with the impugned rejection order dated 19.02.2020 issued by BRO authorities and directed the BRO authorities to accord necessary permission/

issue NOC to the petitioner to enable him to appear in the interview which is at the final stage for his deputation in the NHA I and not later than 15 days from the date of receipt of certified copy of the order.

Aggrieved by the said judgment and order dated 19.07.2021, the BRO Authorities preferred a Writ Appeal being W.A. No.188/2021. A Division Bench of this Court by order dated 02.09.2021 dismissed the appeal and upheld the findings of the Co-ordinate Bench. The Division Bench while dismissing the appeal, further directed the BRO authorities to issue the NOC within a period of 15 days from the date of receipt of a certified copy of the order so that the petitioner may appear in the interview for his deputation in NHA I. The relevant portion of the order dated 02.09.2021 is extracted herein below:

“.....

The settled position in such matter is that the private respondent/writ petitioner was legally bound to take permission/NOC from his employer in case he was to sit in any interview for appointment on deputation in any other department/organization. In the present case, there was no specific denial by the employer when the private respondent/writ petitioner sought for such permission. Although the employer did not grant permission, at the same time, there is no specific denial for such permission/NOC. The order dated 19.02.2020 denying NOC to the petitioner was only communicated to the private respondent/writ petitioner on 09.06.2020, i.e. after he appeared in the examination and was selected. There is nothing on record to show that the order dated 09.02.2020 was communicated to the private respondent/writ petitioner before 09.06.2020 or before he appeared in the examination. In fact,

the finding of the learned Single Judge is that the order dated 09.02.2020 was never communicated to the private respondent/writ petitioner before 09.06.2020. When permission/NOC was sought and when there was no specific denial by the employer, it was not unusual for the petitioner to assume that approval was deemed to have been given. This Court is of the opinion that, under this situation, when there is nothing to show that there was specific denial of the NOC by the employer, but at the same 2021:GAU-AS:8772-DB time, when the same employer had approved the cases of fifteen other Engineers of the same department for deputation in the National Highways Authorities of India, some of whom had not even cleared the examination, it only shows bias against the private respondent/writ petitioner. When the Border Roads Organization itself had recommended the cases of fifteen Engineers for deputation, no reasonable cause has been shown by the employer as to why NOC was denied to the private respondent/writ petitioner.

At this juncture, we are conscious of the difficulties which may be faced by the Border Roads Organization as we have been told that there is shortage of officers for deputing in High Altitude Area, but, at the same time it is also true that when the private respondent/writ petitioner submitted application to his employer for forwarding his candidature for the post, his application was not rejected by his employer. It is also true that it is the Border Roads Organization which recommended its fifteen officers to be sent on deputation to the NHAI. We find that the writ appellants have failed to show any reason as to why NOC should have been denied to the private respondent/writ petitioner.

Under the peculiar facts and circumstance of the case, we are of the opinion that there is nothing for us to interfere with the findings of the learned Single Judge.

We have been informed that during pendency of the present appeal the private respondent/writ petitioner has been transferred to Rohtang in the Solang Valley, Manali, in the district of Kullu, Himachal Pradesh.

We direct the authorities in the Boarder Roads Organization to issue

NOC to the private respondent/writ petitioner within a period of fifteen days from the date of receipt of a certified copy of this order so that he may appear in the interview for his deputation in NHAJ.”

The petitioner was thereafter issued the NOC and he appeared in the interview and got selected. He completed his period on deputation and thereafter was repatriated to his parent department. The petitioner was then served with the Memorandum dated 29.09.2022 whereby a statement of imputations of misconduct or misbehaviour was issued on which action was proposed to be taken and the petitioner was given an opportunity to make a representation within ten days of the receipt of the Memorandum. Pursuant to the representation made by the petitioner, the authorities not being convinced with his explanations in response to the memorandum issued decided to initiate disciplinary proceedings against the petitioner. The Disciplinary Authority vide impugned order dated 29.09.2022 held that the petitioner attended the interview for deputation in the NHAJ without the explicit approval of the competent authority, in violation of the applicable Rules and Regulation and which amounts to misconduct on his part. It is at this stage the petitioner has approached this Court by way of filing the accompanying writ petition being WP(C) no.7373/2022 out of which the present Interlocutory Application arises. This Court while issuing notice on 18.11.2022 passed an interim order wherein this Court suspended the memorandum dated 29.09.2022 till the next

returnable date. The same interim order has subsequently been extended, and is still in force. Learned counsel for the applicant submits that this Interlocutory Application has been filed for vacating the said interim order dated 18.11.2022 in view of the fact that in this disciplinary proceeding, the Department is yet to form an opinion as to whether the misconduct has been committed or not and the petitioner has not even filed his written statements in response to this Memorandum, and therefore at this stage, the writ petition is in fact is prematured and therefore, the interim order ought not to have been passed. The application for vacating the interim order has been accordingly filed by the applicants. Learned Counsel for the applicants further submits that the Department is empowered to conduct any departmental proceeding against any employees including the petitioner, and the scope of initiation of judicial review in disciplinary proceedings is extremely limited pursuant to the law laid down by the Apex Court.

The counsel for the opposite party/petitioner has contested the application by filing the objections. The basic ground for objection of the application is that the NOC, which was rejected by the authorities by order dated 19.02.2020, was never communicated until 09.06.2020. A Coordinate bench of this Court had held that this NOC is not an NOC in the eye of law and proceeded to interfere with the same. This order of the Co-ordinate Bench dated 19.07.2021 was

upheld by the Division Bench in an appeal being W.A No.188/2021 vide judgment and order dated 02.09.2021 filed by the authorities and the authorities were directed to issue the NOC within 15 days from the receipt of the order. Therefore, there's no question of misconduct by the petitioner as the NOC was issued pursuant to the orders of the Court.

Having heard learned counsel for the parties, it is seen that the issue involved in this entire proceeding is whether the petitioner having appeared in an interview without the formal NOC would amount to misconduct. From the pleadings it is seen that the Co-ordinate Bench by judgment and order dated 19.07.2021 passed in WP(C) No.2804/2020 had interfered with the rejection of the NOC by communication dated 19.02.2020 and had instead directed the respondents to issue the NOC, enabling the petitioner to appear in the interview. This direction was upheld by the Division Bench and the respondents were further directed to issue the NOC within 15 days from the date of receipt of the certified copy of the order.

While there is no dispute that department can initiate disciplinary proceedings against his employees subject to the prescription under the Service Rules, however, in the present proceedings, the question whether the act of the opposite party/writ petitioner appearing for an interview before the NHAI will

amount to misconduct in the absence of a formal approval by the respondent authorities is a question which will require determination in the writ petition. Prima facie, it appears that although the application for NOC was rejected by the applicant/respondent authorities as far back as 19.02.2020, but the same was communicated to the petitioner only on 09.06.2020. Therefore, the opposite party/writ petitioner was not communicates of the rejection of his NOC till 09.06.2020. These facts are not disputed by the parties before the Court. It is in the interregnum that the petitioner having not been officially communicated with the rejection of his application for NOC that he had appeared before the NHA I authorities for the interview regarding the deputation he had applied for. A Co-ordinate Bench by Judgment and Order dated 19.07.2021 passed in W.P.(C) No. 2804/2020 set aside the order dated 19.02.2020 whereby the NOC of the opposite party/petitioner was rejected. This order was further upheld by the Judgment and Order dated 02.09.2021 passed in W.A. No. 188/2021 whereby the Division Bench further directed the respondent authorities to issue NOC to the opposite party/writ petitioner within 15 days from the date of receipt of certified copy.

Under such circumstances, whether the disciplinary proceedings contemplated against the petitioner for alleged misconduct is permissible in law and in terms of the Service Rules governing the services of the opposite

party/writ petitioner will require determination in the writ petition.

As such, this Court is not inclined to vacate the interim order passed by this Court on 18.11.2022 at this stage. Interlocutory Application is accordingly rejected. The writ petition may be taken up for expeditious disposal.

JUDGE

Comparing Assistant