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

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Date of Decision:01.07.2019

% **W.P.(C.) No. 6739/2019 & C.M. No. 28309/2019**

YATENDAR KUMAR SHARMA

..... Petitioner

Through: Mr. K.K. Sharma, Advocate
versus

UNION OF INDIA & ORS

..... Respondent

Through: Mr. Dev P. Bhardwaj, CGSC

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE RAJNISH BHATNAGAR, J

VIPIN SANGHI, J. (ORAL)

1. The petitioner has preferred the present writ petition to assail his posting to Silchar on the ground that one of his two daughters is suffering from serious ailment. The petitioner submits that his daughter – Navya, who is seven years old, is suffering from Smith Magenis Syndrome i.e. permanent intellectual disability since her birth. The petitioner further states that the petitioner's daughter is also suffering from a squint in her eyes. She is also suffering from a cardiac ailment. She is undertaking treatment at AIIMS, New Delhi. The petitioner states that the disease from which his daughter is suffering is very rare. 50% of her mental faculties are permanently impaired and the petitioner's daughter comes under the Benchmark Disability as per Section 2(r) of The Rights of Persons with Disabilities Act, 2016.

2. The petitioner states that his said daughter needs constant care. His wife is a housewife and she belongs to the rural area. That is stated to be the ground for claiming that the wife of the petitioner is not able to take care of the petitioner's daughter.

3. The petitioner does not deny the fact that he has remained in Delhi since 2012. The respondents have, however, now transferred him to Silchar considering the fact that the petitioner cannot permanently remain posted in Delhi and he must, like other members of the force, also undertake difficult posting.

4. On the last date, the respondents were required to report whether treatment for the ailment suffered by the petitioner's daughter is available at Silchar. Counsel for the respondent states that the said treatment is not available at Silchar. We may also observe that the petitioner has already joined his duties at Kashipur, Assam in terms of the transfer orders.

5. We have heard learned counsels at some length.

6. Learned counsel for the petitioner places reliance on O.M. dated 08.10.2018 issued by the DoP&T. He also places reliance on the Minutes of the Annual Commandants Conference of Signal units held on 23.07.2018 and, in particular, on paragraph (XII) thereof, which states that request of signal personnel having chronic ailments (or) any other critical/ serious disease for self/ dependant family members for choice of transfer/ posting shall be considered favorably subject to availability of vacancy in particular places.

7. The O.M. dated 08.10.2018 issued by the DOP&T, in so far as it is relevant, reads as follows:

*“Considering that transfer of a Government employee **who serves as the main care giver of persons with disability** would have a bearing on the systematic rehabilitation of persons with disabilities, the Government issued OM of even number dated June 6, 2014 to exempt such employee from routine exercise of transfer/rotational transfer, **subject to administrative constraints.***

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3. With the enactment of the Rights of Persons with Disabilities Act, 2016 on April 17, 2017, the following instructions are issued in supersession of the above-mentioned OMs of even number dated June 6, 2014, November 17, 2014 and January 5, 2016 with regard to the eligibility for seeking exemption from routine exercise of transfer/rotational transfer:

*(i) A Government employee who is a care-giver of dependent daughter/son/parents/spouse/brother/sister with Specified Disability, as certified by the certifying authority as a Person with Benchmark Disability as defined under Section 2(r) of the Rights of Persons with Disabilities Act, 2016 **may be exempted from the routine exercise of transfer/rotational transfer subject to the administrative constraints***

(emphasis supplied)

8. Counsel for the petitioner has also placed reliance on the decision of the Division Bench of this Court in **Mukesh Kumar v. Union of India & Ors.**, W.P.(C.) No. 1133/2016, decided on 27.07.2016.

9. On the other hand, learned counsel for the respondent submits that the disability suffered by the petitioner's daughter, unfortunately, is of

permanent nature and if the submissions of the petitioner were to be accepted, it would mean that he would never be posted at a difficult posting. He submits that other personnel, who have been serving in difficult postings also need respite from their posting, and if such like submissions were to be accepted, it would become impossible for the respondents to manage the aspect of postings and transfers in a satisfactory manner.

10. Learned counsel further submits that merely because the wife of the petitioner is claimed to belong to rural area, it does not mean that she cannot look after the child, even if the child has to remain in Delhi to undergo the treatment.

11. As noticed above, the nature of the medical ailments suffered by the petitioner's daughter are of a permanent nature. Thus, it cannot be said that, in case, she undertakes treatment at AIIMS, Delhi or at any other hospital where the treatment for the petitioner's daughter is available, she would get cured, at least, to such an extent that the need for the petitioners presence, as claimed by the petitioner, would not be felt. Thus, if the petitioner's submissions were to be accepted, he would always have to be posted only in Delhi or at a place where his daughter's treatment could be guaranteed. Such a place would, obviously, be a large metro city such as Mumbai, Chennai, Bengaluru etc. Remote and difficult posting would be ruled out. The OPD card of the petitioner's daughter placed on record shows that she had visited the OPD of the ENT Department at AIIMS on 14.11.2018, and thereafter she visited the same on 29.05.2019 i.e. after a gap of about six months.

12. Learned counsel for the petitioner, however, points out that the petitioner's daughter has visited Cardiothoracic & Neurosciences Centre at AIIMS on 04.01.2019 and on other occasions as well. Be that as it may, it appears to us that the petitioner's daughter is visiting AIIMS, Delhi from time to time only as a follow up measure. The OPD card placed on page 85 does not indicate any next date of visit given by the doctor. It only states to continue with the treatment prescribed for the petitioner's daughter. Learned counsel has not pointed out to the contrary to us.

13. The OM dated 08.10.2018 is postulated on a few pre-requisites. The first is that the Government employee is the care giver of a person with disability. In respect of the petitioner, this cannot be claimed to be entirely true in as much, as, his wife is a housewife and she would primarily be looking after the ailing daughter. Merely because the petitioner's wife is claimed to hail from a rural background, it cannot be a reason to claim that she cannot look after the petitioner's suffering daughter and she cannot take the daughter for treatment to AIIMS, Delhi or administer her medicines as advised by the Doctor. Being the mother she is the most suited and natural care giver in respect of her minor daughter. The submission of learned counsel for the petitioner proceeds on the assumption that a person/ woman from a rural background is not competent to take care of her ailing child. We find this submission to be without any basis and contrary to realities of life. Moreover, the exemption from routine exercise of transfer/ posting is "*subject to administrative constraints*". In the present case, considering the petitioner's circumstances, he was accommodated and he has remained in Delhi for seven years in terms of the policy.

14. Reliance placed on the decision in ***Mukesh Kumar*** (supra), in our view, is of no avail. Even in this decision, the Division Bench did not hold that in such like cases, transfer of the Government Servant, cannot be undertaken.

15. Reliance placed on the minutes dated 23.07.2018 is of no avail, since the same do not attain the status of either a statute, or an enforceable policy decision. There is nothing to show that those minutes have been approved or adopted by the competent authority as a uniform policy for the entire organization.

16. In these circumstances, we are not inclined to interfere with the impugned orders of transfer and posting. However, we leave it to the petitioner to represent to the respondents after he has completed one year of his present posting and, in case, a representation is made by the petitioner, the same may be considered by the respondents keeping in view the policies in that regard and the circumstances of the Petitioner and his minor daughter.

17. The petition stands disposed of in the aforesaid terms.

VIPIN SANGHI, J.

RAJNISH BHATNAGAR, J.

JULY 01, 2019/N.Khanna