

HONOURABLE SRI JUSTICE P. NAVEEN RAO

WRIT PETITION No. 18946 of 2018

Date :13.6.2018

Between:

Shaik Karimulla S/o Saleem
Aged about 37 years
working as Senior Assistant
O/o DM and HO Khammam
R/o 42151/260/6/5
Sreenivasa Nagar
Khammam Town and District
Telangana State

Petitioner

And

The Director of Public Health and family Welfare
Government of Telangana Hyderabad and others

Respondents

The Court made the following:



HONOURABLE SRI JUSTICE P. NAVEEN RAO

WRIT PETITION No. 18946 of 2018

ORAL ORDER:

While petitioner was working as Senior Assistant in Narsampet in Warangal District, the Government created Community Health Nutrition Clusters (for short CHNCs) to provide comprehensive health services and certain posts were also redeployed to CHNCs. Consequently petitioner was transferred to CHNC- Garla, Khammam district on 1.1.2011. After bifurcation of the existing districts and formation of new districts, petitioner was posted to office of the District Medical and Health Officer, Khammam vide proceedings dated 8.11.2016 and joined on 9.11.2016.

2. Recently, Government lifted ban on transfers and vide G O Ms No. 61 dated 24.5.2018 notified transfer guidelines. Government enabled few of the departments mentioned in Para -VI, including Health Medical and Family Welfare Department, to formulate their own guidelines/rules. The Health, Medical and Family Welfare Department notified guidelines in G O Ms NO. 53 dated 1.6.2018. These guidelines partially modified the general guidelines notified by Government.

3. As a consequence to the decision to lift ban on transfers and notification of guidelines, steps are being taken to consider the request for transfers. As per G O Ms No. 61 dated 24.5.2018 an employee who has completed 5 years of service at a particular station cannot be retained in that place without reference to quantum of service rendered in a particular station. The G.O also clarifies that transfer effected and provisionally ordered to serve in new districts during October, 2016 should not be counted as fresh posting. In view of the same, petitioner's tenure is treated as 7 years one month and 30 days and therefore cannot be retained at the present place of work and has to be transferred. This decision to count the entire service from 11.1.2011 as service in a particular station only is under challenge.

4. Learned counsel for petitioner would submit that by way of redeployment, petitioner was transferred and posted to CHNC-Garla in January, 2011 and after closure of CHNC he was transferred and posted to office of DM&HO, Khammam in November, 2016. This being an independent transfer, the previous service rendered by him in CHNC, Garla cannot be treated as continuous service. As petitioner has not completed two years of service in DM&HO, Khammam, he is not liable for transfer. In support of his contention, learned counsel placed reliance on clarification issued by Finance Department in Circular No. 2934-A/334/A1/HRM.1/2018 dated 2.6.2018. According to learned counsel, as clarified by the Finance Department, transfers effected at the time of Districts reorganization are to be treated as regular transfers. He would therefore submit that transfer made in November, 2016 is a regular transfer and thus, petitioner is not liable for transfer in the present transfer counseling.

5. There are plethora of precedents in transfer matters. Some leading decisions are :

- i) Shilpi Bose vs. State of Bihar [1991 Supp (2) SCC 659];
- ii) Bank of India v. Jagjit Singh Mehta [(1992) 1 SCC 306];
- iii) Union of India and other vs. S.L.Abbas [(1993) 4 SCC 357];
- iv) N.K.Singh vs. Union of India [(1994) 6 SCC 98];
- v) State of Madhya Pradesh vs. S.S.Kourav [(1995) 3 SCC 270];
- vi) State Bank of India vs. Anjan Sanyal and others [2001 (5) SCC 508];
- vii) State of Uttar Pradesh vs. Gobardhan Lal [(2004) 11 SCC 402];
- iv) Airports Authority of India vs. Rajeev Ratan Pandey (2009) 8 SCC 337];
- viii) Tushar D.Bhatt vs. State of Gujarath and another [(2009) 11 SCC 678];
- ix) Rajendra Singh and others Vs. State of Uttar Pradesh and others [(2009) 15 SCC 178];

- x) Registrar of High Court of Judicature of Madras vs. R.Perachi [(2011) 12 SCC 137];

6. It is necessary to notice the view expressed by Supreme Court in few of the above decisions to appreciate the contentions in the writ petition.

6.1 In **S.L.Abbas**, Supreme Court held as under:

“6. An order of transfer is an incident of Government service. Fundamental Rule 11 says that “the whole time of a Government servant is at the disposal of the Government which pays him and he may be employed in any manner required by proper authority”. Fundamental Rule 15 says that “the President may transfer a Government servant from one post to another”. That the respondent is liable to transfer anywhere in India is not in dispute. It is not the case of the respondent that the order of his transfer is vitiated by mala fides on the part of the authority making the order, — though the Tribunal does say so merely because certain guidelines issued by the Central Government are not followed, with which finding we shall deal later. The respondent attributed “mischief” to his immediate superior who had nothing to do with his transfer. All he says is that he should not be transferred because his wife is working at Shillong, his children are studying there and also because his health had suffered a setback some time ago. He relies upon certain executive instructions issued by the Government in that behalf. Those instructions are in the nature of guidelines. They do not have statutory force.

7. Who should be transferred where, is a matter for the appropriate authority to decide. Unless the order of transfer is vitiated by mala fides or is made in violation of any statutory provisions, the court cannot interfere with it. While ordering the transfer, there is no doubt, the authority must keep in mind the guidelines issued by the Government on the subject. Similarly if a person makes any representation with respect to his transfer, the appropriate authority must consider the same having regard to the exigencies of administration. The guidelines say that as far

as possible, husband and wife must be posted at the same place. The said guideline however does not confer upon the Government employee a legally enforceable right.

8. The jurisdiction of the Central Administrative Tribunal is akin to the jurisdiction of the High Court under Article 226 of the Constitution of India in service matters. This is evident from a perusal of Article 323-A of the Constitution. The constraints and norms which the High Court observes while exercising the said jurisdiction apply equally to the Tribunal created under Article 323-A. (We find it all the more surprising that the learned Single Member who passed the impugned order is a former Judge of the High Court and is thus aware of the norms and constraints of the writ jurisdiction.) The Administrative Tribunal is not an appellate authority sitting in judgment over the orders of transfer. It cannot substitute its own judgment for that of the authority competent to transfer. In this case the Tribunal has clearly exceeded its jurisdiction in interfering with the order of transfer. The order of the Tribunal reads as if it were sitting in appeal over the order of transfer made by the Senior Administrative Officer (competent authority).”

6.2 In **Shilpi Bose**, Supreme Court held as under:

“3. If the competent authority issued transfer orders with a view to accommodate a public servant to avoid hardship, the same cannot and should not be interfered by the court merely because the transfer orders were passed on the request of the employees concerned. The respondents have continued to be posted at their respective places for the last several years, they have no vested right to remain posted at one place. Since they hold transferable posts they are liable to be transferred from one place to the other. The transfer orders had been issued by the competent authority which did not violate any mandatory rule, therefore the High Court had no jurisdiction to interfere with the transfer orders.

4. In our opinion, the courts should not interfere with a transfer order which is made in public interest and for administrative reasons unless the transfer orders are made

in violation of any mandatory statutory rule or on the ground of mala fide. 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. Transfer orders issued by the competent authority do not violate any of his legal rights. Even if a transfer order is passed in violation of executive instructions or orders, the courts ordinarily should not interfere with the order instead affected party should approach the higher authorities in the department. If the courts continue to interfere with day-to-day transfer orders issued by the government and its subordinate authorities, there will be complete chaos in the administration which would not be conducive to public interest. The High Court overlooked these aspects in interfering with the transfer orders.”

6.3 In **Rajendra Singh**, Supreme Court held as under:

“14. We are pained to observe that the High Court seriously erred in deciding as to whether Respondent 5 was a competent person to be posted at Ghaziabad IV as Sub-Registrar. The exercise undertaken by the High Court did not fall within its domain and was rather uncalled for. We are unable to approve the direction issued to the State Government and the Inspector General of Registration to transfer a competent officer at Ghaziabad IV as Sub-Registrar after holding that Respondent 5 cannot be said to be an officer having a better conduct and integrity in comparison to the petitioner justifying his posting at Ghaziabad IV. The High Court entered into an arena which did not belong to it and thereby committed serious error of law.”

6.4 In **Airport Authority of India**, employee challenged his transfer as in violation of transfer policy. According to him, inter-regional transfer should not be made before the incumbent completes at least five years tenure in that region. Supreme Court observed:

“10. In the writ petition, the transfer order has been assailed by the present Respondent 1 on the sole ground

that it was violative of transfer policy framed by the appellant. The High Court, did not even find any contravention of transfer policy in transferring Respondent 1 from Lucknow to Calicut. In a matter of transfer of a government employee, scope of judicial review is limited and the High Court would not interfere with an order of transfer lightly, be it at interim stage or final hearing. This is so because the courts do not substitute their own decision in the matter of transfer.”

6.5 In **Jagjit Singh Mehta**, Supreme Court observed as under:

“5. There can be no doubt that ordinarily and as far as practicable the husband and wife who are both employed should be posted at the same station even if their employers be different. The desirability of such a course is obvious. However, this does not mean that their place of posting should invariably be one of their choice, even though their preference may be taken into account while making the decision in accordance with the administrative needs. In the case of all-India services, the hardship resulting from the two being posted at different stations may be unavoidable at times particularly when they belong to different services and one of them cannot be transferred to the place of the other's posting. While choosing the career and a particular service, the couple have to bear in mind this factor and be prepared to face such a hardship if the administrative needs and transfer policy do not permit the posting of both at one place without sacrifice of the requirements of the administration and needs of other employees. In such a case the couple have to make their choice at the threshold between career prospects and family life. After giving preference to the career prospects by accepting such a promotion or any appointment in an all-India service with the incident of transfer to any place in India, subordinating the need of the couple living together at one station, they cannot as of right claim to be relieved of the ordinary incidents of all-India service and avoid transfer to a different place on the ground that the spouses thereby would be posted at different places. In addition, in the present case, the respondent voluntarily gave an undertaking that he was prepared to be posted at

any place in India and on that basis got promotion from the clerical cadre to the officers' grade and thereafter he seeks to be relieved of that necessary incident of all-India service on the ground that his wife has to remain at Chandigarh. No doubt the guidelines require the two spouses to be posted at one place as far as practicable, but that does not enable any spouse to claim such a posting as of right if the departmental authorities do not consider it feasible. The only thing required is that the departmental authorities should consider this aspect along with the exigencies of administration and enable the two spouses to live together at one station if it is possible without any detriment to the administrative needs and the claim of other employees.”

7. It is clearly discernible from the precedent decisions that in matters of transfer, scope of judicial review is limited and High Court should not interfere with an order of transfer lightly, unless the transfer is vitiated either by *mala fides* or on the ground of infraction of any professed norm or principle: Only limited judicial scrutiny can be undertaken either at the interim stage or final stage. Transfer is an incidence of service, implicit as an essential condition of service; no employee has vested right to remain posted at a place of his/her choice; at times, several imponderables requiring formation of subjective opinion may be involved; realistic approach is to leave to the wisdom of hierarchical superiors; the wheels of administration should be allowed to run smoothly; Courts do not substitute their own decision in the matters of transfer; there are no judicially manageable standards for scrutinizing the transfers; Courts lack necessary expertise for personnel management; in public interest, transfers involving public services have to be best left to the concerned authorities; writ Court cannot sit as appellate forum to consider transfer matters; guidelines do not have statutory force; guidelines do not confer legally enforceable right; even if an order of transfer is passed in violation of executive instructions or orders, Court should not interfere; affected party should approach higher

authorities; Court should not interfere if transfer is made to equivalent post without any adverse consequence on the service prospects.

8. Employees working in the government seek transfer from the place of work on completion of certain period of service. Such request for transfer can be for variety reasons, such as children's education, health, parental care, working spouse, attraction towards a post, etc. For reasons best known to Government, transfers were not made in the last 4 years. Thus, demand for transfers is more vocal. Yielding to the pressure of employees, government agreed to undertake the exercise of transfers. The process was set in motion by issuing GO Ms. No. 61 finance department dated 25. 4. 2018. Government notified guidelines for transfers.

9. Transfer exercise involves posting in existing vacancies or replacing existing incumbent. It requires identification of vacancies and /or identification of employees who can be disturbed to accommodate request transfers. It is not uncommon that request for transfers to few places can be more than the vacancies available /vacancies that can be made available. Request for transfers cannot be effectively processed unless incumbents are disturbed. It therefore requires prioritisation of requests. There must be some criteria to identify employers who can be disturbed. Further, in mammoth government organisation leaving it to individual competent authorities to process transfer claims may have its own drawbacks. Thus, transfer exercise per force requires formulation of guidelines /framing of rules dealing with it all categories and all claims to the extent possible. As noted above, vide GO Ms. No. 61 government notified guidelines. To accommodate the respective claims of employees seeking transfer for various reasons, certain yardsticks are fixed by the Government.

10. Salient features of these guidelines are:

- (i) Transfer should be effected between 25.5.2018 to 15.06.2018.
- (ii) A person can be transferred only if he has completed 2 years of service in a **station** as on 31.5.2018. Two exceptions are made to this condition:
1. seeking transfer on spouse ground ;
 2. earlier employee was transferred and provisionally ordered to serve in new districts in October 2016.
- (iii) Employee who has completed 5 years of service in a **station** as on 31.5.2018 shall be compulsarily transferred. However, employee retiring from service on/before 31.5.2019 is exempted from transfer even if he has completed 5 years of service in a **station**.
- (iv) While effecting transfers CAP is imposed i.e., not more than 40% in a cadre can be transferred. Thus, even if there are many employees who have completed more than 5 years as on 31.5.2018 or/and requests for transfers are made, while considering such transfers the cadre controlling authority should ensure not more than 40% in the cadre are disturbed.
- (v) Guidelines prescribe priority in consideration of request for transfer, such as spouse working in a station, date of retirement, health of self or dependent, etc. However, such priority is applicable only when more than one employee opts for same post.
- (vi) Station means place of actual working i.e., city/ town/ village. Service in all cadres at a station will be counted.
- (vii) It is pertinent to note that if adequate personnel do not opt for hardship area system of lottery should be followed.
- (viii) Transfers should be made by adopting counselling procedure.
- (ix) These general guidelines are not mutatis/mutandis applicable to certain departments and they are authorized to frame additional guidelines/ amend/ formulate rules.

- (x) The G.O clarifies the presidential Order should be followed and existing instructions on posting of second level and higher level gazetted officers to their native districts.

11. To accommodate request of individual employees, it is necessary to identify the availability of vacancies and to assess the tenure of employee working in a particular place and if it is found that employee is working for long time in a particular place, it is desirable to shift him/ her from the present place in order to accommodate claims of other employees. There is more demand for postings to Urban areas, more particularly to the city. If persons' continuation is allowed in a station for long time, aspirations of other employees would be adversely affected. There is a need to balance the request of employees. Thus, fixing five years tenure has clear objective underlying the very transfer policy. While identifying an employee for transfer to accommodate request of another employee what is required to be seen is whether that employee has worked for considerable period in a station. It is immaterial, for a limited purpose of transfer, to see in what capacity he worked in a station.

12. While assessing the guidelines formulated for transfers, keeping in mind the scope of judicial review on transfer guidelines, the object it seeks to achieve must be seen. Twin objectives discernible from transfer guidelines are, to accommodate the request for transfer of employees to the extent possible and not to retain an employee in a station for longer period. It also takes care of smooth transition by fixing cap on maximum number of employees who can be disturbed. It is also significant to note from para-VII (e) of guidelines, the objective of transfer policy is to act as a catalyst in capacity building by ensuring departmental employees in getting variety of experience and becoming more fit to hold higher responsibilities. Therefore, the tenure of an employee must be viewed not only with reference to the claim of employee for retention, but also with reference to the claim of other employees for posting at prime location,

over all objective of Government. Thus, while identifying the tenure in a station liberal construction to relevant clauses of guidelines is necessary. More so, when transfer is made to equal post and if service conditions are not affected. So long as a person was working in a station for more than five years, in what capacity and in what manner he was working is immaterial and the total amount of service rendered in that station can be computed. What is important is tenure in a 'Station'.

13. Clause II of G O Ms No. 61 prescribes who can be transferred. According to paragraph (b) person who has completed 5 years in a station cannot be retained. According to clause (a) person who has not completed two years of service at a station should not be subjected to transfer. However, according to paragraph II (ii) employees transferred and provisionally ordered to serve in new districts during October, 2016 are not covered by this condition. Petitioner was transferred to office of DM&HO, Khammam vide orders of the Government in G.O.Rt No. 791 Health Medical and Family Welfare dated 11.10.2016. His transfer was consequent to reorganisation of CHNCs and coinciding with postings in newly formed districts. In paragraph 3 of the said Government Order it is stated that persons shown in annexure shall serve provisionally in connection with the District until further orders of the Government. Petitioner's name is shown at serial No.6 in the annexure. In the circular dated 2.6.2018 it is a general clarification on transfers made during the District Re-organisation as regular transfers. However, G O Ms No.61 makes it clear that transfers affected consequent to formation of new districts in October, 2016 are only provisional and made as a tentative arrangement and while computing stay in a station previous service also to be counted. In G.O.ms No. 53 Health Medical and Family Welfare Department dated 1.6.2018, modified guidelines are issued. In paragraph 5, it is stated that to compute seniority for transfers CHNC service also be computed. Petitioner was earlier working in

pre-bifurcated Khammam district and in 2016 posted to Khammam town. His transfer is on account of reorganization of scheme of CHNCs. Thus, for the limited purpose of effecting transfers no exception can be made to computing service rendered in CHNC. Therefore, the contention of the learned counsel for petitioner that he is not liable for transfer as he has not completed two years of service by taking the joining date in DM&HO i.e, 19.11.2016 cannot be appreciated.

14. It is pertinent to note that petitioner is working in transferable post with liability for transfer. Even assuming that his assignment in the office of DM&HO to be treated as a fresh assignment, he cannot claim as a matter of right that he should not be disturbed from said office. He has no indefeasible right to claim that he should not be disturbed from present assignment. It is also appropriate to note that no malafides are attributed against any officer. His conditions of service are not affected by his transfer. Who should be posted in a place where an employee be posted should be best left to competent authority.

15. From the proposition of law as laid down in several precedent decisions, it is manifest that the Court cannot go into intricacies of the cadre management and posting of the employees; there can be several imponderables requiring formation of a subjective opinion and Court cannot go into those administrative issues in exercise of power of judicial review. In any service, there can be competing claims/aspirations and the cadre controlling authority is the best judge to accommodate competing claims and organize his cadres.

16. Having regard to the parameters laid down by the Supreme Court in the precedents referred to above, and in the facts of this case, I do not see any illegality in identifying petitioner as person cannot be retained in the present place of posting warranting interference by this

Court. Writ Petition is accordingly dismissed. Pending miscellaneous petitions shall stand closed.

P NAVEEN RAO,J

DATE:13-06-2018
TVK

