

Item-2 23-08-2021

WP.CT 39 of 2021

Dr. Leena Mistry
Versus
Union of India & Ors.

sg

Ct. 16

(Through Video Conference)

Mr. Debashis Kundu, Sr. Adv.
Mr. R.N. Barik, Adv.
Ms. Ayushi Kundu, Adv.
...for the petitioner

Mr. Samrat Chowdhury, Adv.
...for the respondent nos. 4 to 14

Ms. Indrani Chakraborty, Adv.
Mr. Srada Sha, Adv.
...for UOI

The writ petition is arising out of an order passed by the Central Administrative Tribunal, Kolkata Bench at Kolkata on 9th March, 2021 in connection with an application filed by the writ petitioner under Section 19 of the Administrative Tribunal Act, 1985 praying, inter alia, for revocation and/or withdrawal of Office Order No. 412-T-11/11/158 (OA No. 569 of 20)/2020 dated 1st September, 2020 for transfer of the writ petitioner from ESI Hospital and ODC (EZ), Joka to MDCC Haldia and also the corresponding release order dated 3rd September, 2020 and permit the writ petitioner to continue working in her present place of posting ESI hospital, Joka in the Department of Pulmonary and Chest Disease.

Mr. Debashis Kundu, learned Senior Counsel appearing on behalf of the writ petitioner has assailed the order passed by the learned Tribunal on the ground that the said transfer order was issued in violation of moratorium on rotational transfer of

officers issued on 4th June, 2020 and also Office Memorandum dated 25th October, 2019. Clause II of the said memorandum has specifically stated that in case no regular Specialist is available in a particular department of a hospital, PG qualified GDMOs of that specialty, from the same unit or elsewhere, may be posted as In-charge of that specialty department. Mr. Kundu has submitted that the order of transfer passed on the recommendation of the Fairness Committee on Transfer is in clear violation of the Headquarters' Memorandum dated 13th May, 2020. It is also submitted that the present transfer of the writ petitioner from ESI Hospital and ODC (EZ), Joka to MDCC Haldia is a demotion, inasmuch as, she has now been transferred from a hospital to a clinic which is not permissible under the Office Memorandum mentioned above.

The learned Tribunal in paragraphs 3 to 5 of the impugned order has summarised the arguments made on behalf of the parties.

Before the Tribunal, the order passed by the Medical Superintendent in disposing of the representation dated 5th August, 2020 in terms of an order passed in O.A. No. 569 of 2020 was under challenged. The Medical Superintendent, while disposing of the said representation for transfer, has given the following reasons in favour of the said transfer:-

“9. I have gone through the facts made out in the representation and taken note of the facts transpiring from related matter and records and the same reveals following:-

9.1 The stated transfer is an administrative exigencies yielded for a request made by Dr. Manoj Das,

IMO Grade I for his transfer on medical ground of his autistic child and accordingly his transfer request was accepted by the Competent Authority without TA/DA/Joining time that means no cost to the Government for the stated transfer.

9.2 As per the rotational transfer policy of this Hospital defined by fairness committee on transfer, IMOs serving in this hospital will have to undergo for mandatory rotational transfer to MDDC as per seniority list starting from junior most. Likewise in the instant case Dr. Leena Mistry was junior most among the available IMOs yet to be transferred to MDDC and was supposed to be on rotational transfer in the month of January 2019.

9.3 Whereas the Competent Authority took a humanitarian view in the case of petitioner i.e. Dr. Leena Mistry since she was nursing mother of an infant aged less than six months.

9.4 Therefore breaking the serial and turn, the immediate next IMO senior to her, Dr. Manoj Das was considered for transfer. He has served his stipulated period at MDDC, Haldia and his transfer back to ESIC Hospital, ODC (EZ), Joka was due as per the recommendation of the Fairness Committee. However he served four more months in addition to the definite period on account of lockdown prevailing in this pandemic condition.

9.5 In this situation, considering the representation of Dr. Manoj Das the Competent Authority of this Hospital transferred him back at ESIC Hospital, ODC (EZ), Joka at own cost without providing him TA/DA/Joining time.

9.6 The inevitable vacancy so created was affecting patient care service at MDDC, Haldia. Repeated request was received from I/C, MDDC, Haldia to post an IMO to normalize patient care service.

9.7 Hence the question of transferring an IMO from

ESIC Hospital, ODC (EZ), Joka to MDDC, Haldia was unavoidable. So the stated transfer Order had to be issued.

9.8 Since the applicant's circumstances was already considered once, in view of the ongoing administrative exigencies the same cannot be considered again as it would violate the very purpose of the recommendation of the fairness committee.

9.9 The transfer of Dr. Leena Mistry has been issued as per the policy made by "Fairness Committee on Transfer" of this Hospital.

9.10 Further the applicant stated in his representation that 02 GDMO posts are already sanctioned in Department of Pulmonary Medicine but the fact is posts have been sanctioned but the stated posts have not yet been released. It is further to mention that Chest Medicine Department of this Institute already have one regular Specialist of SAG cadre and one Asst. Professor. The determining criteria laid down in the rotational transfer policy as per seniority list ascending from junior most. Circular on rotational transfer hearing No. 412-Z-11/15/1/2013/Vol-VIII dated 30.10.2013 does not state that PG qualification is an exemption for this rotational transfer of one year tenure to MDDC. Further in the past there are instances of posting of IMOs with PG qualification being transferred to MDDC as per rotational transfer policy.

9.11 Regarding point no. 2 of the representation it should be clearly noted that this is a rotational transfer of one year and not a permanent posting. So the issue is not valid in this regard.

10. In view of aforesaid the representation dated 05.08.2020 of the petitioner has been considered but cannot be acceded to.

11. This Speaking Order is issued in compliance

with directions of Hon'ble CAT, Kolkata Bench in OA No. 350/00569/2020 .”

It would appear from the said order of the authority concerned that although, rotational transfer was issued to her previously but due to humanitarian ground, the same was deferred since she was nursing mother of an infant aged less than six months. It is clear from the order that the present transfer order is based on an administrative exigency caused by transfer of Sri Manoj Das, IMO Grade I to Joka on medical grounds of his autistic child which qualified as an exception to the moratorium on rotational transfers till 30th April, 2021. Moreover, the office order dated 4th June, 2020 in Clause 2 has clearly stated the exceptions to the moratorium in the following words:

“The exception to this moratorium on rotational transfers, would, however, be administrative reasons to fill up any vacancy due to promotion/retirement and consideration of requests by officers/staff on compassionate grounds i.e. medical emergency with self or family members etc. with general principles that minimum dislocation is caused to the officers/officials while deciding posting on promotion.”

In terms of the rotational transfer policy, serving IMOs will have to undergo mandatory rotational transfer to MDDC as per seniority list starting from the junior most IMO. Dr. Leena Mistry was the junior most amongst the available IMOs, and hence, she was eligible for rotational transfer in January, 2019. The authorities, however, exempted Dr. Mistry since she was nursing her new born infant. The IMO who was immediately

senior to her, Dr. Manoj Das, was, therefore, considered for transfer. Dr. Das has served more than his stipulated period at MDCC, Haldia, and his transfer back to ESIC Hospital, ODC (EZ), Joka was due as per the recommendation of the Fairness Committee. The consequent vacancy so created having affected patient care service at MDCC, Haldia, repeated requests were received from I/C, MDCC, Haldia to post an IMO to address the rising incidence of patients in the pandemic situation.

On such consideration, the transfer order of the applicant was issued on the basis of the recommendation made by the Fairness Committee on Transfer. The Chest Medicine Department of the respondent Institute is attended by one regular Specialist of SAG cadre and one Assistant Professor. The circular on rotational transfer does not exempt post-graduates from such transfer and IMOs with PG qualifications have been transferred to MMDC as per rotational transfer policy. Moreover, the tenure of rotational transfer is only one year.

It is well-settled that in a judicial review the Court shall not substitute the findings of the Fairness Committee with its own even if it appears to the Court that another view is possible. The administration should be allowed to function in public interest. Unless, the transfer order is tainted with malafide or in violation of any rules, the Court should be extremely cautious and careful to interfere with the order of transfer. In this pandemic situation, the requirement and need of medical help is of paramount importance. The authorities were duty bound to discharge such public service and attend to the patients in public interest. In our view, the authority did not act malafide or in

arbitrary manner and the transfer of the petitioner was only for one year on the basis of a rotational transfer to MMDC, Haldia. Transfer is an incidence of service. It is elementary that the government servants are liable to be transferred to a similar post or same cadre, which is the normal feature and no government servant can claim to remain in a particular post or place unless, of course, his appointment or post specialized for non-transferable post, which in the instant case, does not arise.

In absence of any malafide or arbitrary conduct on the part of the respondent authorities in transferring the writ petitioner to MMDC, Haldia and in view of the fact that such transfer was in public interest, we do not find any reason to interfere with the order of transfer recommended by the Fairness Committee on Transfer and we do not also find any reason to interfere with the order passed by the learned Tribunal which is based on sound reasoning and consideration of relevant facts.

In view of the fact that another doctor has now been appointed as MMDC, Haldia, the transfer of the petitioner to MMDC, Haldia as on date does not arise.

The writ petition, accordingly, stands dismissed.

Mr. Kundu has submitted that she has not received salary for many months and she is now without any pay and post.

The petitioner may make an appropriate application before the authorities concerned for release of her salary and appropriate post and in the event such representation is made the authority concerned shall consider and dispose of such application in accordance with law as expeditiously as possible,

preferably within two months from the date of the application.

Pending consideration of such application suitable posting may be given to the writ petitioner commensurate with her status and qualification.

(Hiranmay Bhattacharyya, J.)

(Soumen Sen, J.)