

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1394 OF 2015

Colonel Anil Kumar Sharma)
 residing at 1 James House,)
 Napier Road, Colaba, Mumbai) Petitioner

Versus

- 1 Union of India,)
 (through Secretary, Ministry of)
 Defence), IHQ OF MOD (Army),)
 101-A, South Block,)
 DHQ PO, New Delhi -11)
- 2 Chief of Army Staff,)
 IHQ of MOD (Army), South)
 Block, DHQ PO, New Delhi-11---11)
- 3 The GOC, HQ (through Judge)
 Advocate General (JAG),)
 Uttar Maharashtra and Gujarat,)
 Sub Area, Colaba, Mumbai) .. Respondents

Colonel Anil Kumar Sharma, petitioner in person.

Mr. Rajiv Chavan, Senior Advocate with Mr. Vinod Joshi for respondents 1, 2 and 3.

Mr. Yeshwant Shenoy i/by Mr. Sachin Dube for intervenor.

CORAM: ANOOP V. MOHTA &

V. L. ACHLIYA, JJ.

CLOSED FOR JUDGMENT on :July 20, 2015

PRONOUNCED ON :August 26, 2015

JUDGMENT : (Per V. L. Achliya, J.):

Rule. Rule is made returnable forthwith. By consent of the parties, taken up for final disposal.

2 The Petitioner has challenged the order of transfer and posting dated 26th February 2015 as well as inaction on the part of the respondents in deciding the representation made by the petitioner on 11th of March, 2015 seeking Last Leg Posting.

3 Before adverting to appreciate the submissions advanced, it is necessary to consider few facts leading to filing of this petition:

(a) The Petitioner claims to be a permanent commissioned infantry officer serving in the Indian Army since 8th of June 1985. According to the Petitioner, he has rendered 30 years unblemished service. He is due for retirement in the month of July 2017. He was posted in Mumbai since 1st of September 2011 as “MCO, C.S.T., Mumbai”. On 1 January 2014 he was hospitalized in INHS Aswini, at Colaba, Mumbai i.e. Respondents' Military Hospital, as he experienced a sudden rise in his blood pressure and gastric problems. According to petitioner INHS Aswini provides the best

facilities in the country for neurological disorders.

(b) On 6th January 2014, after various tests, the doctors detected multiple abscesses and oedema in the petitioner's brain. The Petitioner underwent a craniotomy on 8th January 2014 and part of Petitioner's skull was sliced and kept in his abdomen pouch for preservation. He was in ICU for about 20 days. He was placed on DI List (dangerously ill list). Petitioner had to live without part of his skull bone for three months. Finally, on 1st April 2014, the petitioner underwent cranioplasty to reinsert the petitioner's skull bone into his skull with titanium plates and screws at the same hospital. The Petitioner was specifically informed by Doctors treating him that he would be required to be under treatment and observation for the next two to three years. Therefore, petitioner addressed a letter dated 29th April, 2014 to the Integrated HQ of MoD, in which he requested the authority to continue him in Mumbai, on compassionate ground on account of his serious illness. However, he received no response to that letter. Taking into account the petitioner's medical condition, Senior Most Officer of M & G Area made recommendation vide letter dated 12th May, 2014 that

the Petitioner be side-stepped to a local posting so that he could continue his treatment at INHS Aswini. There was no response. Therefore, petitioner made several representations to the concerned authorities to continue him in Mumbai. Due to above stated medical problems, the Petitioner was required to appear before the Medical Board. The Board reached the finding that the petitioner's intercranial abscesses and surgeries were attributable to service and, therefore, issued employment restrictions to prevent aggravation of his illness. The petitioner was directed to be under periodic surveillance by a Specialist at MH/Civil Hospital, where such facility is available to monitor his condition. The Board has further recommended that petitioner be given restricted diet and declared unfit for high altitude climates, terrains, extreme exertion and competitive sports. He was declared to be fit for only sedentary or desk job.

(c) Vide letter of 17th January, 2015 the Petitioner was informed that his application to continue in Mumbai has been rejected mainly on the ground that his compassionate grounds were considered earlier and the option for medical treatments were

available at other stations, apart from the fact that he had spent a total period of three years and five months in Mumbai. Since the fact that options for medical treatment were available at other stations did not change the fact that the petitioner was in the midst of treatment at INHS Aswini and the doctors at that particular facility could administer the necessary treatment to the petitioner, the petitioner sent a reply letter dated 28th January, 2015 expressing his wish that his problem be taken seriously.

(d) On 26 February 2015, Respondent No.2 issued the posting Order and the petitioner was posted at Sealdah, West Bengal and called upon to report at new station on 13 April 2015. Since petitioner was due for retirement in July, 2017 and next posting would be his last posting and entitle to apply for a last leg posting as per Army's rules, he made representation for last leg posting vide representation dated 11th March 2015. As there was no reply, therefore, the petitioner filed present petition on 17 March 2015 challenging the transfer posting as well as inaction to decide his representation dated 11th March, 2015.

4 We have heard the petitioner, who appeared in person

and Mr. Rajiv Chavan, learned counsel appearing on behalf of respondents. We have also perused the written notes of arguments filed by the petitioner and other documents placed on record by petitioner as well as respondents for consideration of Court.

5 It is the case of the petitioner that looking to the ailments and long standing medical history, the petitioner can be properly treated only at Aswini Military Hospital at Mumbai. It is further the case of the petitioner that his wife is recently transferred to Mumbai. His children are prosecuting studies at Mumbai. Considering his medical ailments, it is impossible for him to join at a place of posting at Sealdah at Calcutta. It is further case of the petitioner that he is due for retirement in the month of July, 2017 and entitled to be considered for last posting as per his choice i.e. the Last Leg Posting. He has made various representations seeking cancellation of transfer order and consideration of his request for grant of Last Leg Posting. The authorities concerned have not considered his representations in the light of ailments which he is suffering.

6 The respondents have filed an affidavit and opposed

the reliefs claimed in the petition. In nutshell, it is the contention of the respondents that the petitioner is lying posted at Mumbai, since the year 2011. He has completed his three years' tenure in the year 2014. Accordingly the transfer has been made and the petitioner has been posted at Sealdah in West Bengal. According to the respondents, all the medical facilities as required in the case of treatment of ailments with which the petitioner is suffering, are available at his place of posting. So far as the representation made by the petitioner, it is stated that same has been duly considered which include the representation for Last Leg Posting made by the petitioner. On due consideration of the representation made, in the light of earlier requests of the petitioner for accommodation on compassionate ground granted by the department, it was decided to reject the representation.

7 The petitioner, who appeared in person, has argued the matter at length. He has also filed written notes of arguments. We have thoroughly perused the written notes of arguments filed by the petitioner. He has reiterated the submissions made in detail in the written notes of arguments filed on record.

8 Mr. Rajiv Chavan, learned senior counsel appearing for the respondents strenuously contended that the transfer and posting of the petitioner has been made as per the routine administrative exercise. The petitioner has neither pointed out any breach of statutory provision, rules and regulations on the part of respondents nor made out any case of malafides so as to interfere with the order of transfer and posting made by the respondents. It is strenuously contended that pursuant to order dated 16th April, 2015 passed by this Court (Coram: V. M. Kanade & A. R. Joshi, JJ.) the petitioner appeared before the Dean of J.J. Medical College, Mumbai, who in turn referred the petitioner to the panel of experts in the field and obtained their opinion. So far as the Neurosurgery and Neurological problems are concerned, the panel of the experts appointed by the Dean of J.J. Medical College has observed in the report that the petitioner requires regular follow up in hospital where neurosurgery and Neurology facility are available round the clock. He has contended that said report from the panel of experts appointed by the Dean of J. J. Medical College, Mumbai, fortify the stand of the respondents that the kind of treatment and follow up as

suggested by the experts can be made available to the petitioner at his place of transfer and posting. He has argued that it is settled position in law that in matters of transfer and postings of civilians the Court should be very slow in exercise of its powers under Article 226 of Constitution of India. In support of the contention that the scope of interference by Courts in regard to the members of Armed Forces is limited and Court should be extremely slow in interfering with such order of transfer and posting of civilian employees or members of Armed Forces relied upon the decision of the Apex Court in the case of **Major General J K Bansal v. Union of India & Ors.**, decided on **23/08/2015 in Appeal (Civil) 5189 of 2005**.

9 We have carefully considered the submissions advanced by petitioner as well as Mr. Rajiv Chavan, learned Senior counsel appeared for the respondents.

10 The fact is not in dispute that the petitioner was admitted in INHS Aswini Naval Hospital in Mumbai and subsequently it was noticed that he was developed with multiple cyst in right Temporal Lobe as well as right parietel region with

oedema and uncal Herniation and Mid Line shift of Brain. He was required to undergo Crainotomy brain surgery in the month of January, 2014. Subsequently he undergone Crainoplasty. So also the fact is not in dispute that the petitioner was required to be admitted in hospital for long time and undergone treatment for various ailments on account of side effects as well as other ailments with which the petitioner suffered. The fact is also not in dispute that the petitioner is required to be under constant follow up and check up for neurological problem with which he is suffering. The fact is also not in dispute that the petitioner was examined by the panel of experts specially appointed by the Dean of J.J. Medical College, pursuant to the order passed by this Court. The report of the experts reflects that the petitioner is required to undergo regular follow up in hospital where neurosurgery, neurology facility as well as the facility of Cardiology, Orthopaedics, ENT and GIT specialists are available. So also the fact is not in dispute that the petitioner has completed the normal tenure of service of three years at Mumbai and he was due for transfer. The fact is also not in dispute that medical facilities to treat the person with Neurosurgery

and Neurology are available at place of posting.

11 If, we consider the rival submissions then there appears to be no dispute that the transfer and posting order which the petitioner has challenged no way amounts to any breach of statutory provisions, rules and regulations or made with malafide intention. The transfer and posting of the petitioner appears to be fully in accordance with the rules and regulations and policy of the respondents governing the transfer and postings of its officers and employees. The petitioner could not point out breach of any rules and regulations or contravention of the policy decision in the matter of his transfer. Although it is contended by petitioner that some of the members though completed normal tenure of three years are still working, in our view, this cannot be a ground to interfere by this Court in the matter of transfer and posting of petitioner. Once it is clear that the petitioner was due for transfer and department has issued the order of transfer and posting in accordance with the rules and regulations as applicable in the matter of transfer and posting of its officers and employees, the retention of some of the officers who have completed three years cannot be treated as an act of malafides

on the part of the respondents. We are of the view that in the present case except to consider the case of petitioner on the ground of ailments with which petitioner is suffering and family consideration, no other ground exists to claim the retention and posting at Mumbai.

12 It is settled position in law that a Government servant holding a transferable post has no vested right to remain posted at one place or the other. He is liable to be transferred from one place to the other. So also even if a transfer order is passed in violation of any executive instructions or orders, ordinarily the Courts are not expected to interfere with such order. In such matter, the affected party is expected to approach the higher authority in the department for redressal of their grievance. It is further settled that who should be transferred, where the persons should be transferred, are the matters exclusively fall within the domain of concerned authority to take such decision in the matter. Unless the order of transfer is vitiated by malafides or made in violation of any statutory provision, the Court is not expected to interfere the same.

13 Mr. Chavan, the learned Counsel appearing for the respondents has rightly placed reliance on the decision of Apex

Court in the case of **Maj. Gen. J. K. Bansal** (supra), wherein the Apex Court has observed in para 12 about the overall scope of interference by the Courts in regard to transfer and postings of civilian and members of armed forces. The Apex Court has observed as under:

“It will be noticed that these decisions have been rendered in the case of civilian employees or those who are working in Public Sector Undertakings. The scope of interference by courts in regard to members of armed forces is far more limited and narrow. It is for the higher authorities to decide when and where a member of the armed forces should be posted. The Courts should be extremely slow in interfering with an order of transfer of such category of persons and unless an exceptionally strong case is made out, no interference should be made.”

(Emphasis supplied)

14 In the light of discussions made in the foregoing paras, we are of the view that on merit no case has been made out by

petitioner so as to interfere with impugned order of transfer and posting in exercise of writ jurisdiction under Article 226 of Constitution of India. The order of the transfer cannot be said to be passed in breach of any statutory provision or suffers from malafides.

15 However, the fact remains that in the light of peculiar facts and circumstances of the case i.e. serious ailment, with which the petitioner is suffering and wife of the petitioner, who is also working in the Income-tax Department recently transferred and recently posted (i.e. in the year 2015) in Mumbai and the children of the petitioner are prosecuting education in Mumbai, the request of petitioner deserves to be considered by authority vested with administrative powers to deal with representation made on compassionate grounds or claiming Last Leg Postings.

16 Mr. Rajiv Chavan, learned Senior counsel has placed before us the copy of the office noting in respect of representation made by the petitioner including the representation seeking Last Leg Posting on compassionate ground processed by department. By referring the chequered history of past transfers and postings of the

petitioner made on the compassionate ground, the learned counsel has submitted that under the facts and circumstances of the case, the decision of the authority concerned to reject the representation of the petitioner is fully justified and calls for no interference in exercise of writ jurisdiction by this Court.

17 Perusal of office submissions made in the note put up for consideration of concern authority clearly reflects that the petitioner was throughout accommodated by the respondents and his request for postings of choice has been considered in past. On due consideration of past history of requests made by the petitioner favourably considered by the respondents, we are of the view that there is absolutely no substance in the say of the petitioner that he has been treated differently or any malafides on the part of the officials of the respondents to transfer and post him at Sealdah in West Bengal.

18 However, we have noted from office submissions placed for our perusal that the reason for rejection of the petitioner's representation including representation for Last Leg Posting made on 11th March, 2015 was taken mainly on the ground that the

requisite medical facilities are available at Sealdah, Calcutta (West Bengal). While dealing with the representation of the petitioner, the concerned authority has not independently applied its mind to consider the background in which the petitioner has made request for retention at Mumbai. The fact that the petitioner has twice undergone the major surgery relating to brain not taken into consideration. The fact that the petitioner required to be admitted in the hospital for a long time and still he required to take follow up treatment has not been taken into consideration while rejecting his representation. While dealing with representation made on medical grounds, it is expected that the authority should consider the same sympathetically. The medical facilities to treat the ailment with which the petitioner is suffering may be available at place of his posting. But the availability of such facility at the place of posting cannot be the basis to turn down such request. It is to be noted that the petitioner is due for retirement in the month of July, 2017. He has rendered more than 30 years of service. His wife is recently posted at Mumbai. His children are prosecuting education at Mumbai. Looking to the ailments of the petitioner, the petitioner

will require constant care and follow up treatment. Considering to ailments of the petitioner, it is expected that someone from his family should be available with him at the place of his posting. So also the family support is also required for person, suffering from Neurological problem. The proposed transfer and posting of the petitioner may cause serious problem for petitioner. The wife of the petitioner who is recently posted in Mumbai, may not be able to stay with the petitioner at place of his proposed transfer and posting. All these aspects deserves consideration by the authority dealing with the representation of the petitioner and more particularly the request of the petitioner for Last Leg Posting. In our view, such request made on personal ground not to be dealt strictly in accordance with the Rule. The authority is expected to consider such request on humanitarian ground so as to redress the genuine problems of their employees/officers. Since we are of the view that the representations of petitioner were decided mainly on the ground that in past the similar requests of petitioner for transfer and posting were considered and the medical facilities are available at the place of his proposed transfer and posting and the situation as exists and

the grounds as raised by the petitioner in his representation were duly considered, we deem it proper to direct the respondents to decide the representation afresh by giving opportunity of personal hearing to the petitioner.

19 In view of the discussions made in the foregoing paras, we are not inclined to interfere with the impugned order of transfer and posting and dismiss the petition on that count. However, in the peculiar facts and circumstances of the case, we direct the respondents to decide the representations of the petitioner afresh including the representation dated 11th March, 2015 for last leg posting, after giving opportunity of personal hearing to the petitioner. We further direct the respondents not to implement the impugned order of transfer and posting till representations of petitioner are decided and decision in that behalf communicated to the petitioner. In case the representations made by the petitioner are not favourably considered and the concerned authority decides to reject the same, then same be not implemented for further period of two weeks from the date of communication of the order to the petitioner.

20 Accordingly, the rule is disposed of in above terms
with no order as to costs.

(V. L. ACHLIYA, J.)

(ANOOP V. MOHTA, J.)

md.saleem