

THE HIGH COURT OF MADHYA PRADESH**WP-14841-2021***(KAMLESH SHARMA Vs THE STATE OF MADHYA PRADESH AND OTHERS)***GWALIOR; dated 12.08.2021.**

Shri Prashant Sharma, counsel for the petitioner.

Shri Aijaj Quraishi, GA for the respondent/State.

With the consent of parties, the matter is finally heard.

Challenge is being made to the order dated 5.8.2021 passed by respondent no.2 whereby, the petitioner has been transferred from Gwalior to Panna.

It is submitted that the action of the respondents is clearly against the public policy and contrary to the transfer policy and Article 14 and 16 of the Constitution of India. It is argued that the petitioner was appointed as Assistant Grade III from handicap quota vide order dated 2.6.1996 by the respondent No.3. The petitioner is having 45% disability as is clear from the certificate issued from the State Govt. and the department with respect to her disability. The General Administration Department has introduced a policy of transfer of employees on 24.6.2021 and as per Clause 22 of the transfer policy, the person having more than 40% disability generally should not be transferred. It is submitted that she is due for retirement after five years and is difficult for her to go at a distant place like Panna carrying 45% disability. She is having cervical problem and remains under regular treatment at Gwalior. Husband of the petitioner is working as Asstt. Grade I who has also been transferred from Gwalior to Panna vide impugned order and he has only eleven months left for his retirement.

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It is submitted that as the transfer of the petitioner to such a distant place, is contrary to the policy introduced by the government with respect to the transfer of handicap employee, she had preferred a detailed representation to the authorities but the same is not decided till date. She has relied upon the judgment passed by the coordinate Bench of this Court at Indore in **W.P.No.148 of 2017 (Sudhanshu Tripathi Vs. Bank of India and Others)** vide order dated 27.4.2018 with respect to the transfer of the handicapped person carrying 45% disability. The court has interfered with the matter and the petition was allowed and the transfer order was quashed. It is argued that the similar are the facts and circumstances in the case of the petitioner. It is further pointed out that the Parliament considering the disability of the employees have introduced a policy known as The Right of Persons with Disabilities Act, 2016 (hereinafter would be referred as to the 'Act of 2016') and as per statement of object and reasons for enactment, considering the disabilities of the employees and the difficulties being faced by them, the policy was introduced for consideration of the employees carrying disability not to be transferred them generally. In such circumstances, the transfer order is bad in law and he has prayed for quashment of the transfer order.

Per contra, counsel appearing for the State has vehemently opposed the prayer submitting that the transfer is the condition of service as has been held by Hon'ble Supreme Court in the large number

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of cases. He has relied upon the judgment rendered in the case of **Union of India Vs. S.L.Abbas reported in AIR 1993 SC 2444** and further on the case of **B.Vardha Rao Vs. State of Karnataka reported in AIR 1989 SC 1955**. It is argued that the transfer of the petitioner is made on the administrative ground as is clearly reflected from the impugned order. It is submitted that while transferring the petitioner, the authorities have taken care of the fact that generally husband and wife who are working in same department, should be placed at the same place, therefore, while transferring the petitioner at Panna, her husband who is also working in the same department as Asstt. Grade III has also been transferred by the same order and his named finds place at Sr.No.1 in the transfer order. In such circumstances, the authorities have minutely taken care of the fact that the petitioner as well as her husband are placed at the same place. As far as disability is concerned, Clause 22 of the policy says that generally, they should not be transferred but the condition is not mandatory and the transfer of the petitioner is on the administrative ground as husband and wife both have been working at Gwalior since a long time and not being transferred till date. In such circumstances, it is submitted that the transfer order is just and proper and does not call for any interference in the present writ petition. As far as representation submitted by the petitioner is concerned, he has relied upon the judgment passed by Hon'ble Division Bench of this court in the case of **Mridul Kumar Sharma Vs. State of M.P. Reported in**

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I.L.R (2015) MP 2556, wherein, it is held that the representation of the petitioner can only be considered once the employee joined at the transferred place of posting. In such circumstances, the petitioner may be directed to comply with the transfer order first and then consideration will be made upon her representation. He has prayed for dismissal of the writ petition.

Heard learned counsel for the parties and perused the record.

From perusal of record, it is seen that the transfer of the petitioner has been made on the administrative ground from Gwalior to Panna. Her husband has also been transferred from Gwalior to Panna on administrative exigency. Clause with respect to placing husband and wife generally at same place of posting has been followed by the transferring authorities while passing the impugned order. As far as disability of 45% is concerned, the petitioner is shown to have been carrying disability of 45% as is reflected from the certificate issued by the Joint Director as well as by the Government Doctor which is duly attested by the Superintendent of the Hospital. The Central Government has introduced the Act of 2016 in this regard. The aforesaid aspect was considered by the Division Bench of the High Court of Delhi in the case of **V.K.Bhasin Vs. State Bank of Patiala and Others decided on 3.8.2005 in L.P.A.No.74 of 2005** wherein in paragraph 16 to 27, it has been held as under :

“16. The affidavit further goes on to state that an Officer of the

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Bank who can be transferred throughout India would not be entitled to any indulgence in the matter of transfer on ground of physical disability. This plea is based on reading of certain circulars. The respondent Bank unfortunately produced only some of the circulars / office memorandums, while the others had to be produced by the appellant. It would be necessary to reproduce the circulars / office memorandums :-

(i) "F. NO. 302/33/2/87-SCT(B) Government of India Ministry of Finance Deptt. of Economic Affairs (Banking Division) New Delhi, Dated 15.2.1988 All CES of public Sector Banks And Financial Institutions RBI/NABARD SUB : Posting/Transfer of Physically Handicapped employed in public sector banks/financial institutions.

Sir, Representations have been received that in view of their physical disability bank employees who are physically handicapped may be exempted from routine periodical transfers from places of their original postings/appointment. Earlier the Government had issued instructions vide letter No. 302/33/2/87-SCT(B) dated 31st August, 1987 that BSRBs should endeavor as far as possible to allot the selected physically handicapped candidates to banks having branches located in or near their home town or village.

The question of their posting/transfer has also been considered in the same context and it has been decided that subject to the administrative exigencies, the physically handicapped persons employed in public sector banks in all cadres should normally but exempted from the routine periodical transfers. It has been decided that such persons should not normally be transferred even an promotion if a vacancy exists in the same branch/office, town/city. When the transfer of a physically handicapped employee becomes inevitable on promotion to a place other than his original place of appointment due to non-availability of vacancy, it should be ensured that such employees are kept nearest to their original place of posting and in any case are not transferred to far off/remote places. This concession would not be available to such of the physically handicapped employees of the banks who are transferred on grounds of disciplinary action or are involved in fraudulent transactions, etc. The receipt of this letter may be acknowledged.

Yours faithfully, sd/-

(Y.P. Sethi) Deputy Secretary to the Govt. of India"

(ii) "No. A-B 14017/41/90-Estt (RHQ) Government of India Ministry of Personnel Pubic Grievances and Pensions Deptt. of Personnel and Training New Delhi, the 10th May, 1990.

OFFICE MEMORANDUM Subject : Posting of Physically Handicapped Candidates The undersigned is directed to say that a suggestion has been made that

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physically handicapped candidates appointed under the Government should preferably be posted in their native places or at least in their native district. The matter has been examined carefully. It may not be possible or desirable to lay down that physically handicapped employees belonging to Group-A or Group-B who have all India transfer liability should be posted near their native places. However, in the case of holders of Group-C or Group-D posts who have been recruited on regional basis and who are physically handicapped. Such persons may be given posting, as far as possible, subject to administrative constraints, near their native places within the region.

2. Requests from physically handicapped employees for transfer to or near their native places may also be given preference.

3. Suitable instructions may also be issued to all subordinate.

sd/-

(J.S. MATHUR) Joint Secretary to the Govt. of India"

(iii) "GOVERNMENT OF INDIA MINISTRY OF PERSONNEL, PUBLIC GRIEVANCES AND PERNSIONS DEPARTMENT OF PERSONNEL and TRAINING, NEW DELHI No. 36033/1/2000-Estt(Res) Dated 18th Feb., 2000 OFFICE MEMORANDUM Sub : Posting of Government employees who have children with hearing impairment or multiple disability.

1. The undersigned is directed to say that there has been a demand that an employed parent of a child suffering from hearing impairment or multiple disability may be given posting to their own preferred linguistic / one or State where educational facility for their hearing impaired or multiple disabled child exists and that too in the same language exists. This demand has been made on the ground that the disabled children may have opportunities of learning in the single language, as these children cannot cope up with learning their subjects in more than one language, as a result of transfer of their parents from one State to another.

2. The matter has been examined. Considering that the facilities for medical care and education of children with hearing impairment multiple disability may not be available at all Stations, such requests from the parents of a child suffering from hearing impairment or multiple disability, may as far as possible be considered sympathetically. Where, however, this may not be possible, efforts may be made to accommodate such a Government servant in the same State to the extent possible.

3. All the Ministries/Departments, etc. are requested to bring these instructions to the notice of all the appointing authorities under their control.

sd/-

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(L.P. Bhardwaj) Under Secretary of the Govt. of India"

(iv) "No. AB 14017/16/2002-Estt.(RR) Government of India, Ministry of Personnel, Public Grievances and Pensions Department of Personnel and Training New Delhi, the 13th March, 2002 Office Memorandum Subject : Posting of physically handicapped candidates.

Reference this Department's O.M. No. AB-14017/41/41/90-Estt(RR) dated 10.5.1990 (copy enclosed) on the above subject.

2. It is clarified that the guideline contained in para 2 of this Department's O.M. dated 10.5.1990 that requests from physically handicapped employees for transfer to or near their native places may also be given preference, covers physically handicapped employees in Groups A, B, C and D.

3. Suitable instructions may also be issued to all subordinate offices, etc.

4. Hindi version will follow.

sd/-

(Alok Saxena) Deputy Secretary to the Government of India"

(v) "No. 3/4/2004-SCT(B) Government of India Ministry of Finance Deptt. of Eco. Affairs (Banking Division) New Delhi, dated the 14th July, 2004 To, The Chief Executives of all Public Sector Banks / Financial Institutions The Executive Director, Reserve Bank of India, Central Officer, Mumbai The Chairman, Indian Banks' Association, Mumbai Subject : Posting of physically handicapped employees and employees with mentally retarded children Sir, It has been brought to the notice of the Government that the Banks are not giving due attention in posting of physically handicapped employees/employees with mentally retarded children. It is reiterated that the physically handicapped clerical and subordinate staff may be given a posting, as far as possible, subject to administrative constraints, near their native places.

Similarly, the employees/officers with mentally retarded children may be posted, as far as possible, taking into account the merits of each case and subject to administrative constraints, to places where facilities for medical cadre education and rehabilitation of the children are available.

The Banks and Financial Institutions are advised to take into account the difficulties being faced by such employees/officers while deciding about the place of posting.

Yours faithfully, sd/-

(A. THOMAS) Under Secretary to the Govt. of India"

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17. A reading of the aforesaid circular dated 15.02.1988 would show that even prior to the said Act coming into force, the issue of posting / transfer of physically challenged employees in public sector banks / financial institutions (the respondent Bank being one such) was dealt with by the Ministry of Finance. In terms of the circular, every endeavor has to be made so far as possible to allot persons with disability to branches located in or near their hometown or village. Not only this, such person are exempted from routine periodic transfers except on account of administrative exigencies. The circular further goes on to record that such person should not normally be transferred even on promotion, if a vacancy exists in the same branch office and town / city, but in case of such promotion, if the transfer is inevitable, the person is to be kept nearest to his/her original place of posting. Of course, in case of disciplinary action, the position would be different. Such a circular itself would take care of persons with disability. This circular has never been superseded.

18. The respondent Bank, however, seeks to rely upon the subsequent office memorandum on 10.05.1990 issued by the Ministry of Personnel, Public Grievances and Pensions stating that in respect of Group A and Group B posts where all-India transfer liabilities there, it will not be feasible to always place employees nearby to their original native places. However, in respect of Group C and D posts, posting should be accordingly made. The third circular is in respect of posting of Government employees, who have children with hearing impairment or multiple disability. This, in our considered view, would have no application to the case of the appellant.

19. It is the appellant who brought to our notice that even the Ministry of Personnel, Public Grievances and Pensions vide office memorandum dated 13.03.2002 clarified with respect to the earlier memorandum of 10.05.1990 that the guidelines contained in para 2 of the earlier memorandum dealing with request from physically challenged persons for transfer to or near their native places may also be given preference in Groups A, B, C and D. Thus, to that extent, 1990 circular was, in fact, modified and yet reliance was placed by the respondent on the earlier circular without bringing to the notice of this Court the earlier circular. Even 1988 circular was brought to the notice of this Court only by the appellant and, in our considered view, it was the duty of the respondent Bank to bring to the notice of the Court all the relevant circulars dealing with persons with disability. In so far as the last circular of 14.07.2004 is concerned, which is issued by the Ministry of Finance, emphasis has been laid on the fact that such preference should be given in posting. The circular is issued on the basis that the Government has been informed that the banks were not giving due attention to this aspect. This circular refers to the clerical and subordinate staff. In our considered view, even this circular may not be germane to the issue as nothing has been brought on record to suggest that the earlier circulars have been given a go-bye. The most important aspect is that the circular dated 15.02.1988 has

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never been revoked and the same was issued by the Ministry of Finance and to deal with public sector banks like the respondent. The Ministry of Personnel has issued certain circulars for its officers. It is abundantly clear to us that the clear intent is that the bank must give preference in a nearby location to the original native place for posting of such persons with disability.

20. The aforesaid, thus, makes it clear that the very premise of the decision of the respondent Bank is erroneous. The affidavit and the decision show that the circulars are being read as if no preference is sought to be given to persons in Group A and posts, which is fallacious.

21. The other important aspect is that the authorities of the Bank are not to sit in appeal over the medical certificate issued by the competent Medical Board as the final certificate. Such a certificate in terms of Rule 6 of the said Rules is liable to be accepted by all authorities. The change in the degree of disability has been done by the competent Board on a representation of the appellant and in accordance with Rule 5 of the said Rules. The fact that the authority taking the decision considered the matter as if it has to even examine the medical certificate and its validity would show that the very basis of the decision is wrong.

22. In fact, even after the said decision, we gave an opportunity to the respondent Bank to consider the cases in view of the provisions, but it appears that the Bank is adamant and is not willing to follow the memorandums and guidelines. The circular of 1988 and even of 2002 have not even been considered by the Bank. The approach of the Bank must be deprecated. If the decision taken by the Deputy General Manager is considered, these aspects would be writ large on its face. The decision is reproduced as under :-

"As per the direction of the Hon. Delhi High Court dated 03.05.2005, the case of transfer of Shri V.K. Bhasin was considered afresh.

I have carefully gone through the latest Report dated 26.04.2005, of the Medical Board, Dr. R.M.L. Hospital, New Delhi, I find that the 'Locomotor Disability' of Shri Bhasin for all practical purposes is only 38.7%, which is less than 40%.

The stated disability of 1.1% in the left shoulder and 1% in the right little finger of the hand cannot be said to have led to substantial restriction of movement of the upper limbs and therefore could not be regarded as a Locomotor Disability under the 'Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995'.

I have also noted the disability as reported by the Medical Board. I am of the considered view that the nature of his disability in left lower limb is such which does not warrant any change in the order of his transfer.

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I also observe that Circular dated 14.07.2004 of the Ministry of Finance, read with Circular dated 10.05.1990 of the Ministry of Personnel, Public Grievances and Pension, makes it amply clear that the officers of the Bank who can be transferred throughout India were not as of right entitled to any indulgence in the matter of their transfer, on the ground of physical disability. However, the Bank is conscious that while passing transfer orders of physically disabled persons, care should be taken not to transfer them to such places where adequate medical facilities were not available. It is not the case of Shri Bhasin that the required medical facilities were not available at Varanasi. In fact, Varanasi, being a divisional head quarter, hosts ample medical facilities, including a renowned Medical College. Shri Bhasin would have availability of all medical attendance at Varanasi as and when required by him.

Moreover, the Act and the rules made there under do not provide for any discrimination or special treatment in the matter of transfer of physically disabled persons.

At the time of his accident on 26.05.1997, Shri Bhasin was posted at Delhi, where after he was accommodated at Dehradun. He is continuing in supernumerary capacity at Dehradun from 18.03.1998 and his transfer from Dehradun is overdue. Overstay at the same Branch/Station always creates problems. I also reasonably apprehend, if Shri Bhasin is allowed to continue at Dehradun, certain administrative problems are bound to crop up in the background of present litigation, given his present attitude and conduct with the officers of the Bank. He even accused the members of the Medical Board of bias against him.

The fact that Shri Bhasin has chosen to remain a bachelor, is a matter of personal choice and convenience and cannot by itself be a ground to remain posted at one particular place throughout the service period.

Taking into account the facts and circumstances of his case in totality, I am of the view on merits that the order earlier passed on 16.08.2001 for his transfer to Varanasi does not require any change.

In so far as granting leave and releasing his balance emoluments were concerned, leave have been sanctioned and our Varanasi Branch has been advised to release his emoluments.

sd/-

Deputy General Manager (Delhi)"

A reading of the decision, thus, makes it clear that the authority first sat as an appellate authority over the certificate, considered circulars piecemeal ignoring the circulars of 1988 and 2002 even though they were known to the Bank and had been brought to the notice of the Bank even by the appellant in these proceedings. It

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is an admitted position that the appellant is a bachelor and is dependent on his sister living in Dehradun. Even this aspect is dealt with in an extremely insensitive manner in the decision stating that it is the own decision of the appellant to remain a bachelor.

23. In the written synopsis filed by the appellant, an endeavor has been made to once again raise the issue of the medical certificate like an appellate authority which is not permissible. A perusal of the certificate even otherwise does not show any a parent mistake. In fact, the plea raised is that the Bank should be permitted to take the nature of disability into account, while observing the guidelines. It has to be appreciated that once a person is certified with permanent disability of more than 40% and is, thus, covered under the provisions of the said Act, this aspect is not germane. There is no doubt that the appellant is only to be considered for transfer to a proximate place to his native place, but the guidelines of 1988 make it clear that such request is to be accepted unless in case of administrative exigency otherwise.

24. The written synopsis also goes on to raise the issue of scope of judicial review. In matters of transfer, this Court does not sit as a court of appeal. However, where the very basis is erroneous, this Court is entitled to intervene. Totally irrelevant factors have been taken into account as stated above and the provisions of statutory enactment like the said Act, the said Rules and the Office Memorandum issued in furtherance thereof are sought to be defeated. One cannot lose sight of the fact that the legislation is in furtherance of international commitments and to give an equal treatment to persons with disability. All this has been given a go-bye while rejecting the request of the appellant and the Bank insists on implementing the erroneous decision. In such a case, this Court cannot be powerless to remedy the situation.

25. Nothing has been brought on record to show us that it is not possible to accommodate the appellant at Dehradun. It is not a place of posting like Delhi or Mumbai. The appellant is a bachelor dependent on a sister residing there. The respondent Bank did not even agree when the appellant wanted to be relieved of the services and is obviously desirous of keeping the appellant as a serving officer. Normally, we would have left it to the respondent Bank to again take a fresh decision, but seeing the attitude, it would serve no purpose. Further, the appellant was posted in a supernumerary post even at the stage of transfer from Dehradun. We, thus, consider it appropriate to direct that the appellant should be posted and accommodated at Dehradun and would continue as such, but in case of administrative exigency of extreme nature arising (which at present looks implausible) posting in nearby place can always be given in terms of the circular dated 15.02.1988.

26. We, thus, allow the appeal and direct the respondent Bank to post the appellant at Dehradun within a period of 15 days from the date of this Order. The appellant has already utilised a large part of his leave as he has been treated on leave. Since the decision of the

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respondent Bank is totally erroneous and in ignorance of the circulars / office memorandums, the leave account of the appellant will not be debited from the date of rejection of the case of the appellant, which was brought to the notice of this Court as 30.05.2005 and, thus, leave would lie to the credit of the appellant w.e.f. 01.06.2005 despite the appellant being on leave and being paid the emoluments for the said purpose.

27. The appeal is allowed in the aforesaid terms with costs of Rs.10,000/-.

Considering the object of the Act introduced by the Central Government, the court has intervened into the matter and has held that the employee having disability up to 45% or above should not generally be transferred. In such circumstances, the case laws relied upon by the State counsel are not applicable. The case has to be dealt with on different platform as it is not a case for normal employee rather it is a case of disabled employee who is carrying 45% disability.

The special provisions are made in Clause 26 the transfer policy with respect to transferring an employee carrying on the disability which reads as under :

“26. ऐसे दिव्यांग कर्मचारी, जिनकी दिव्यांगता 40 प्रतिशत या उससे अधिक हो, के सामान्यतः स्थानांतरण न किये जायें, किन्तु उनके द्वारा स्वयं के व्यय पर स्वेच्छा से स्थानांतरण का आवेदन देने पर स्थानांतरण पर विचार किया जा सकेगा।”

From bare reading of the aforesaid provision/clause of the transfer policy, it is clear that the employees carrying more than 40% disability generally should not be transferred and only on the application given by them for transfer on the own request, can be taken into consideration by the authorities. As it has already been argued that the petitioner has never submitted any representation requesting her

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own transfer to such a distant place and that the petitioner has not been relieved till date, she has prayed for quashment of the impugned order.

Considering the over all facts and circumstances of the case and the specific statement made by counsel for the petitioner that the petitioner has not been relieved till date, this court deems it appropriate to entertain this writ petition and considering the judgment rendered by Delhi High Court, the petition is disposed of with a direction to the petitioner to submit a detailed representation against the transfer order to the respondent authorities within a period of seven days from the date of receipt of certified copy of the order and in turn, the respondent authorities are directed to consider the case of petitioner and decide the same in accordance with law considering the policy issued by the State Govt. with respect to the transfer of disabled persons as well as the judgment passed by the Division Bench of the Delhi High Court. Aforesaid representation be decided within a period of one month from the date of receipt of certified copy of the order and **till the representation is decided, the petitioner is permitted to continue on the present place of posting.**

With the aforesaid, this petition stands allowed and disposed of.

CC as per rules.

(Vishal Mishra)
Judge