

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**WRIT PETITION NO. 1514 OF 2016
WITH
INTERIM APPLICATION (L) NO. 5802 OF 2021**

Lt. Col. Anil Kumar Yadav } Petitioner
Versus
Military Secretary Branch }
(Artillery/MS 11) & Ors. } Respondents

Mr. Kranti L. C. with Mr. Kaustubh Gidh for the petitioner.

Mr. B. B. Sharma with Mr. Suresh Kumar for respondents in WP/1514/2016 and for applicant in IAL/5802/2021.

**CORAM: DIPANKAR DATTA, CJ. &
 M. S. KARNIK, J.**

RESERVED ON : JULY 12, 2022
PRONOUNCED ON: JULY 14, 2022

JUDGMENT: (Per Chief Justice)

1. Interim application (L) No. 5802 of 2021 has been filed by the respondent no.1 in the writ petition seeking, *inter alia*, the following relief: -

- (a) The writ petition be disposed of since it has been rendered infructuous;
In the alternative,
- (b) The interim order passed in the writ petition be vacated."

2. While hearing the interim application, we have heard the parties on the merits of the writ petition.

3. The writ petition is at the instance of a Lieutenant Colonel who has been posted at the Embarkation Headquarters in Mumbai since January 2011. The subject matter of challenge in the writ petition are orders dated 6th October 2015 (Exhibit 'K') and 2nd February 2016 (Exhibit 'R'). By the order dated 6th October 2015, which is in the nature of a message, the petitioner was, *inter alia*, informed that his request for posting in Mumbai stands regretted. By the other order dated 2nd February 2016, the petitioner's prayer for extension of tenure in Mumbai was once again regretted and he was requested to indicate his choice of stations within 7 (seven) days of receipt thereof, failing which posting order would be issued based on inputs available with the Military Secretary Branch.

4. The reason why the petitioner has been insisting for his continued posting at Mumbai is personal. The older of the petitioner's two sons (hereafter "the child", for short) is having 100% disability on number of counts. He required special treatment which, according to the petitioner, was available only in Mumbai. It is perfectly understandable that as a doting and concerned father, the petitioner would seek to secure the wellbeing of the child and, therefore, leave no stone unturned to have his posting in Mumbai continued upon reversal/recall of the impugned order dated 6th October 2015 by the respondent no.1. In pursuit of the same, the petitioner appears to have sought for interviews with his superior officers, which were granted. In course thereof, the petitioner sought to impress that categorization of the child as P-IV was in violation of the policy decision contained in letter dated 5th

December 2014 issued from the Military Secretary Branch and that the child ought to have been categorized as P-I/P-IA. However, persuasions of the petitioner having failed, he was perhaps left with no other alternative but to knock the doors of this Court seeking justice for the child.

5. The writ petition was heard by a coordinate Bench of this Court on 12th February 2016. Considering that in terms of the policy of the Government of India, as amended from time to time, an officer like the petitioner having a child with 100% disability is not normally transferred on account of the adverse impact the transfer may have on the rehabilitation of the child, the Bench proceeded to stay the impugned order of transfer till the next date of hearing. The stay was thereafter extended from time to time.

6. In due course of time, the writ petition was listed for consideration before the Bench presided over by the Chief Justice. For the reasons recorded in its order dated 21st December 2016, the Bench vacated the interim order dated 12th February 2016 and posted the writ petition for final hearing on 9th January 2017.

7. The petitioner appealed to the Supreme Court and succeeded. By an order dated 13th November 2017, the Supreme Court disposed of the special leave petition. The order dated 21st December 2016 was set aside and the interim order dated 12th February 2016 restored.

8. It is not in dispute that the petitioner has continued in Mumbai on the strength of the aforesaid orders.

9. In course of hearing, our attention was drawn by Mr. Sharma, learned advocate for the respondent no.1 to several representations that the petitioner had made to the respondent no.1 after the first of the impugned orders was received by him. By the representation dated 27th October 2015, being the first in the series, the petitioner requested for extension of posting anywhere in Mumbai till the child completes the transition stage of rehabilitation, i.e., till he attains the age of 15 years (till May 2020). In the next representation dated 29th December 2015, the petitioner made, *inter alia*, the following request:

(b) Extension of tenure in Mumbai for another Five years or till the Multiple Disable Dependent of the undersigned enters Vocational Training.

*****"

Yet again, in the representation dated 18th January 2016, the petitioner reiterated that during his conversation with the "AMS", he had explained that he was seeking extension of tenure in Mumbai till 2020.

10. It is on the basis of such representations of the petitioner that Mr. Sharma has contended on behalf of the respondent no.1 that the petitioner having already overstayed in Mumbai by more than 2 (two) years since May 2020, the writ petition has worked itself out; hence, the interim order ought to be vacated and the writ petition disposed of with liberty to the respondent no.1 to post the petitioner at some other station according to the extant transfer policy.

11. If, at this stage, Mr. Kranti, learned advocate for the petitioner had agreed to disposal of the writ petition as infructuous with liberty to the petitioner to exercise his choice of station for posting as per the transfer policy, as contained in the impugned order dated 2nd February 2016, the matter could have been put to rest. However, to our utter dismay, we heard Mr. Kranti submit on behalf of the petitioner that since the petitioner has 2 (two) years left for retirement and since the transfer policy permits posting at a place of the choice of the officer during the last leg of his service, the petitioner would like to have a posting at Hyderabad and the respondent no.1 may be directed by the Court to issue a transfer order to that effect; and, if that was not possible, the petitioner ought to be continued in Mumbai.

12. We are not insensitive of the child's needs, for, the almighty has not been too kind to him. We are conscious that he would require the constant presence and support of his parents. But, we are equally conscious that sentiments or sympathy cannot form the basis for exercise of writ jurisdiction. Having expressed our mind in Court that the petitioner was not being reasonable in his approach, despite having stayed in Mumbai for over a decade, and that he ought to realize that there are other officers (number is in excess of 100 as per the reply affidavit of the respondent no.1) waiting in the queue for a posting in Mumbai on grounds similar to those for which the petitioner seeks continued posting in Mumbai, we did not find the petitioner, who was present in Court, to provide any instructions to Mr. Kranti that he would be satisfied if the respondent no.1 considers his future posting

in terms of the extant transfer policy. The insistence of the petitioner to have a posting, in the last leg of his service, at a place of his choice, viz. Hyderabad, or in Mumbai, appears to us to be a continuation of his mindset to dictate terms while corresponding with his superior officers (this opinion, we have formed, after reading some of his representations). We, countrymen, take pride in having a defence force comprised of personnel who are willing to lay down their lives without any sense of fear or feelings as to what might happen if they are not there. For them, national interest is above any other interest including self-interest. As an officer associated with the defence of the country, which is of paramount importance, we expected the petitioner to be rational in his approach and actions and place national interest in the forefront. The facts and circumstances, somehow, impel us to observe that he lacks fraternal feelings. We say no more.

13. In course of hearing, Mr. Kranti invited our attention to a document generated from the office of the Director-Education, Helen Keller Institute for Deaf and Deafblind (hereafter "the HKIDD", for short) to support the petitioner's case that there is no other institute in India like the HKIDD where the child could be cared for in his best interest. It has also been his contention that the categorization of P-IV was entirely wrong and that P-I/P-IA ought to have been the appropriate categorization and in this writ petition, we should decide such a plea.

14. At this distance of time and particularly having regard to the petitioner's several representations, referred to above, it is considered futile to decide the plea of categorization.

However, we have read the message contained in the document which was generated from the office of the Director-Education of the HKIDD. The document is undated, but must have been issued sometime in 2015. This is because of the age of the child mentioned therein. The Director's view is clear: that, dislodging the child from the familiar environment of the HKIDD "at this stage" (underlining ours) could be extremely detrimental to his progress and, in fact, may have adverse effect on his emotional and functional growth. It could be so that resting thereon, the Supreme Court in its order dated 13th November 2017 recorded that the child can only be treated effectively in the HKIDD.

15. According to Mr. Sharma, the position as obtaining on 13th November 2017 could have warranted such a finding by the Supreme Court and, till May 2020 or even beyond, the petitioner has not been dislodged by the respondent no.1. It is only on 21st February 2021 that the interim application was filed. It has been contended by referring to a document dated 29th February 2016, forming part of the reply affidavit of the respondent no.1 to the writ petition, and the fact that the child is almost a month short of his 18th birthday, that the petitioner should be permitted to be posted as per the transfer policy and not according to his choice, particularly when the petitioner during the last 19 years of his service, beginning April 2003, has been posted in the state of Maharashtra only (Kamptee, Deolali, Pune and Mumbai) except for a short stint of 28 months at Jammu and Kashmir.

16. From the document dated 29th February 2016 referred to above, we find an opinion of a psychiatrist, who had attended

to the child. It has been emphasized therein that the medical condition of the child is non-progressive and not likely to improve. It is also opined that though the child requires follow-up by a psychiatrist and facilities of special schools for vocational rehabilitation, the case has reached medical finality and no medical management is required except on "as required basis and any other vocational training".

17. Having regard to the present age of the child and the document dated 29th February 2016 referred to in the preceding paragraph, it would not be appropriate on our part at this stage to accept whatever is contained in the undated document generated from the HKIDD upon which Mr. Kranti has relied. The said document refers to "at this stage", meaning thereby a stage in 2015. No further document has been brought on record to suggest that the child can be taken care of only in the HKIDD and nowhere else. Whether HKIDD keeps on its roll any child who has attained majority has not been shown. It has also not been brought on record that there is no other like institute in the country as the HKIDD. Even if we were to proceed on the premise that the child requires vocational training and that is available only in the HKIDD, located in Mumbai, we have failed to comprehend why the petitioner sought for a posting, in the last leg of service, at Hyderabad. We can reasonably infer that facilities conducive for the wellbeing of the child are also available at Hyderabad and that is what prompted Mr. Kranti to submit that the petitioner may be posted there. Also, having regard to the developments made by the country in all spheres, it would not be unreasonable to presume that there are similar such

institutes in other metropolitan cities of the country. In all fairness, the petitioner ought to leave the issue of his posting to be dealt with by the respondent no.1 instead of seeking an order from this Court that he should be posted at Hyderabad, or continued in Mumbai. Notwithstanding that the child needs special care and our empathy as well, we think that the petitioner has indeed been given what he intended while he submitted the representations dated 27th October 2015, 29th December 2015 and 18th January 2016. His earnest desire that for the child's sake he should be continued in Mumbai has fructified by efflux of time and it would amount to an indulgence on our part if we are to accept his request for a direction of the nature sought for by Mr. Kranti.

18. We, therefore, accept the request of Mr. Sharma and dispose of the writ petition holding that by efflux of time, the same has been rendered infructuous. The interim application also stands disposed of. There shall be no order as to costs.

19. The interim order of stay stands vacated forthwith, subject to the following direction.

20. The petitioner's posting in Mumbai shall initially continue for a further period of a fortnight from date. By Monday next (18th July 2022), the petitioner may exercise his choice of posting; upon such choice being exercised, the respondent no.1 shall consider further posting of the petitioner within 7 (seven) days of receipt of such choice. It shall be open to the respondent no.1 to give such joining time as is permissible according to the policy. If no choice is exercised, the respondent no.1 shall be free to proceed according to law.

21. Since the petitioner is eligible for voluntary retirement from service, this order shall not preclude him from so applying. If such application is made by 18th July 2022, the same may be considered and disposed of according to law. Till such time the application is disposed of, the petitioner's posting in Mumbai may be continued.

SALUNKE
J V

Digitally signed
by SALUNKE J V
Date: 2022.07.14
16:45:47 +0530

(M. S. KARNIK, J.)

(CHIEF JUSTICE)