

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 24th July, 2020.**

+ **W.P.(C) 4455/2020 & CM No.16048/2020 (for stay)**

DR. SHYAM SUNDER TIWARI

..... Petitioner

Through: Mr. Ankur Chhibber, Mr. Anshuman Mehrotra and Mr. Harsh Dhankar, Advs.

Versus

UNION OF INDIA AND ORS

..... Respondents

Through: Mr. Arun Bhardwaj, CGSC with Mr. Abhishek Sharma, Mr. Nikhil Bhardwaj and Mr. Piyush Gaur Advs. Mr. Virender Pratap Singh Charak, Ms. Shubhra Parashar, Mr. Kapil Gaur, Mr. Pushpender Singh Charak, Mr. Vaishnav Kirti Singh and Ms. Deepa Malik Advs. for respondents.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

HON'BLE MS. JUSTICE ASHA MENON

[VIA VIDEO CONFERENCING]

RAJIV SAHAI ENDLAW, J.

1. The petitioner, a Commandant (Medical) with the respondent No.5 Assam Rifles and on inter-force transfer/deputation to the respondents No.2&3 Indo-Tibetan Border Police (ITBP) and presently posted at Referral Hospital ITBP, Greater Noida, Uttar Pradesh, has filed this petition (a)

impugning the order dated 15th July, 2020 whereby the petitioner has been asked to report back to his parent cadre i.e. the respondent No.5 Assam Rifles; and, (b) seeking mandamus to the respondents to allow the petitioner to continue at his present place of posting, for another two years, as per the Office Memorandums (OMs) dated 22nd November, 2016 and 18th May, 2018, thereby allowing the petitioner to take medical treatment for his son; and, (c) in the alternative, seeking mandamus to the respondents to extend the benefit/relaxation as provided in the OMs dated 6th June, 2014, 17th November, 2014 and 5th January, 2016 issued by the Department of Personnel and Training (DoPT).

2. It is the case of the petitioner, (i) that he was appointed as an Assistant Commandant (MO) in the respondent No.5 Assam Rifles in February, 2003 and was in the year 2007 promoted to the rank of Deputy Commandant; (ii) that the petitioner, in or about the years 2007-2008 applied for permission to apply for Post Graduation and which permission was granted and accordingly, the petitioner, in the years 2008-2011 completed his Doctorate in Medicine in Radio Diagnosis, from Armed Forces Medical College, Pune; (iii) that between the years 2011-2017, the petitioner remained posted at Nagaland, Dimapur and in the year 2012 promoted to the rank of Second-in-Commandant and in the year 2016 to the rank of Commandant; (iv) that a son was born to the petitioner and his wife on 27th December, 2011, who in the years 2012-2013 was found to be suffering from squint and was under treatment at Shankar Netralaya, Guwahati; (v) that the son of the petitioner thereafter developed persistent seizure attacks and was diagnosed to be suffering from Hypoxic Ischemic Insult and secondary seizures/cerebral palsy and was being treated at Guwahati; (vi) that however the medical

condition of the son of the petitioner kept deteriorating and he also developed deformities in his right leg and right hand and also suffered loss of learning abilities; (vii) that the petitioner, for all the said reasons took extended leave in the year 2016 for the medical treatment of his son; (viii) that the petitioner thereafter applied for the post of General Duty Medical Officer in ITBP, on deputation and the competent authority, vide order dated 30th May, 2017, approved the inter-force transfer of the petitioner from the respondent No.5 Assam Rifles to respondents No.2&3 ITBP and vide Signal dated 10th July, 2017 posted the petitioner to the Referral Hospital ITBP, Greater Noida, on compassionate grounds, for a period of three years only; (ix) that the petitioner since then is at Referral Hospital ITBP, Greater Noida and has been making all efforts to have his son treated at Vardhman Mahaveer Medical College (VMMC) and Safdarjung Hospital, New Delhi and the son of the petitioner has shown signs of improvement; (x) that the son of the petitioner requires regular follow up at VMMC and at Safdarjung Hospital as well as physiotherapy and has been attending Special Children School at Greater Noida and has been issued a “80% permanently physically handicapped” certificate; (xi) that the petitioner made a representation dated 22nd August, 2019 to the respondents requesting the respondents to extend his deputation tenure for five years as per the prevalent policy; (xii) that the Policy Guidelines for Deputation of Combatised Central Armed Police Forces (CAPFs) and Assam Rifles (AR) Personnel in Other Organisations, issued by the Ministry of Home Affairs (MHA) on 22nd November, 2016 clearly state that the tenure of deputation to the other CAPF and Central Government Organisations will initially be five years and further extendable upto seven years; (xiii) that the petitioner thus is entitled to the minimum

tenure till 17th July, 2022; (xiv) that on the representation aforesaid of the petitioner, the respondent No.4 Additional Director General (ADG) (Medical) (CAPFs, National Security Guard (NSG) and AR), sought certain comments / recommendations on the requirement of the petitioner in the Referral Hospital, Greater Noida; (xv) that the Inspector General (IG) (Medical), Referral Hospital ITBP, Greater Noida vide letter dated 30th November, 2019 clarified that the petitioner as a Radiologist is required to run and keep the department functional, as in Radiology Department of the hospital there is already heavy load of patients and the hospital is also in the process of expansion; it was also clarified that the petitioner is main care giver to his own son, who is differently abled; the petitioner was recommended the full term of five years; (xvi) that MHA, vide order dated 30th October, 2015 directed that the inter-force transfer/deputation of all doctors will continue to be decided by the MHA on the proposal of the Director General of the forces concerned and the recommendation of ADG(Medical); (xvii) that however the respondents are not extending the tenure of deputation of the petitioner and not forwarding the case of the petitioner to the MHA; (xviii) that even the OM dated 6th June, 2014 regarding posting of government employees who have differently abled dependants provides that a government servant who is also a care giver of disabled child may be exempted from the routine exercise of transfer/rotational transfer, subject to administrative constraints; (xix) that DoPT OMs dated 6th June, 2014, 17th November, 2014 and 5th January, 2016 also categorically provide that government employees who are care giver of disabled child will be exempted from the routine exercise of transfer/rotational transfer, subject to administration constraints; (xx) that as

per the OM dated 18th May, 2018 of the DoPT also, the period of deputation/foreign service shall be as per the Recruitment Rules (RRs) of the ex-cadre post or five years in case no tenure regulations exist for the ex-cadre post; (xxi) that the RRs of the Medical Officer Cadre of the respondent No.5 Assam Rifles nowhere state the tenure of deputation and thus the petitioner, under the OM dated 18th May, 2018 is entitled to the deputation from the respondent No.5 Assam Rifles to the respondents No.2&3 ITBP at least for a period of five years; (xxii) that the respondent No.5 Assam Rifles, vide order dated 15th January, 2020 to the Referral Hospital ITBP Greater Noida, requested that on the deputation of the petitioner coming to an end on 17th July, 2020, the petitioner be released; (xxiii) that the petitioner made another representation dated 31st January, 2020 to the respondents; and, (xxiv) that the respondents, vide impugned order dated 15th July, 2020, rejected the petitioner's representation for extension of tenure and directed the petitioner to be relieved from the respondents No.2&3 ITBP.

3. It is the contention of the counsel for the petitioner that the respondent No.5 Assam Rifles is posted at the extremist and the remotest areas of the country and if the petitioner is repatriated to his parent organization i.e. Assam Rifles then he would be posted in such remote and extreme locations which would not be a suitable environment to raise his son aforesaid.

4. The petition came up before this Court first on 22nd July, 2020, when upon none appearing for the respondents, we asked Mr. Arun Bhardwaj, Standing Counsel Central Government to obtain instructions and posted the matter to today.

5. In pursuance to our earlier order dated 22nd July, 2020 Mr. Arun Bhardwaj, Advocate has obtained instructions and on our request started apprising us of the same. However Mr. Virender Pratap Singh Charak, Advocate also appears and states that he is appearing for all the respondents i.e. ITBP as well as Assam Rifles but has not received instructions from Assam Rifles as yet. It is stated that though ITBP was in favour of retaining the petitioner at Greater Noida but a letter has been received from Assam Rifles to the effect that it does not have medical staff and urgently requesting the petitioner to be relieved immediately on expiry of three years, for which he was granted inter service transfer to ITBP. Mr. Arun Bhardwaj, Advocate states that the respondent No.5 Assam Rifles vide letter dated 30th June, 2020 to the ADG(Medical) of all the CAPFs including ITBP, and also of Assam Rifles, has stated that there is urgent need of the petitioner at the border. It is stated that taking into consideration all the facts, decision has been taken to not accede to the representations of the petitioner for further deployment of two years at Referral Hospital ITBP, Greater Noida.

6. The counsel for the petitioner has taken us through the various OMs referred to in his petition, to contend that the petitioner being the main care giver of his son aged about nine years suffering from disabilities as pleaded, is entitled to the benefit thereof. However the main emphasis of the counsel for the petitioner is on the Policy Guidelines dated 24th November, 2016 for Deputation of Combatised CAPFs and AR Personnel in Other Organisations, filed as Annexure P-1 (colly.) to the petition. The same, in Clause 3 titled “Period of Deputation” in sub-para (B)(i) provides as under:

“(B)(i) The tenure of deputation to other CAPF and Central Government Organisations such as :-

- CAPFs - (AR, BSF, CISF, CRPF, ITBP, NSG, SSB)*
- CPOs – (IB, CBI, BPR&D, NCRB, SVPNPA, NEPA, NICFS)*
- NDRF*
- Any other Central Government Organisations except as mentioned in Para-3(A) above will initially be 05 years and further extendable up to 07 years, one year at a time with prior consent of the lending Organisation by the competent authority, on specific request from the borrowing Organisation/Department.”*

7. The counsel for the petitioner contends that once as per the Policy Guidelines, the period of deputation initially is for five years and further extendable upto seven years, the deputation granted to the petitioner for three years only is contrary to the Policy and the petitioner, as a matter of right, is entitled to extension of his deputation for another two years.

8. Per contra, Mr. Arun Bhardwaj, Advocate for the respondents contends that as per the aforesaid Clause also the deputation is on an yearly basis and subject to the prior consent of the lending organisation i.e. Assam Rifles. He has taken us to Annexure P-4 to the petition at page 83, being the Signal/posting order dated 10th July, 2017 of Assam Rifles, approving the inter-force transfer/posting of the petitioner to ITBP and which *inter alia* provides that the same is on “compassionate grounds” and that the tenure thereof was “three years only; no representation will be entertained”. He thus contends that the petitioner was in fact not even entitled to represent for extension and has no right of extension. Though Mr. Arun Bhardwaj,

Advocate has also taken us through the OPD Cards of Sardarjung Hospital of the son of the petitioner, filed by the petitioner along with the petition, to contend that the petitioner has falsely stated that his son requires continuous follow up treatment, as Safdarjung Hospital OPD Card of the visit of 3rd June, 2020 shows that the petitioner had last taken his son to Safdarjung Hospital on 30th August, 2017 and has also contended that the visit of 3rd June, 2020 was only for the purposes of making representation and filing this petition, but we do not deem it expedient to go into the said aspect, as it is not in dispute that the son of the petitioner is differently abled and needs special care.

9. We had on 22nd July, 2020, when the petition had come up first, as well as today again, enquired from the counsel for the petitioner, if owing to such personal difficulties of each and every official of Assam Rifles, who according to the petitioner himself are posted at remotest areas of the country, none is willing to be so posted, who will serve the respondent No.5 Assam Rifles and how the respondent No.5 Assam Rifles will perform the role for which it has been established by a legislative act.

10. We also enquired, whether the wife of the petitioner is working or otherwise not in a position to give the care which the son of the petitioner requires, for the petitioner to claim to be the main care giver. We yet further enquired from the counsel for the petitioner that considering that the son of the petitioner is only nine years of age and his needs and requirements are unlikely to change in the two years for which the petitioner is seeking extension, whether not the petitioner, after two years also, will have to make arrangements, as he would be required to make today.

11. The counsel for the petitioner states that the wife of the petitioner is a home maker and otherwise invokes the sympathetic grounds.

12. Undoubtedly the circumstances of the petitioner are deserving of sympathy. Giving relief to the petitioner will give us, who are but human, also joy and happiness. 'Giving liberates the soul of the giver', in the words of Maya Angelou. On the contrary refusing relief to the petitioner will not only pain us but also make us appear harsh and without compassion. However, we cannot be unmindful of the need for doctors and medical professionals as the petitioner is, to fulfill the emergent medical needs of the personnel of Assam Rifles posted at the borders and in the remotest areas of the country, where no other medical facility except of Assam Rifles itself is available and which personnel are likely to suffer injuries while protecting and securing the country. The said personnel/soldiers also deserve the sympathy and concern of this Court. For the Court to show sympathy, has to essentially consider and ensure that the sympathy shown in the case before it is not to the prejudice of any others. Here, it is the case of the respondents before us that the Assam Rifles, already short of Medical Officers, on compassionate ground, to enable the petitioner to tide over his difficulties, allowed deputation to the petitioner for three years only and is not in a position to extend the same. There is no material before us or for that matter even a plea, that the said decision and assessment has not been made *bona fide* by the officers of Assam Rifles. Once it is so, it is not for us, sitting in places made safe owing to the sacrifice of those posted at the borders and in the remotest corners, to grant relief as sought by the petitioner, only on the facts brought by the petitioner before us and being unmindful of those securing the country and the safety of its citizens.

13. As far as the reliance by the counsel for the petitioner on the Policy Guidelines is concerned, without going into the question of the interpretation of the Policy Guidelines, we have enquired from the counsel for the petitioner, whether not as per the contentions of the counsel for the petitioner, the violation of the Policy was on 10th July, 2017 itself, when inter-force transfer/deputation was allowed on the request of the petitioner, for a period of three years instead of for a period of five years and with the express stipulation that no representation will be entertained. We have further enquired that if it was so, whether not the cause of action for the challenge today made, accrued as far back as on 10th July, 2017 and why did the petitioner then only not protest and approach the Court and which would also have given the luxury to the Court to call for the counter affidavit to enable the respondents to explain why and under which provision or rule inter-force transfer/deputation to the petitioner was permitted for three years only with an express stipulation that no representation shall be entertained. In this context, we may mention that the Policy Guidelines dated 24th November, 2016 do not provide for inter-force transfer/deputation on compassionate grounds and it is well-nigh possible that the petitioner, in terms of the said Policy Guidelines was not even eligible for deputation and was allowed deputation on compassionate grounds only, as the order dated 10th July, 2017 of his inter-force transfer/posting specifies. It is quite obvious that the petitioner also was aware that but for compassion then shown to him he was not entitled to inter-force transfer/deputation which has been allowed to him and therefore choose to avail of the compassion shown. The petitioner now, by approaching the Court at the fag end, cannot extend his stay in the National Capital Region. As far as other DoPT OMs

referred to are concerned, they also make provisions subject to administrative constraints and the decision of the lending department. Here, the lending department i.e. Assam Rifles, after considering the representations of the petitioner and after assessing the availability of the medical professionals as per its requirements has expressed the need for the petitioner and the respondent No.4 ADG (Medical) (CAPF, NSG & AR) as the representative of the MHA has vide order dated 15th July, 2020 impugned in this petition taken a decision that the petitioner be relieved from Referral Hospital ITBP, Greater Noida to Assam Rifles.

14. We therefore do not find any ground to interfere.

15. Dismissed.

RAJIV SAHAI ENDLAW, J.

ASHA MENON, J.

JULY 24, 2020

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