

\$~9

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

+ **W.P.(C) 6037/2021**

KAVENDRA SINGH SIDDHU Petitioner

Through: **Mr. Aditya Hooda, Advocate.**

versus

UNION OF INDIA & ANR. Respondents

Through: **Mr. Jivesh Kumar Tiwari,**
Senior Panel Counsel with Mr.
Shoumendu Mukherji, GP for
Union of India.

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

ORDER

%

02.07.2021

(Video-Conferencing)

per C. HARI SHANKAR, J.

1. The petitioner joined the Border Security Force (BSF) on 10th April, 1997. In December, 2007 he was detected HIV+. The petition avers that, as a consequence, he was placed in the Low Medical Category and was not promoted. Since the day of his detection as HIV+, the petitioner has been posted at Gandhinagar, Kolkata and Delhi. He has been posted at Headquarters, New Delhi since 2017.

2. Owing to his affliction, the petition avers that the petitioner is undergoing Mega Highly Active Retroviral Therapy at the base hospital and at the All India Institute of Medical Sciences (AIIMS) at New Delhi. Owing to his medical condition, the petitioner was permitted to work from home from 22nd May, 2020, consequent on the onset of Covid-19 Pandemic.

3. The petitioner is aggrieved by an order dated 9th June, 2021 which posts him to the 134 Battalion of the BSF at Cachar, Assam, located on the Indo-Bangladesh Border. As travelling to Cachar, Assam and discharging duties would be severely deleterious to the petitioner's health, and could also imperil his life, the petitioner applied for voluntary retirement on 9th June, 2021. The application was returned on the ground that there were certain formal defects therein, and the petitioner re-applied for voluntary retirement on 16th June, 2021. It is a conceded position, *ad idem* between the parties, that the rules applicable to the BSF permit BSF personnel to apply for voluntary retirement on 90 days' notice. As such, the petitioner sought voluntary retirement with effect from 30th September, 2021. He also addressed a separate representation on 16th June, 2021, seeking suspension of the order transferring him to Cachar, Assam.

4. The petition avers that no decision on the petitioner's application for voluntary retirement or his representation against his transfer order has been received by him till date. Instead, on 22nd June, 2021, a movement order was issued by the respondent, relieving the petitioner of his duties at Delhi with effect from 21st June, 2021 and directing him to report at

Cachar, Assam on or before 5th July, 2021.

5. It is in these circumstances that the petitioner has moved this Court. The prayer clause in the writ petition reads as under:

“In view of the foregoing facts and circumstances, this Hon’ble Court may graciously be pleased to:

a. Issue a Writ, order or direction in the nature of Certiorari quashing order dated 09.06.2021 (Annexure P-7) whereby the petitioner has been posted to 134 Bn BSF currently deployed at Cachar, Assam; and

b. Issue a Writ, order or direction in the nature of Certiorari quashing movement order dated 21.06.2021 (Annexure P-11) whereby the petitioner has been relieved from BSF HQ, New Delhi and directed to report at 134Bn BSF by 05.07.2021; and

c. Issue a Writ, order or direction in the nature of Mandamus directing the Respondents to process the voluntary retirement of the petitioner as per 023 the applicable rules without requiring the petitioner to go to 134 Bn BSF posted at Chachar, Assam; and

d. Pass any other/ further order(s) or direction(s) as this Hon’ble Court may deem fit and proper in the interest of justice.”

6. On the last date of hearing, i.e. 30th June, 2021, Mr. Jivesh Tiwari, learned Counsel for the respondent had requested that the matter be re-notified for today, stating that possibly the petitioner’s grievance might be assuaged at an administrative level. That, however, unfortunately, has not come to pass and, today, Mr. Jivesh Tiwari has contested the petition with all the vehemence at his command.

7. Mr. Jivesh Tiwari submits that the petition deserves to be dismissed outright. He submits that the petitioner was well aware that, at the time of his posting at Delhi, that it was for a specific tenure and that, in fact, the petitioner has already been granted one year extension. Apropos the VRS application submitted by the petitioner, Mr. Tiwari submits, in the first instance that the petitioner ought to have submitted the application at Cachar, Assam to the 134 Battalion as he stood transferred to the said office and that, therefore, the very submission of the application to the Headquarter at New Delhi was irregular. Even while acknowledging the fact that BSF personnel could apply for voluntary retirement at any point of time, Mr. Jivesh Tiwari submits that the petitioner ought, in good faith, to have submitted his application of VRS at least three months before the expiry of his tenure so that this Court would not be burdened with a petition such as this.

8. He further submits that there are as many as 17,129 BSF personnel who are in the Low Medical Category, of which 16,029 suffer from chronic diseases and 667 suffer from HIV. He, however, is unable to enlighten the Court as to whether the said 667 HIV+ BSF personnel are posted at stations where they do not have regular access to specialist facilities to treat the ailment.

9. *Qua* the petitioner's HIV affliction, Mr. Jivesh Tiwari submits, further, that the petitioner was diagnosed with HIV as far back as in 2007, but is posted in Delhi only since 2017. As such, he submits that the petitioner cannot, of right, claim a posting at Delhi. He submits that, as per his instructions, a government medical college is available at Silchar within 10 kms of Cachar, where the petitioner has been posted.

10. The final nail in the coffin of the petitioner's case, according to Mr. Jivesh Tiwari is the fact that the replacement of the petitioner has already joined at Delhi as a result of which there can be no question of continuing to accommodate the petitioner at Delhi. He, however, is unable to enlighten the Court as to whether the replacement joined Delhi before or after the issuance of movement order to the petitioner on 21st June, 2021.

11. Mr. Hooda, learned Counsel for the petitioner invited our attention to the guidelines issued by the Ministry of Home Affairs (MHA) on 28th September, 2017 which have been placed on record and as per which the following criteria have been prescribed for posting of personnel who are in the P-3 medical category i.e. persons who have major disablement with limited physical capacity and stamina:

“Fit for sedentary duties not involving undue stress. May have restricted employability as advised by medical authorities such as:-

- a. To avoid places with high humidity level 75% round the year.
- b. Have access to specialist services nearby.
- c. To avoid driving/handling of weapons near water, fire or heavy machinery.
- d. Restricting physical excess, work in desert/snow bound areas etc.
- e. Restricting active participation in hostilities, counter insurgency operations etc. (excluding staff, logistics and allied support duties)”

12. Mr. Hooda submits that, therefore, even as per the extant guidelines, the petitioner, as a P-3 medical category personnel, cannot be posted in a place which has humidity levels of 75 % round the year and cannot be posted in a place which does not have access to nearby specialist services.

The categorisation of the petitioner as P-3 is vouchsafed by the certificate at page-75 of the Paper Book to which Mr. Hooda drew our attention. This fact, indeed, is not disputed by Mr Tiwari either. Nor does Mr Tiwari dispute the applicability of the aforesaid MHA guidelines.

13. In response to the submission of Mr. Tiwari that the petitioner has been posted at Delhi only since 2017, Mr. Hooda submits that, since he was detected HIV+ in 2007, the petitioner has always been posted in a place which has nearby access to specialist HIV treatment facilities, *viz.* Delhi, Gandhinagar and Kolkata. Mr. Hooda also invited our attention to the medical certificate at page 31 of the Paper Book, which reflects the petitioner CD4 count as 215 which, according to Mr. Hooda, represents a borderline case of an HIV+ person who would progress to the stage of being an AIDS patient, which would increase, as a matter of course, the possibility of mortality manifold.

14. In view of the submission made by Mr. Hooda regarding the guidelines dated 28th September, 2017 of the MHA, the Court queried of Mr. Tiwari as to whether the place to which the petitioner was being transferred i.e. Cachar, conformed to criteria A and B governing the places to which P-3 category personnel would be posted, i.e. at which humidity level is less than 75 % round the year and which has access to specialist services nearby. To both these queries, the only submission of Mr. Tiwari is that there happens to be a government hospital within 10 kms of the place to which the petitioner has been posted. As to whether the said government hospital has the ART facilities to treat HIV+ patients, Mr. Tiwari has no instructions, except to state that it is a medical college.

Later, however during dictation of the order, Mr Tiwari submitted that he had just received telephonic intimation that the Government hospital did have the facility to treat HIV+ patients. As to whether the hospital has Mega Highly Active Retroviral Therapy facilities, which the petitioner requires, however, Mr Tiwari is unaware.

15. On the last date of hearing, we were hopeful that a more compassionate approach would have been adopted by the respondents, keeping in view the medical condition of the petitioner; nevertheless, the respondents have chosen to contest the petition.

16. The fact that the petitioner has been HIV+ since 2007 i.e. for nearly a decade and a half as on date is not disputed.

17. It is a matter of common knowledge that, over a period of time, HIV being a progressive disease, the condition of the patient usually deteriorates. In this context, Mr. Hooda has also pointed out that the petitioner has a CD4 count of 215, which is a borderline count between HIV and AIDS.

18. The MHA guidelines dated 28th September, 2017 clearly require that P-3 category BSF personnel be posted at a place which has a humidity level of less than 75 % round the year and has access to specialist services nearby. To merely state that there is a medical college which has ART facility (which, too, is merely a telephonic instruction received during the course of hearing) at a distance of 10 km, in a place such as Assam, can hardly reflect compliance with the mandate of the guidelines dated 28th September, 2017.

19. Justice, it is well settled, has to be tempered with mercy and compassion. Justice to which mercy is alien is no justice at all. Our preambular goal is, moreover, not “law”, but “justice”, and law, and its administration must, consequently, defer, in any and every instance, to the dictates of justice. Within the confines of the law, compassion must inhere in the approach of every court which practices equity.

20. The petitioner does not insist on retaining posting at Delhi. He has, very fairly and at the cost of his career, agreed to voluntarily retire, in accordance with the BSF Rules and the procedure stipulated in that regard therein. He applied, for such retirement, on the very day when the transfer order was issued, i.e. 9th June, 2021. He re-applied on 16th June, 2021, on being asked by the respondent to do so. We cannot appreciate the insistence of the respondent on the petitioner joining duty at Cachar, in his precarious medical condition, even while keeping the application pending.

21. In view thereof, we are of the opinion that, given the peculiar circumstances in this present case, till the next date of hearing the petitioner is entitled to a stay of operation of the impugned order transferring him to Cachar as well as the movement order relieving him for the said purpose.

22. We have noted Mr Tiwari’s submission that the petitioner’s “replacement” has been posted. To a pointed query from the Court as to whether this took place even before issuance of movement order to the petitioner, however, Mr Tiwari has no answer. Besides, given the fact that the petitioner had applied for voluntary retirement on 9th June, 2021, this fact cannot, in our view, inhibit the grant of *ad interim* succour to the

petitioner.

23. Accordingly, issue notice in the writ petition to show cause as to why rule *nisi* be not issued.

24. Notice is accepted by Mr. Jivesh Kumar Tiwari on behalf of respondent. Counter affidavit be filed within four weeks with advance copy to learned Counsel for the petitioner, who may file rejoinder, if any, before the next date of hearing.

25. It appears that, the writ petition is not accompanied with an application for stay. The power of the Court to pass appropriate orders, to aid the final order which can be passed by it, stands settled by Supreme Court as far back as in *I.T.O. v Mohd Kunhi*¹. That apart, Mr. Hooda while sincerely apologising for having failed to the stay application, submits that, given the circumstances of the present case, his client should not be prejudiced owing to this default on the part of Counsel. In the circumstances in which the petitioner is placed, we are inclined to treat this default leniently. Accordingly, *subject to the petitioner filing during the course of the day, an application for stay after serving an advance copy thereof by e-mail to Mr. Tiwari*, the operation of the impugned order dated 9th June, 2021, posting the petitioner at 134 Battalion BSF Cachar, Assam as well as the consequent order dated 22nd June, 2021 relieving the petitioner from Delhi and directing him to report at Cachar, Assam, shall stand stayed till the next date of hearing.

¹ AIR 1969 SC 430

26. Re-notify on 6th September, 2021.

**C. HARI SHANKAR, J.
(VACATION JUDGE)**

**SUBRAMONIUM PRASAD, J.
(VACATION JUDGE)**

JULY 2, 2021/hd

सत्यमेव जयते