
(1999) 01 CAL CK 0013
In the Calcutta High Court
Case No : Writ Petition No. 19989 (W) of 1998

Biswabrata Dey

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 29-01-1999

Acts Referred:

Citation : 1 CWN 441

Hon'ble Judges : Altamas Kabir, J

Bench : Single Bench

Advocate : A.P. Sircar, S. Munshi and Anup Kr. Das, for the Appellant; N.C. Roy Chowdhury, Debatosh Khan and Sukla Dasgupta, for the Respondent

Final Decision : Dismissed

Judgement

Altamas Kabir, J.—In this writ application the petitioner, who is a member of the armed forces and is deployed as an Electrical Mechanical Engineer in the E.M.E. wing, has questioned an order of posting whereby he has been posted to 628 E.M.E. Kupwara (Kashmir) under the Northern Command. The said order of posting has been challenged by the petitioner on grounds of victimisation and malafide and also on the ground that the petitioner had earlier served for two periods under the Northern Command and he was being moved back to the said Command without being allowed to complete his normal tenure on compassionate posting of two years at 338 Recovery Coy., E.M.E. Station Workshop, Ballygunge, Calcutta. Appearing in support of the writ petition, Mr. Arun Prokash Sircar submitted that the petitioner had served under the Central Command from 13th May, 1986, to 8th July, 1989 and, thereafter, in the Northern Command from 9th July, 1989 to 1st June, 1992, which were field postings. Subsequently, the petitioner was posted in the Western Command till 7th September, 1996, and from 8th September, 1996, he was posted at Calcutta on compassionate posting.

2. Mr. Sircar submitted that, although, the petitioner was brought to Calcutta on compassionate posting he was sent to Nagaland, which was a field posting in a

hard zone, on Temporary Duty for a period of nine months, thus depriving the petitioner of the benefits of compassionate posting for nine months out of the normal tenure of two years, Mr. Sircar submitted that instead of allowing the petitioner to continue in his posting at Calcutta for the period during which he was sent to Nagaland, the petitioner has been issued posting at Kupwara once again under the Northern Command.

3. Mr. Sircar urged that not only had the petitioner been posted at Kupwara in violation of the rules relating to compassionate posting, but the said order of posting was issued malafide in order to victimise" the petitioner because of certain complaints made on his wife's behalf regarding the unseemly conduct of the Subedar M. Behera with his wife in the quarter allotted to him at body guard lines at Alipore, while he was on temporary duty at Nagaland.

4. Mr. Sircar submitted that within a few days of his returning to Calcutta from Temporary Duty in Nagaland he was informed of his posting to 628 E.M.E. Kupwara which was really a punishment posting because of the complaint made on behalf of his wife on 15th September, 1998.

5. Mr. Sircar urged that since the petitioner had already served under the Northern Command on two occasions and had been deprived of nine months of his compassionate posting, he could have been posted in one of the other Commands to which he had not yet been posted.

6. Mr. Sircar lastly urged that having put in more than 15 years of qualifying service, the petitioner was entitled to take retirement and opt for pension according to the Army Pension Rules, and if an application was made by the petitioner in this behalf, the respondents should be directed to consider the same in accordance with the said Rules.

7. In this regard Mr. Sircar referred to Rule 5 of the Pension Regulations relevant to the petitioner which prescribes a minimum period of 15 years as qualifying service for entitlement to pension. Mr. Sircar also referred to the decision of the Hon"ble Supreme Court in the case of Kamal Singh Ghugtyal Vs. Union of India (UOI) and Others, wherein the 15 year period of qualifying service for pension was referred to and since the petitioner therein had not completed 15 years of service, it was held that the petitioner was not entitled to get. the benefit of pension under Army Pension Rules.

8. Appearing for the respondents, Mr. N. C. Roychowdhury firstly urged theft the writ application was misconceived since transfer is an incident of service and more particularly in the defence services. Mr. Roychowdhury submitted that none of the grounds of challenge to the impugned order of posting were available to the petitioner and the writ application was liable to be dismissed.

9. Regarding the question of tenure on compassionate posting, Mr. Roychowdhury referred to the relevant provisions of the EME Record Office Instructions. Instruction 42 deals with posting on compassionate grounds.

10. Clause (a) of Instruction 42 provides that the maximum period of compassionate posting is to be two years only and no extension of tenure would be granted under any circumstances so that others on waiting list also get a change for such posting.

11. Clause (b) of Instruction 42 provides that personnel who have already served in a particular station on compassionate grounds will not be considered for reposting to the same station or nearby area upto 800 kilometres within six years without the approval of the Army Headquarters EME (EME Pers).

12. Clause (f) of Instruction 42 provides that any period spent on attachment awaiting formal posting will also be counted as part of the two year tenure.

13. Mr. Roychowdhury submitted that the petitioner was stationed at Calcutta on compassionate posting on and from 8th September, 1996, and the maximum period of such tenure for two years came to an end on 7th September, 1998. At the end of his tenure in Calcutta, the petitioner was issued fresh posting orders to Kupwara. Mr. Roychowdhury submitted that except in the case of compassionate posting, there was nothing in the Army instructions which prevented an army personnel, who had already served in a particular command, from being reported to such command. Mr. Roychowdhury submitted that there was no substance in the submissions made on behalf of the petitioner that since he had already served in the Northern Command, he ought to have been posted to some other command where he had not served before.

14. On the question of the petitioner's attachment on Temporary Duty in Nagaland during his tenure of compassionate posting at the Calcutta station. Mr. Roychowdhury referred to the Travel Regulations forming part of the Defence Service Regulations. Chapter Three of the said Regulations deals with Temporary Duty Moves and Regulation 91 thereunder defines Temporary Duty as follows:

"Except where otherwise specifically stated, any move on duty which as per the expectation of the ordering authority is that the individual shall do duty in the station to which his move is ordered for a period of 180 days or less than 180 days, will be classified as temporary duty.

Provided that a transfer classified as temporary shall be reclassified as permanent" if and when the period of duty in the said station does exceed 180 days.

Authorised courses of instructions at on outstation will be classified as "temporary" duty if the duration of the course does not exceed 180 days initially. Move of an individual in pursuance of a tour of inspection will remain classified "temporary" irrespective of the duration of the tour."

15. Mr. Roychowdhury urged that in the petitioner's case the period of temporary duty undergone at Nagaland was less than 180 days and could not, therefore, be classified as a permanent posting. Mr. Roychowdhury submitted that the petitioner was sent to Nagaland on Temporary Duty in January, 1998 and was

struck off strength in his place of temporary attachment in Nagaland on 9th June, 1998, within 180 days and the additional period was spent on travel to and from nagaland. Mr. Roychowdhury submitted that the period spent on temporary duty by the petitioner would, therefore, be counted as part of his two-year tenure on compassionate posting and the contention that the petitioner be allowed to continue in Calcutta was not tenable in view of the specific instructions contained in Instruction 42(a) referred to above.

16. Regarding the allegation of malafide, Mr. Roychowdhury submitted that although certain allegations had been made against one Subedar M. Behera, the same had no connection with the impugned order of posting which was made in the normal course.

17. Mr. Roychowdhury urged that unless made in palpably malafide exercise of power or in violation of express provisions and guidelines, an order of transfer is normally not interfered with, and more so where the order of transfer or posting relates to a member of the armed forces.

18. In support of his submissions, Mr. Roychowdhury referred to and relied on an unreported judgment of a Division Bench of this court in F.M.A.T. No. 2065 of 1992, wherein a similar question involving transfer on posting of the concerned officer, who was a Brigadier, was under consideration. Refusing to interfere with the order of the learned Single Judge dismissing the writ petition and directing the petitioner to join the transferred post, the Division Bench, inter alia, held that since the writ petitioner was holding a transferable post and since the guidelines and/ or rules relating to posting had no statutory force, the respondents were entitled to deviate therefrom in the exigencies of a given situation and the petitioner was only entitled to make a statutory complaint in respect thereof which had to be disposed of in accordance with law.

19. Mr. Roychowdhury submitted that none of the grounds sought to be urged were available to the petitioner in the instant case and the writ application was, therefore, liable to be dismissed with costs.

20. The case of the petitioner, in my view, does not merit interference.

21. It is no doubt true that the petitioner served under the Northern Command on two occasions, but nothing has been brought to my notice that the same would operate as a bar to the petitioner being reposted under the said Command after serving in other Commands. The only exception appears to be when an army personnel is posted at a station on compassionate posting in which case the person concerned would not be eligible for reappointment in the same station or within 800 kilometres thereof after expiry of his tenure on such posting.

22. The Defence Service Regulations are explicit that any move on duty comprising a period of 180 day or less would be classified as "temporary duty". Read with Instruction 42 of the EME Record Office Instructions, the position which clearly emerges is that the maximum tenure on compassionate posting is

two years and the said period cannot be extended under any circumstances and that any period spent on temporary duty during such, posting must be counted against the tenure of such compassionate posting in" a particular, station.

23. There is no doubt that the period spent on temporary duty by the petitioner in Nagaland was less than 180 days, though some amount of time was consumed in travel between the station of posting and the station of attachment on Temporary Duty. The petitioner is not, therefore, entitled to the benefit of Regulation 91 of the Defence Service Regulations (Travel Regulations) of having his transfer on Temporary Duty" reclassified as "permanent" and the period spent on Temporary Duty must be counted as part of the petitioner"s two-year tenure on compassionate posting. The petitioner cannot, therefore, claim that he should be allowed to add on to his tenure on compassionate posting the period spent by him on Temporary duty and travel comprising a total period of about nine months.

24. The ground of malafide is also not supported by proper and sufficient evidence against the authority who passed the impugned order of posting. At best a story of harassment relating to the petitioner"s wife has been made out, but no cogent reason has been shown as to why such story of harassment of the petitioner"s wife has to be read as a motivating factor for issuance of the impugned order of the petitioner"s posting to Kupwara.

25. In my view, the writ petitioner has failed to make out any ground warranting interference with the impugned posting order, and the writ application must accordingly fail. I am also not inclined to accept Mr. Sirkar"s 1st submission regarding the right allegedly accrued to the petitioner to opt for retirement and to receive pension on completion of 15 years" qualifying service.

26. In my view, the concerned regulation merely indicated that the period of qualifying service for receiving pension is 15 years. It does not give the petitioner an option to opt for retirement on completion of 15 years of service.

27. The writ application is, accordingly, dismissed.

28. The petitioner is directed to join his place of posting at Kupwara within three weeks from date. There will be no order as to costs. Prayer for stay of their order is considered and refused.