



2024:DHC:5946-DB



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

Date of Decision:- 08.08.2024

+ W.P.(C) 15759/2022

PAWAN KUMAR

....Petitioner

Through: Mr.Vikas Kumar with Mr.Arun
Kumar, Mr.Pranjal Srivastava, Ms.Vidhanshi
Kamalia, Advs.

versus

UNION OF INDIA THROUGH ITS SECRETARY & ANR.

.....Respondents

Through: Mr.Ajay Digpaul, CGSC with
Mr.Kamal Digpaul, Ms.Akanksha Kumari,
Advs Mr.Nitin Chaturvedi, DC/BSF

CORAM:

HON'BLE MS. JUSTICE REKHA PALLI

HON'BLE MS. JUSTICE SHALINDER KAUR

REKHA PALLI, J(ORAL)

1. The petitioner, who is working as Deputy Commandant (Executive) with the Border Security Force (BSF) has approached this Court by way of the present petition under Article 226 of the Constitution of India to seek quashing of order dated 03.08.2022 insofar as it excludes the name of the petitioner for grant of Non-Functional Financial Upgradation (NFFU) in the JAG level w.e.f. 01.04.2017. Consequently, the petitioner seeks a direction to the respondents to grant him the benefits under the NFFU in the JAG level w.e.f. 01.04.2017 along with up-to date arrears and interest.



2. Before dealing with the rival submissions of the parties, it would be apposite to note the brief factual matrix of the case as emerging from the record.

3. The petitioner, on 29.09.2005, joined the Border Security Force (BSF) as an Assistant Commandant and was subsequently promoted to the rank of Deputy Commandant on 01.04.2012. Even after his promotion as Deputy Commandant, the petitioner who had been posted in the Law Branch at the Headquarters, Punjab Frontier, a static posting, since 12.04.2010 was retained in the same position. Consequently, he continued to discharge his duties in the Law Branch, Punjab Frontier Headquarters till 06.08.2013 whereafter he was transferred to the Law Branch at Frontier Headquarters, Gujarat where he continued to serve till 10.05.2017. It appears that while the petitioner was still posted at Gujarat, he made a request for being posted to the Law Branch, BSF Headquarters, Delhi. In response whereeto, the petitioner was vide letter dated 18.04.2017 informed that in case, his request for continuance in the Law Branch was accepted, the same would not count towards field service. He was further informed that as per the BSF Group "A" (General Duty Officers) Recruitment Rules, 2017 (Rules), two years Mandatory Field Service (MFS) as a Deputy Commandant was a pre-requisite for promotion to the next higher rank/grade.

4. On receipt of this communication, the petitioner furnished an undertaking wherein he clearly stated that he was willing to be posted at the headquarters and was aware that his service at the said location would not count towards MFS which was a pre-condition for promotion from the rank of Deputy Commandant to Second in Command as per



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the Rules. Consequently, the petitioner, was transferred to the Law Branch, BSF Headquarters, Delhi w.e.f. 11.05.2017, where he continued to serve till 31.08.2021 before being transferred to Shillong.

5. While the petitioner was serving at the Law Branch in Delhi, the Ministry of Personnel Public Grievances and Pensions, on 12.07.2019, issued an OM extending the benefits of NFFU to the Group “A” Executive Officers of the CAPF w.e.f. 01.01.2006. This benefit was to be extended in accordance with the conditions laid down in the OM dated 24.04.2009 issued by the Department of Personnel and Training (DoPT) as per which whenever an IAS officer of State or Joint Cadre was posted at the Centre to a particular grade carrying a specific Grade Pay in PB-3 & PB-4, officers belonging to batches of Organized Group “A” Services who were two years senior or more and had not been promoted to the higher grade, would be granted the same grade on non-functional basis (NFFU) from the date of posting of the IAS officer in that particular grade at the Centre.

6. However, since as per OM dated 24.04.2009, the benefit of NFFU was available only to those officers who were found to be eligible for promotion but had not been granted promotion for want of vacancies in the promotional cadre, the petitioner, like all other Group “A” CAPF officers was required to fulfill the requirements of the Rules. As per these Rules, for promotion from Deputy Commandant to Second-in-Command (JAG level), an officer was required to be in Medical Category Shape-I and completed 10 years’ service as a Group “A” officer, besides qualifying the pre-promotional course as prescribed by the Director General (DG) of BSF. Further, he was also required to



complete two years of MFS as Deputy Commandant in a Duty Battalion.

7. It is the admitted case of the parties that the petitioner completed the qualifying period required for the grant of NFFU on 01.04.2017 and had duly completed the pre-promotional course i.e. Junior Command Course between December, 2016 to February, 2017. Further, he was in Medical Category Shape-I, but had not completed two years of MFS in a Duty Battalion as Deputy Commandant. Apprehending that he may be treated as ineligible for grant of NFFU for not having the requisite MFS as a Deputy Commandant, the petitioner submitted an application to the DG, BSF/ respondent no.2, seeking relaxation of the requirement of two years MFS in the rank of Deputy Commandant (Law) for promotion to the next higher rank and grant of NFFU. The petitioner's plea before the respondent no. 2 was that after his promotion as Deputy Commandant, he was, in public interest, retained in the Law Branch initially at the Punjab Frontier, Jalandhar and thereafter at the Frontier Headquarters, Gujarat and therefore, was not able to complete MFS of two years only on account of service exigencies and should therefore be granted relaxation in terms of Rule 12.

8. Upon consideration of the petitioner's application, the respondent no.2 vide his order dated 05.08.2021, granted the requisite relaxation to the petitioner in MFS in the rank of Deputy Commandant for all purposes including NFFU. On 03.08.2022, the respondent no.1 in accordance with the Ministry of Personnel Public Grievances and Pensions' OM dated 12.07.2019 considered the cases of all eligible Deputy Commandants for grant of NFFU which included not only the



batch mates of the petitioner but also the persons who had been promoted as Deputy Commandant as late as in 2007. Upon finding that his name had been excluded from the list of selected candidates, the petitioner submitted a representation dated 09.09.2022, which remained unanswered, compelling him to approach this Court.

9. In support of the petition, learned counsel for the petitioner, by placing reliance on the decision of this Court in ***“Ashok Kumar &Ors vs Union of India &Ors”*** WP(C) 21900/2005 submits that once the petitioner was, in public interest, posted by the respondent no.2 to different Law Directorates, he could not be penalized for not being able to complete MFS before the cutoff date of 01.04.2007. This decision, he submits was followed in ***S. Arul Raj v. UOI[W.P.(C)2266/2011]*** and ***SI/GD Ghaman Singh v. UOI[W.P.(C)80416/2011]***, wherein this Court reiterated that officers who could not complete the MFS due to being posted in static locations in public interest, ought to be granted relaxation under Rule 12.

10. In the light of these decisions of this Court which were unsuccessfully assailed before the Apex Court, the respondent no.1/Ministry of Home Affairs took a considered decision on 02.06.2012 to grant similar relaxation in appropriate cases and issued detailed guidelines in this regard. Further, this power to grant relaxation in MFS, was specifically delegated to the respondent no.2/the DG, BSF, for which purpose he draws our attention to para 5 (i) of the guidelines dated 02.06.2012, which reads as under:

“5 It has been decided that since MFS is the operational requirement for the Force to hold higher responsibilities, doing away with the requirement of 44 MFS from the Recruitment Rules



Itself will adversely affect the operational efficiency and functional effectiveness of these CAPFs & ARs. Therefore, all such cases wherein the CAPFs & ARs personnel concerned, has not completed the MFS, while his name is being considered for promotion to the next rank, the (waiver/relaxation of such eligibility condition should be considered by the CAPFs/MHA objectively and sympathetically. CAPFs & ARs may follow the following guidelines, while considering such waiver/relaxation of the MFS condition prescribed in the RRs :

(i) Those CAPFs & ARs personnel who could not be posted to Duty Battalion, due to exigency/requirements of CAPFs In the Interest of the work of the Force or due to other technical reasons/grounds, cases of such CAPFs & ARS personnel will be duly considered by the DG of the, CAPF concerned, for granting Waiver/relaxation In the Mandatory Held Service.”

11. By placing reliance on the aforesaid directions issued by the respondent no. 1, he contends that once the DG/respondent no.2, had been authorized to grant relaxation in MFS to BSF officers by taking into account the facts and circumstances of each case, the respondent no. 1 could not override or ignore the said relaxation. The petitioner, he submits, was granted the requisite relaxation by respondent no. 2 after due consideration of the reasons due to which he after being promoted as Deputy Commandant on 01.04.2012 had been posted to Law Branches across the Country and not to Duty Battalion. Furthermore, after the requisite relaxation had been granted to the petitioner by respondent no. 2, the respondent no.1 could not have held that he was not meeting the eligibility criteria for grant of NFFU. Finally, he submits that the reliance placed by the respondent no.2 on the undertaking given by the petitioner on 18.04.2017 is wholly immaterial as the petitioner's eligibility for grant of NFFU has to be examined with reference to 01.04.2017 before which date he was not granted any



opportunity to complete MFS of two years and was in public interest retained in Law Branches. He, therefore, prays that the writ petition be allowed.

12. *Per contra*, Mr. Ajay Digpaul, learned counsel for the respondents while not disputing that the respondent no.2 had granted relaxation in the MFS to the petitioner, seeks dismissal of the writ petition by urging that once the petitioner had given an undertaking on 18.04.2017 that he was aware that he was required to complete the two years MFS for being considered for promotion to the next higher rank, he cannot now claim that he was not given the opportunity to complete MFS before 01.04.2017. The petitioner having voluntarily accepted his postings to static locations, cannot now be permitted to turn around and contend that the fault lies with the respondents in not posting him to Duty Battalions to enable him to complete the requisite MFS.

13. After some arguments, he does not deny that the respondent no.1 had authorized the respondent no.2 to grant relaxation in appropriate cases for considering BSF officers for promotion. He also does not dispute that the respondent no. 2 had on 05.08.2021 granted relaxation in MFS to the petitioner for the purposes of promotion as also for NFFU. He, however, contends that merely because the respondent no. 2 had granted relaxation to the petitioner for promotion, it would not imply that the said relaxation was *ipso facto* applicable for grant of NFFU as well. Finally, he submits that the petitioner's plea regarding discrimination to him, is also misplaced as the relaxation inadvertently granted to some similarly placed officers is also being reviewed shortly. He, therefore, prays that the writ petition be dismissed.



14. Having considered the submissions of learned counsel for the parties and perused the record, we find that the question for our determination in the present case lies in a very narrow compass as we find that the parties are *ad idem* on the factual matrix. As noted hereinabove, the respondents do not deny that the petitioner had completed the qualifying service for grant of NFFU in JAG level on 01.04.2017 as also qualified the pre-promotional courses. Further, he was in medical category SHAPE-1. The only reason why the petitioner has been denied NFFU is that he had not completed the two years MFS, which is a pre-condition for promotion from the rank of Deputy Commandant to Second in Command as per the Rules.

15. The submission of the petitioner however is that he could not complete the MFS as taking into account his legal qualifications his services were in public interest being utilized at different Law branches at different Frontiers across the Country, initially at Punjab and thereafter at Frontier Headquarters, Gujarat. Once the respondents admit that the petitioner was posted at these static locations because of his specialized legal knowledge and not because of any request made by him, the petitioner is justified in urging that just because he obeyed the lawful orders of postings issued under the directions of respondent no. 2, he cannot be penalized by denying his rightful claim for NFFU. As an employer it was the duty of respondent no. 2 to ensure that all Force personnel are posted in such a manner that they are not rendered ineligible for promotion by complying with the posting orders issued by respondent no.2 without making any requests for being posted to Duty Battalions. We are, therefore, of the view that the petitioner could not



have been penalized for not been able to complete two years' MFS before 01.04.2017 and this is a fit case for exercise of power of relaxation under Rule 12.

16. The respondents have vehemently urged that the petitioner who is a Group A officer was expected to be aware that he was required to do two years' MFS for earning promotion and therefore ought to have made representation for being posted to Duty Battalions. This plea of the respondents to say the least, overlooks the fact that it is not open for Officers or Personnel in the Forces to seek their posting at a particular location. On the other hand, the petitioner is justified in urging that when the respondent no. 2 in the interest of the Force, decided in public interest to post the petitioner to Law Branches i.e. static locations, it is not open for the respondents now to claim that it is the petitioner's fault for not been able to complete MFS.

17. Even otherwise, in our view, it is for the respondents to ensure while managing the posting profile of the members of the Force to ensure that they are allocated postings in such a manner that none of them are rendered ineligible for promotion unless they choose to specifically request for static posting in which case they must be informed that they may be rendered ineligible for promotion on account of MFS. Further we find that the fact that his service at the Law Branch in Delhi where he was being posted at his request from May, 2017 would not be counted as MFS, was communicated to the petitioner only on 18.04.2017. Admittedly, no such communication was given to the petitioner till 01.04.2017 when he otherwise became eligible for grant of NFFU. The respondents therefore cannot be permitted to urge that



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the petitioner was himself responsible for not being able to complete MFS before 01.04.2017 when he was otherwise eligible for NFFU.

18. We also find merit in the petitioner's plea that the relaxation granted by respondent no. 2 could not have been ignored by respondent no. 1. From the counter affidavit, we are unable to discern any justifiable reason as to why the respondent no.1 has rejected the specific recommendations for relaxation made by the respondent no.2. In our considered opinion once the respondent no.1 has delegated the power of relaxation to the respondent no.2, it is expected to follow the advice given by the said respondent. It is respondent no. 2 who is conversant with the requirements of the Force and is required to take a decision as to which Officer is to be posted at which location. In the present case, taking into account the qualifications of the petitioner, he was, in public interest, under directions of respondent no. 2, posted to static locations for which he cannot be blamed.

19. In fact, the rejection by the respondent no.1 of the relaxation in MFS granted to the petitioner by respondent no. 2 would not only be contrary to own guidelines dated 12.07.2019, but would also amount to penalizing the petitioner for obeying the lawful orders issued by the respondent no.2. We may note that it is not even the respondents' case that any time before 01.04.2017, the petitioner was ever posted to any Duty Battalion or that he had made any request for seeking posting to static location.

20. In the light of the aforesaid, we have no hesitation in holding that the decision of respondent no. 1 to hold the petitioner as being ineligible for grant of NFFU in JAG level w.e.f. 01.04.2017 was arbitrary and is



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unsustainable. The decision of respondent no. 1 to ignore the order for grant of relaxation passed by respondent no. 2 is accordingly set aside.

21. The writ petition is therefore allowed by directing the respondent no.1 to re-consider the petitioner's case for grant of NFFU in the JAG level w.e.f.01.04.2017 by taking into account the relaxation in MFS granted by respondent no. 2 on 05.10.2021. The petitioner's case for NFFU will be considered by examining the relevant promotion criteria as per Rules, he will, however, not be held ineligible for not having completed MFS of two years as Deputy Commandant. We direct that the exercise in terms of this order be carried out within eight weeks. In case the petitioner is found eligible for grant of NFFU, arrears in terms of this order will be released in his favour within four weeks thereafter. In case, the arrears are not paid within the time so granted, the same will bear interest @ 6% p.a.

(REKHA PALLI)
JUDGE

(SHALINDER KAUR)
JUDGE

AUGUST 8, 2024
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