

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Before:

**The Hon'ble Justice T. S. Sivagnanam
and**

The Hon'ble Justice Hiranmay Bhattacharyya

**FMA 1798 of 2018
Union of India & Ors.**

vs.

Mintu Mondal

For the Appellant : Mr. Vipul Kundalia,
Mr. Sukanta Ghoshadvocates

For the Respondent : Mr. Jaytosh Majumdar,
Mr. Debabrata Mondal,
Mr. Arjun Roy Mukherjee,
Ms. Sreetama Neogi,
Ms. Riya Ballavadvocates

Heard on : 17.06.2022

Judgment on : 30.06.2022

Hiranmay Bhattacharyya, J.:-

1. The instant appeal is at the instance of the Union of India and the authorities of the Border Security Force (for short "BSF") and is directed against the judgment and order dated July 5, 2017 passed by a learned Single Judge in WP 14868 (W) of 2016.

2. By the said judgment and order, the respondent no. 3 in the writ petition was directed to revisit the claim of the writ petitioner in the light of the beneficial provisions for utilisation of his services in jobs where public safety issues are not involved.
3. Facts, in a nutshell, that gave rise to the writ petition and are necessary for deciding this appeal are summarised hereunder.
4. Writ petitioner/respondent was appointed provisionally as Constable (General Duty) in the BSF on April 8, 2013. A show cause notice dated August 28, 2014 was issued to the writ petitioner while in service at Mizoram which, *inter alia*, conveyed the intimation that as per the opinion of the Medical Board constituted on July 8, 2014, the petitioner was found to be “colour blind” and therefore unfit to discharge duties as constable. The writ petitioner was given the option to appear before a review medical board to assess his alleged “colour blindness”. The review medical board also confirmed his “colour blindness” and accordingly his name was struck off the rolls.
5. The respondent thereafter filed an appeal under Rule 28A of the 1969 Rules and prayed for an order of reinstatement. Respondent herein filed an application under Article 226 of the Constitution of India alleging inaction of the BSF in deciding the said appeal. The writ petition was disposed of by an order dated April 26, 2016 directing BSF to decide the appeal.

6. The appellate authority by an order dated May 19, 2016 rejected the appeal petition after taking note of the fact that the superior authority agreed with the findings of the review medical board and further directed to retire the writ petitioner/respondent from service and also that subsequently vide order dated August 10, 2015 the writ petitioner was directed to retire from service on August 10, 2015 without any pensionary benefits on the ground of "colour blindness" under the provisions of Rules 1969. Challenging the said memo dated May 19, 2016 as well as the action of the BSF in removing the writ petitioner from service as Constable (General Duty) with effect from August 10, 2015, the respondent herein filed WP 14868 (W) of 2016 which was disposed of by the judgment and order dated July 5, 2017 which is impugned in this appeal.
7. Being aggrieved against the said judgment and order dated July 5, 2017, the instant appeal has been preferred.
8. Mr. Kundalia learned Counsel representing the appellants contended that the learned Single Judge after holding that the circular dated February 27, 2013 shall govern the case of the writ petitioner/ respondents herein ought to have dismissed the writ petition. He further, contended that the circular dated February 27, 2013 is to be applied in its true letter and spirit even assuming the same to be merciless in its application to colour blindness or defective vision personnel. He further contended that since the respondent herein was not appointed prior to 18.05.2012 that is the cut of date fixed by the circular dated February 27, 2013 providing

for utilisation of the services of the colour blind personnel appointed prior to the said date to be utilised for the jobs where public safety issues are not involved, the learned Single Judge erred in directing the BSF authority to revisit the claim of the petitioner/respondent herein as directed in the impugned judgment and order. He, further contended that considering the nature of the disease which the respondent is suffering, and the nature of duties which are required to be performed by a constable in the Para Military Forces, it would be against the interest of public safety to allow the respondent to continue with his service in BSF.

9. Mr. Majumdar learned Counsel for the respondent seriously disputed the submissions made by Mr. Kundalia. By drawing the attention of the Court to the expression “recruitment” appearing in the circular dated February 27, 2013, as well as the circular dated May 28, 2013, Mr. Majumdar highlighted the distinction between the expression “recruitment” and “appointment” in service jurisprudence by referring to a decision of the Hon’ble Supreme Court of India in the case of *Prafulla Kumar Swain vs. Prakash Chandra Misra and ors.* reported at 1993 Supp (3) SCC 181.

10. According to Mr. Majumdar the respondent appeared before the medical board on July 20, 2012 for Detailed Medical Examination (for short “DME”) and the medical board after conducting the DME declared him “FIT” and thereafter the petitioner was appointed on April 08, 2013. He further contended that the petitioner having appeared before the Medical Board on July 20, 2012 and only upon

being declared fit became eligible for appointment and was ultimately appointed thereafter. Thus, according to Mr. Majumdar the writ petitioner /respondent though appointed on April 08, 2013 was recruited prior to February 27,2013 and as such he should not be boarded out from service in terms of the clarificatory circular issued on May 28, 2013. Mr. Majumdar also sought to challenge the validity of fixing 27.02.2013 as the cut of date for the purpose of boarding out the personnel who were detected to be suffering from colour blindness with retrospective effect. In support of his contention regarding the validity of fixation of such cut of date, Mr. Majumdar placed reliance upon a decision of the Hon'ble Supreme Court in All Manipur Pensioner Association vs. State of Manipur and ors. reported at (2020) 14 SCC 625.

11.Heard the learned advocates for the parties and considered the materials placed.

12.It is evident from the letter dated June 15, 2012 that the writ petitioner was declared provisionally qualified for the DME and for such purpose the petitioner was requested to report for the same before the Medical Board/MO , BSF Campus, Kalyani on July 20, 2012. It further appears from the said document that the DME was to be conducted as per the following medical standards.

“The DME will be conducted as per the following medical standards:

a) Eye Sight: the minimum distant vision should be 6/6 and 6/9 of two eyes without correction i.e.,

without wearing glasses. The candidate should possess high COLOUR VISION.

b) The candidates must not have knock-knee, flat foot, varicose vein or squint in eyes, bow legs, inability to close the left eye, inability to flex the fingers properly and any other obvious deformities. They must be in good mental and bodily health and free from any physical defect which is likely to interfere with the efficient performance of the duties.”

13. It was further indicated in the said letter that the candidates appearing for DME should satisfy himself/herself that he/she fulfills all the eligibility conditions like age, educational qualification, category, status etc as on January 4, 2012 and physical and medical standards as laid down in the notice of the examination. Candidates not fulfilling the eligibility conditions will not be allowed to appear in medical examination. Candidates will undergo Medical Examination in which they would be declared either “FIT” or “UNFIT” only.

14. It is not in dispute that the respondent appeared before the Medical Board/MO for BME on July 20, 2012 and the petitioner was declared fit in the said medical examination.

15. The Hon’ble Supreme Court in *Prafulla Kumar Swain* (supra) held that the term “recruitment” connotes and clearly signifies enlistment, acceptance, selection or approval for appointment. In contra distinction the word “appointment” was held to mean the actual act of posting a person to a particular office. The Hon’ble

Supreme Court further held that recruitment is just an initial process that may lead to eventual appointment in the service but that cannot tantamount to an appointment.

16. Thus, the Hon'ble Supreme Court in the aforesaid decision pointed out the real distinction between the term "recruitment" and "appointment". Applying the aforesaid legal principle this Court is of the considered view that upon being declared fit by the Medical Board/MO before whom the petitioner appeared for DME on July 20, 2012, petitioner became eligible to be appointed and it ultimately led to appointment in the service. By applying the said well settled legal principles, this court holds that it shall be deemed that approval for appointment which is a stage of recruitment process was given on July 20, 2012 that is the date when he appeared before the Medical Board/MO for DME and was ultimately declared to be fit for appointment in service.

17. The new policy guidelines on recruitment or retention in respect of Central Armed Police Forces(CAPFs) and Assam Rifles (ARs) personnel having defective vision including colour blindness was issued on February 27, 2013. The said policy guidelines is necessary for the purpose of deciding this appeal and as such the same is reproduced in full-

"D) Now, in the backdrop of the above discussion, the policy of 27th February, 2013 requires to be reproduced in full:-

"The standing policy of the Government is that only persons who are fully fit in all respects i.e. in SHAPE-I are to

recruited to the CAPFs and AR. It is and has always been the standing policy of the Government that if any member of the CAPFs & AR is declared permanently unfit while in service, he is boarded out from service. The reasons for this are very clear. The personnel of the CAPFs and AR are issued with lethal weapons and are expected to use lethal force against insurgents and terrorists. If any of the personnel of the CAPFs and AR is not fully fit, he will either not be able to protect himself or his colleagues in a battle with insurgents/terrorist groups or he will run the risk of killing innocent people especially if his eyesight is weak and he cannot distinguish between uniforms, etc. The policy of boarding out personnel who had been declared unfit applies to all types of unfitness whether it be unfitness in physical parameters or in any other SHAPE component and that is how it should have remained. However, in the years 1991,, 1997, 2002, 2008,2011 and 2012, various orders were issued saying that those who had been recruited prior to a particular date and were found to be colour blind at a later stage, would not be boarded out while those recruited after that would be boarded out. This marked a departure/an exception from the standing policy and departure exception was not in the public interest- these departures were also bad in law because no policy could apply retrospectively. For the above reasons, it has been decided as follows :-

(i) The circulars/orders/instructions issued by the Ministry of Home Affairs or by any of the Central Armed Police Force (CAPF) & Assam Rifles (AR) vide communication No. R.II-31/91-E-II dated 16.5.1991, No. R.II-31/97-E-II dated 12.6.1997, No. I-45020/52/2001- Pers-II dated 17.5.2002, No. I- 45024/1/2008-Pers-II dated 29.10.2008, No.I-45024/1/2008- Pers-II Dated 11.3.2011 and No.I-45024/1/2008-Pers-II dated 08.12.2008-Pers-II dated 08.12.2011,are withdrawn with immediate effect. Further, any reference to the colour blindness especially Para-5 & 6, including those for the gazetted officers contained in New

Visual Standard Policy No.I-45024/1/2008- Pers-II dated 18.5.2012 also stands withdrawn with immediate effect :

(ii) Any person who has defective vision or is colour blind will not be recruited in future. If any person is wrongly recruited despite having defect in vision or despite being colour blind, he will be promptly removed from service as soon as the defect is noticed. The Doctor who declared him fit will be proceeded against in Departmental Proceedings for major penalty. The person who was wrongly recruited will not be allowed to continue to take advantage of this wrong act, and the Govt. cannot be bound by the wrong act of any of its functionaries.

(iii) It is however, clarified that the present directions will only apply prospectively. Those personnel recruited earlier and thereafter found to be colour blind will not be boarded out on account of colour blindness. But, it is reiterated that, any person recruited herein after, if found colour blind even after recruitment shall promptly be boarded out of service. Keeping in view the directions of the Hon'ble High Court and in the public interest, the services of the colour blind personnel recruited prior to 18.05.2012, would be utilized for the jobs where public safety issues are not involved. Some of the posts/cadres identified for such personnel by CAPFs are enlisted in the Annexure-I.

(iv) As the Colour Blindness is a congenital disease, to obviate the induction of colour blind personnel in CAPFs & Assam Rifles by error or by manipulation in any of the future recruitments, an undertaking shall be taken from all the selected candidates at the time of joining that if at any stage of their service career, if they are found to be colour blind, they will be boarded out as per the SHAPE Policy in vogue.

This issues with the approval of Union Home Secretary."

18. It is evident from the said circular dated February 27, 2013 that the directions contained in the said circular will apply prospectively. It was further mentioned therein that keeping in view the direction of the Hon'ble High Court and in the public interest, the services of the colour blind personnel recruited prior to 18.05.2012 would be utilised for the jobs where public safety issues are not involved. Thereafter, a clarificatory circular was issued on May 28, 2013 which would be relevant for the purpose of deciding the instant appeal and the same is also reproduced below-

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*Government of India
Ministry of Home Affairs
Pers-II Desk*

Subject: New Policy Guidelines on recruitment/retention in respect of Central Armed Police Forces (CAPFs) and Assam Rifles (ARs) personnel having defective vision including colour blindness regarding.

Reference BSF's UO No. 29/40(WO)/2013-stt/10399 dated 18.04.2013 on the above mentioned subject seeking clarification whether the personnel recruited between the date 18.5.2012 to 27.2.2013 and at later stage detected to be suffering from colour blindness are also to be boarded out or will be retained in service.

2. The matter has been considered in this Ministry. It is clarified that, personnel recruited earlier to 27.2.2013 would not be boarded out. But any person recruited thereafter (i.e., after 27.2.2013) if found colour blind even after recruitment, shall promptly be boarded out of service.

(R.P.Sati)

*Under Secretary to the Govt. of India
23092343*

*DG,BSF:{ Shri Dharmendra Pareek DIG(Estt)}
MHA UO No.[-45024/1/2013-Pers-II dated 28th May 2013”*

19. It is further evident from the said memo dated May 28, 2013 that the concerned ministry after considering the issue as to whether the personnel recruited between 18.05.2012 to 27.02.2013 and at a later stage was detected to be suffering from colour blindness are also to be boarded out or will be retained in service, clarified that personnel recruited earlier to 27.02.2013 would not be boarded out but any person recruited thereafter (i.e., after 27.02.2013) if found colour blind even after recruitment shall promptly be boarded out of service.
20. The new policy guidelines dated February 27, 2013 as well as the clarificatory circular dated May 28, 2013 used the term “recruitment” and not “appointment”.
21. The recruitment process for recruitment of such personnel is a lengthy process involving various stages. It involves physical efficiency test as well as eye sight verification in course of DME and a candidate in order to be declared fit in DME has also to possess high colour vision. Undoubtedly a candidate being declared fit in DME had to undergo all the tests including physical efficiency test and eye sight test and only thereafter the final approval for appointment is given. This might be the reason for the authorities to use the term “recruitment” in the aforesaid circulars instead of “appointment” as appointment only means the act of posting a person to a particular office in terms of the approval for appointment. Once approval is granted the rest is a matter of formality. It is well settled that the circulars issued by the

authorities has to be given its true meaning. Since the authorities consciously used the term recruitment in the aforesaid circulars, this court has to interpret the same so that the intention behind issuance of such circular is not frustrated. Therefore, this court is of the considered view that in order to decide as to whether such personnel is to be boarded out or retained, the date of recruitment and not the date of appointment would be a relevant factor.

22. Since this court already held that the petitioner shall be deemed to have been recruited on July 20, 2012, the case of the petitioner is squarely covered under the clarificatory circular dated May 28, 2013 as the recruitment of the petitioner took place earlier to 27.02.2013. Thus, this Court is of the considered view that the petitioner could not be boarded out and the authorities are to consider the claim of the petitioner for utilization of his services in jobs where public safety issues are not involved in terms of the policy guidelines issued on 27.02.2013 read with the clarificatory circular dated 28.05.2013.

23. Mr. Majumdar, in course of his submission, sought to rely upon reports and certificates of various institutions which according to the petitioner, are reputed institutes in the field of ophthalmology in order to satisfy this Court that the writ petitioner does not suffer from colour blindness as held by various medical boards of the BSF authorities. Since the petitioner has not challenged the judgment and order dated July 5, 2017 passed by the learned Single Judge, this Court is not inclined to enter into such disputed factual issues

in this appeal keeping in mind the well settled principles that the appellants cannot be made worse-off in their own appeal.

24. In view of the findings rendered by this Court hereinbefore it is not necessary to dilate on the issue as to the validity of imposition of the cut off date in this appeal as argued by Mr. Majumdar.

25. Though, this Court does not fully agree with the reasoning assigned by the learned Single Judge in support of the conclusions arrived at while disposing of the writ petition but the ultimate conclusion arrived at by the learned Single Judge is approved by this Court for the reasons as aforesaid. This court accordingly holds that the judgment and /or order dated July 5, 2017 directing the concerned respondent no. 3 in the writ petition to revisit the claim of the writ petitioner/respondent herein in the light of the beneficial provisions for utilisation of his services in jobs where public safety issues are not involved does not suffer from infirmity and as such the same is not interfered with by this court. The appeal being FMA 1798 of 2018 stands dismissed without, however, any order as to costs. Since the time limit fixed by the learned Single Judge to complete the exercise as directed by the impugned judgment and order has expired in the meantime and this appeal against the said judgment and decree was pending before this Court for a long time, the time to complete the entire exercise stands extended by four weeks from the date of obtaining a server copy of this order.

26.Let the original case file in connection with this matter be returned to the learned advocate for the appellants forthwith.

27.Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties on priority basis.

I agree.

(T.S. Sivagnanam, J.)

(Hiranmay Bhattacharyya, J.)