

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No.16119 of 2016

Date of Decision: 09.09.2016

Pardeep Singh and others

... Petitioners

Versus

State of Haryana and others

... Respondents

CORAM:- HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. Kanwaljit Singh, Sr. Advocate,
with Mr. Chirag Wadhwa, Advocate,
for the petitioners.

Mr. Harish Rathee, Sr. DAG, Haryana.

RAJIV NARAIN RAINA, J.

1. “Although the world is full of suffering, it is also full of overcoming of it”, said Helen Keller. Her life was even more difficult than the blind petitioners. She was not only blind but also deaf. Among the many things she is famous for, she was a Lecturer. She was the first woman in America to Graduate, to earn a degree of Bachelor of Arts. The petitioners are blind persons. The petitioners teach in Government schools and are Lecturers. By separate orders all passed on August 06, 2016 by the Additional Chief Secretary, School Education, Government of Haryana they have been transferred against clear vacancies and one of them against a “deemed vacancy” created by transfer of a colleague. Three of them teach Political Science while one teaches English. The first and fourth petitioner belongs to Ambala, the second to Jind while the third petitioner lives in District Jhajjar.

2. They have approached this Court in a joint petition filed under Articles 226 of our Constitution. They pray that their transfer and posting

orders be annulled by a writ of certiorari. They pray for a mandamus to forbear the respondents from transferring them out to other schools in the districts of Ambala, Jind and Jhajjar.

3. The Central Government has enacted The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short "1995 Act"). Section 2 (ii) defines blindness as a disability. Even as per section 2 (u) persons with low vision with impairment to the extent are covered by the provisions of the 1995 Act. It is the statutory duty of the State Governments to formulate State Coordination Committees in accordance with Section 13 of the 1995 Act. The Secretaries to Government and the Minister-in-charge are also part of such Committees. State Governments are also enjoined to constitute State Executive Committees to promote the cases of disabled persons. Section 33 of the 1995 Act mandates every Government in every establishment covered to provide such percentage of vacancies not less than 3% for class of persons with disability out of which one per cent is to be reserved for persons suffering from blindness or low vision, hearing impairment, locomotor disability or cerebral palsy respectively.

4. Section 38 of the 1995 Act maintains State Government and local authorities to notify and formulate schemes for such disabled persons as are covered by the provisions of the 1995 Act. Chapter-13 of the 1995 Act casts a duty of the Governments and local authorities to undertake rehabilitation of differently-abled persons of the 1995 Act has been given primacy under section 72 of the 1995 Act in addition to all prevailing acts which provide any special benefit to such disabled persons.

5. The Government of Haryana in pursuance of the statutory obligations under the 1995 Act framed policy guidelines dated October 06, 2004 whereby a transfer policy was framed for Haryana Government employees. As per Clause 6 of the policy it was specifically mentioned that blind employees may be shown due consideration to mitigate their hardship while considering questions of transfers and posting and in this behalf the Government was empowered to relax the provisions of the transfer policy. Subsequently, the Haryana Government issued instructions vide policy dated December 23, 2008 in which it was specifically stipulated that as far as possible the handicapped and blind employees be shown due consideration to mitigate their inconvenience while considering the question of posting and transfers and that they should not be effected without their consent and also they should not be posted in rural areas except by consent. Both these policies have been issued in furtherance of the mandates in 1995 Act. In the current year Haryana Government formulated its transfer policy of teachers which came into force on June 29, 2016 where no consideration has been shown to persons like the petitioners except for providing them weightage by a formula adopted dependent on the fiction of “deemed vacancies”. The expression “deemed vacancies” has been further clarified in the policy holding that weightage only pertains to cases where there are more than one person giving consent to transfer at a place of posting.

6. It is the case of the petitioners that due attention has not been paid by the State Government to protect the interests of handicapped, blind or visually handicapped persons and, therefore, the said policy is bad and deserves to be struck down to the extent it gives no special allowance for

their disability while the appropriate Government is enjoined to frame regulation and schemes for protecting the rights of the disabled by creating an environment suitable to bring them within the social main stream. In the very nature of their predicament the petitioners urge that they should be left to teach in the schools where they have been teaching for a long time and have coped up with their duties entirely with the help of their parents, spouses, children and friends to reach their places of work and fetch them back. Left alone they may find it difficult if not impossible to reach their workplaces, to count their steps, pathways and the class rooms they teach in. Commuting from home to school is arduous exercise and uprooting them from the schools they teach would be personally disastrous as they may have to re-organize their lives, find lodging and access their daily needs. If the impugned transfers are given effect to, the petitioners may not be able to perform their accustomed duties which they have learnt to carry out in what is for them an environment which provides a modicum of stability to their already complicated lives. They have acquired over a period of time a cocoon and a comfort zone in their respective schools where they have counted their footsteps, measured their distances and overcome the obstacles. They have come to Court to extend its hand and rescue them from their imminent hardship of starting their lives again in alien atmosphere, that the transfers entail even if it is not to distant schools within their districts. These humanitarian issues cannot be decided by the cold letter of the policy without due and sensitive thought paid to their disability. Depending every moment on physical help aided with walking sticks for the blind to overcome obstacles in the encounter in their everyday lives. Their

life must not be easy to live in darkness. Let not there be distress anymore than they deserve.

7. Apprehending their transfers in the welter of the teacher transfer policy they approached this Court in CWP No.15913 of 2016 cause titled Mangal Sain and others v. State of Haryana challenging the impugned policy but in the meantime, the impugned transfer orders were issued leading to withdrawal of the petition with liberty granted by Court to file a fresh one to bring challenge to the guidelines. The present is the fresh petition challenging the impugned orders dated August 06, 2016 passed separately for each of the petitioners. When this matter came up for hearing instead of issuing a formal notice of motion to the respondents, this Court requested Mr. Harish Rathee, Sr. DAG, Haryana to seek instructions from the Director Secondary Education, Haryana regarding the status of the petitioners, who were 100% blind persons and whether anything could be done to bring them succour. This Court passed the following order on August 10, 2016 while posting the matter for August 16, 2016:-

“List on 16.08.2016.

Mr. Harish Rathee, Sr. DAG, Haryana, would seek instructions from the Director Secondary Education, Haryana regarding status of the petitioners, who are 100% blind persons. Mr. Rathee would also ask the Director to depute a responsible person, who may independently take stock of ground situation and extent of hardship caused or which may ensue in case, transfer orders are not cancelled.

A copy of the petition be supplied to Mr. Rathee during the course of the day.

Meanwhile, Mr. Kanwaljit Singh, learned senior counsel, would go through the orders passed recently by this Court in transfer matters (CWP No.13555 of 2016) and whether those orders substantially guard the interest of the

petitioners.”

8. On August 16, 2016 the Court was informed by the learned Senior counsel for the petitioners, Mr. Kanwaljit Singh that the petitioners had joined their respective places of transfer in obedience of the impugned transfer orders.

9. Ms. Shruti Jain Goyal, AAG, Haryana appeared for the State and the following order was passed on August 16, 2016:-

“At the very outset, Mr. Kanwaljit Singh, learned senior counsel informs this Court that the petitioners have joined their respective places in obedience of the transfer orders.

Further to the previous order, Ms. Goel would communicate the present and the previous orders to the competent authority for him to take a holistic and sympathetic decision on the transfer of the petitioners keeping in view their options and their disability, which may cause the least physical inconvenience of having to measure their steps at their new work places.

List again on 23.08.2016.

However, the interim order will not be taken by the competent authority not to examine the cancellation of the orders in the special facts of this case, which power he draws on the principle that the right to do includes the right to undo.

A copy of the order be given to Ms. Goel under the signatures of the Court Secretary.”

10. The case was adjourned to August 23, 2016. On the next date of hearing, the learned Senior counsel appearing with Mr. Chirag Wadhwa, learned counsel for the petitioners and Ms. Shruti Jain Goyal, AAG, Haryana were heard and Ms. Goyal made a statement which is recorded in the interim order dated August 26, 2016 and meanwhile, the impugned orders were directed to be treated as in abeyance. The order reads:-

“Ms. Goyal, on instructions from Sh. Rajesh, Assistant, in O/o Director Secondary Education, makes a statement that even though the transfer of the petitioners has been in terms of the Policy-2016 but the Government is prepared to reconsider the matter for which purposes the petitioners' options will be sought for their preferences of posting either in the present institutions or near about as per their choice. The petitioners would give their preferences to the Director, Secondary Education, Haryana. In order to avoid inconvenience to the petitioners because of their condition, options will be sought from them by the Director Secondary Education, Haryana on the official telephone. The petitioners would supply their mobile/telephone numbers by Monday i.e. 29.8.2016. The petitioners will not be disturbed till the passing of the final order and placing the same before this Court for further orders. Final decision that may be taken, be placed on the record of this case for which purposes, the case is adjourned to 9.9.2016.

In the meantime, the impugned order shall be treated as in abeyance.

Copy of this order be given to the learned State counsel attested by the Bench Secretary of this Court.”

11. Today, Mr. Rathee has produced a letter from the department which this Court is heartened to read but there was a rider therein that the Transfer Policy of Teachers was approved by the Cabinet and, therefore, any departure from the policy would have to be placed before the Cabinet for its further consideration since it may involve change of specific policy to accommodate the interest of the petitioners. The two page noting produced by Mr. Rathee attached to the letter records that there are instructions issued by the office of the Chief Secretary, Haryana regarding decision not to transfer blind persons without their consent. Accordingly, papers were sent to the higher authorities with the proposal of the Director Secondary

Education to cancel the transfer orders of the petitioning postgraduate teachers on compassionate grounds. The note put up by the Deputy Superintendent of the office for orders of the Director met the response on the noting sheet as follows:-

“1. First four cases have approached the court. Their grievance is that they have become accustomed/conditioned to paths and approaches to their present schools. So, any new school may be like an alien land for them.

The reasoning appears convincing. Moreover, the CS instructions are also result of a sort of understanding arrived at after consultation with the Blind's Associations. So, we may honour these instructions.

2. The fifth case the one in whose case no-one has been posted at his previous place of posting. So, his orders may be cancelled.

May approve as above.

Sd/-

29/8”

12. The papers were then placed before Sh. P.K. Das, IAS, Additional Chief Secretary, Secondary Education, Haryana who made the following note:-

“There is a specific policy for transfer of teachers, which has been approved by the Cabinet. So we may defend our orders.”

13. The rider put by the Additional Chief Secretary, Secondary Education, cannot be criticized as it is within the law that a Cabinet decision can only be altered by the Cabinet in a meeting convened for the purpose. Since it is a Cabinet decision, Mr. Rathee submits and rightly so that the issue cannot be resolved in a day but can only be reviewed in a Cabinet meeting of the Government of Haryana. The Court respects the decision of

the State Government to defend the orders of transfer in Court. The noting in accordance with the Rules of Business of the Government that it is only the competent authority which is empowered to take a decision, and takes one as a policy decision that can undo its own act within the framework of law and it is certainly not the business of the High Court to make policy which lies in executive domain.

14. However, the fundamental duties enshrined in Chapter-IVA were introduced by the Constitution (42nd Amendment) Act, 1976 into the Constitution which spells out the fundamental duties of every citizen which includes the fundamental duty to develop humanism and a spirit of reform. Though the provisions in Chapter-IVA as to fundamental duties cannot be enforced by writs, then can however be promoted by constitutional methods, the vehicle of which may be Article 162 which extends the executive power of the State to matters which the legislature of the State has power to make laws. Executive policies are also created under Article 162 to meet contingencies not known to existing law, policy or rules. Transfer policies made by the State owe their existence to Article 162 [or if enacted under proviso to Article 309 in the shape of rules] but in the case of blind persons they are protected by the Central Law in the 1995 Act to the extent provision is made therein. When both the provisions are read together the petitioners fall in a special class of persons who cannot be compared with other citizens and even within the range of group disability in the 1995 Act and persons suffering from one hundred percent blindness form a unique class which can be differentiated from other disabilities like low vision, locomotor disability and cerebral palsy etc. In degrees of affliction cases of

cerebral palsy also constitute a special class which cannot be compared in degrees of disadvantage from locomotor disability or low vision employees. To quote from Helen Keller again she said “the best and most beautiful things in the world cannot be seen or even touched-they must be felt with the heart”. In the matter of disability, I had occasion to deal with a case of competing interests and inter se rights of a young polio afflicted lady in her early 20s appointed to service whose appointment was challenged by a disabled man in his early forties who suffered motor accident in advanced age. The challenge was that the rules had been changed at the eleventh hour before the interview only to accommodate the lady. There was a degree of error in the selection but I ruled in favour of the lady who by then had already served for three years as a Draftsman. I observed in Jagdev Sharma v. State of Punjab, 2015 (2) PLR 570 as follows:-

“I cannot help saying that in the matter of physical disability care and caution have to be exercised with sensitivity by those bound by office to take decisions and for them to make sufficient room by and large for the one who is suffering the more when both can perform the job. This evaluation cannot be left only to certificates of disability and percentages of physical handicaps determined by medical boards. You have to see a person and feel by the heart and mind to gauge where a person with disability really stands as against another in the queue. Documents and papers can never tell the true picture and to an uncaring mind such decisions should not be left. I am inclined to think the selection committee did not do badly in choosing the younger and more "infinitely suffering thing". It goes without saying that experience she will gain, if she has not already. If the work of the department is being performed well and to the satisfaction of the demands of work by the 3rd respondent for the last three years, then why disturb the stasis by forensic reasoning or a debate on case law and inert legal principles.” and further “...The relief provided by article 226 of the Constitution is a discretionary one.

A writ may neither issue nor an order made merely because it is lawful to do so. The writ court sits in equity where the rules of prudence preside and occupy the field of vision when known legal principles may not come to the rescue or be of any intrinsic help to cull out the relief or to deny it. Equity in its brightest and the most sublime form is a jealous mistress which may not want to share its bed and be betrayed by pedestrian rules, shackled by plebeian legal principles which may be found insufficient whilst venturing to do unconventional justice in a case. It is often said that a case to be decided ex aequo et bono, overrides the strict rule of law and requires instead a decision based on what is fair and just, given the circumstances. Life and its vicissitudes are larger than the law.”

15. A reading of the noting sheet produced by Mr. Rathee till the recommendations were made by the Director, Secondary Education, Haryana signing on a positive note in favour of the petitioners is a proposal on merits and especially the well thought out words used with sensitivity that the: “petitioners have become accustomed and conditioned to their paths and approaches to their present schools are such, that any new school may be like alien land for them” is appreciable and the officer has sensitively dealt with the issue and found the reasoning of the petitioners convincing which are duly supported by instructions of the Chief Secretary, Haryana on consent before transferring blind persons. The Additional Chief Secretary, Secondary Education, Haryana in his note has not dislodged the case against transfer on merits but on a technical ground that the policy was born in a Cabinet meeting and, therefore, relief could not be granted directly to the petitioners without the nod of the Cabinet of the Government of Haryana. The logic of the Additional Chief Secretary, Government of Haryana, Secondary Education is unassailable in abiding by the law of jurisdictions. In other words, he has in fact expressed his limitations which

are without doubt legal and valid.

16. However, the writ court is a court of equity and here appears to be an appropriate case to exercise equitable considerations for a request to the Additional Chief Secretary, Government of Haryana in the Department of Secondary Education to remit the matter to the Cabinet to review the transfer policy to accommodate the claims of the petitioners who form a special class by considering making a provision in the policy to treat them differently in the larger class of the disabled. And in the meanwhile to return the petitioners to their previous schools till the Cabinet decides on their fate.

17. On September 09, 2016 while allowing the petition after hearing counsel at great length, with reasons to be stated, this Court passed the order as an ad interim arrangement that the petitioners will be posted back to the schools from where they were transferred. A copy was given to Mr. Rathee under signatures of the Bench Secretary of this Court for compliance.

18. This order contains the reasons why I have allowed the petition by upholding the reasoning of the Director, Secondary Education, Haryana while at the same time honouring the technical view of the Additional Chief Secretary, Secondary Education, Haryana accepting that any change in the Transfer Policy of Teachers-2106 can be effected only through the Cabinet. A fresh Cabinet decision taken in the wisdom of the Government may take time and, therefore, it would neither be fair nor proper to put any limitations of time for such consideration and consequently while accepting the petition the following directions are issued for the present and for the future:-

(i) The Teachers Transfer Policy-2016 deserves to contain a

special provision for persons suffering from 100% blindness. They should not suffer transfers and posting except by consent which is the view of the Government expressed by the Chief Secretary, Haryana in the earlier instructions relied upon by then Director Secondary Education, Haryana.

(ii) It will be open to the State Government to differentiate cases of Government servants suffering from one hundred percent blindness from other categories of disability falling under the provisions of the 1995 Act such as locomotor disability, hearing impairment and low vision but not complete blindness. These other are somewhat lesser disabilities in degrees of suffering than complete blindness making persons completely dependent on others while living in darkness. In this exercise, the Government would be free to make reasonable classification within the rehabilitation carved out by section 33 of the 1995 Act.

(iii) Till such time as the Cabinet does not meet and review the Transfer of Teachers Policy-2016 to accommodate the special claims of persons like the petitioners, the petitioners would continue at their previous places of posting and accordingly, the interim order dated September 09, 2016 is made absolute but by way of an ad interim arrangement till new provision is made in the Policy in accordance with law and in the wisdom of the Cabinet.

(iv) These orders will not be treated in *personam* but in *rem*. That is for every category of teachers from primary to secondary and higher education in the State of Haryana who suffers complete blindness. They constitute a class apart within the reservation. The State Government in making its policy of transfer and posting in schools and colleges in Haryana

through the window of the present case will no doubt do debate in the Cabinet with the spirit of humanism, sympathy and compassion for the special class of persons dealt with in this case. The officers of the Government in charge of posting and transfers of teachers will I am sure acquaint themselves with the nature and condition of disability of each Government employee and their family circumstances falling within the categories covered by the 1995 Act and the policy and/or other categories of disability which it may like to include in the list that may follow deserving special attention. Officers of Government may like to read the once published World Report on Disability released by the World Health Organization where in the Foreword the famous British theoretical physicist Stephen Hawking who has amyotrophic lateral sclerosis commented as follows:-

"We have a moral duty to remove the barriers to participation for people with disabilities, and to invest sufficient funding and expertise to unlock their vast potential. It is my hope this century will mark a turning point for inclusion of people with disabilities in the lives of their societies"

(v) However, a word of caution; the directions hereby issued awaiting Cabinet revisit of the Policy are not meant for Teachers/Lecturers who suffer from one hundred percent blindness and are facing disciplinary proceedings for gross misconduct involving moral turpitude inviting major punishment, in the present or in the future.

19. For the foregoing reasons the petition is allowed while setting aside the impugned orders of transfer qua the petitioners while holding at the same time that the orders are neither illegal nor arbitrary. They have been passed *ex aequo et bono*. Before parting this Court records its

appreciation of the honest and courageous stand points of both, the Director, Secondary Education and the Additional Chief Secretary, Secondary Education, the latter placing a definite legal barrier to relief from the administration. This order I believe is a workable via media for the time being and as an ameliorative measure to mitigate extreme hardship which cannot be achieved if the orders are left to stand.

20. The letter from Government produced by Mr. Rathee together with the noting sheets is retained on record as Mark 'A'.

(RAJIV NARAIN RAINA)
JUDGE

09.09.2016

manju

Whether speaking/reasoned

Yes

Whether reportable

Yes