

(2024) 08 BOM CK 0008
In the Bombay High Court
Case No : Writ Petition No. 382 Of 2024

Devyani C. Naik

APPELLANT

Vs

State Of Goa Thr. Chief Secretary And Anr

RESPONDENT

Date of Decision : 13-08-2024

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 19(1)(g), 21, 226
Central Civil Service (Rules) 1972 — Rule 43(c)

Citation : (2024) 08 BOM CK 0008

Hon'ble Judges : M. S. Karnik, J;Valmiki Menezes, J

Bench : Division Bench

Advocate : Dhaval Zaveri, Nehal Govekar, S. Kamulkar, D. Pangam, Siddharth Samant

Final Decision : Allowed

Judgement

M. S. Karnik, J

1. By this petition under Article 226 of the Constitution of India, the petitioner seeks directions to the respondents to enforce the effect of Office Memorandum dated 18.03.2024 issued by the Director of Social Welfare, Panaji, Goa. The petitioner prays for a direction to the respondent no.2 to exempt the petitioner from the routine exercise of transfer/rotational transfer and consequently for quashing and setting aside the impugned order dated 14.02.2024. By the impugned transfer order, the petitioner is transferred from SB Centre Ponda to AHTU Panaji.

2. This petition invokes the provisions of 'The Rights of Persons with Disabilities Act, 2016', ('The Disabilities Act', for short). Before elaborating any further, it would be apposite to briefly state that the petitioner's son 'K', is certified by the Institute of Psychiatry and Human Behaviour, Bambolim, Goa, a competent authority under Section 2(e) read with Section 57(1) of the Disabilities Act, to be suffering from mild autism between 40 to 60 percent as a permanent disability in relation to autism. The suffering of 'K' is increasing. Considering the nature of

the disability, it is the case that petitioner's presence needs to be in his close proximity. 'K' is studying in a school at Ponda where facilities for children with special needs is available. The petitioner is not averse to a transfer but is concerned with the special needs of 'K'. For this reason, she prays for an exemption from the routine transfer/rotational transfer.

3. The law of transfer is well settled. The petitioner is working in a transferable post. The petitioner cannot claim a vested right to remain in a particular post. Transfer is a routine exercise on completion of a specified tenure or for administrative exigencies even before the completion of the tenure. The impugned order transferring the petitioner was an exercise carried out pursuant to the directions of Election Commission of India. Ordinarily, there was no reason to interfere with such transfer. This Court by an interim order, stayed the impugned order of transfer. During the pendency of the petition, the petitioner has completed her tenure at Ponda. According to the respondents, she is now subject to a routine transfer. The scope of interference in such transfers hardly exists except on the very limited grounds available if the transfer is arbitrary or smacks of malafide or is contrary to the statutory provisions governing transfers. With these considerations in mind, we proceed to examine the facts of the case.

4. The petitioner was appointed as a Lady Police Sub-Inspector on 14.06.2002 and is working as such for almost 22 years. The petitioner's husband is presently employed with Reliance Industries at Mercedes-Goa. His office timings are from 8.30 a.m. to 6.30 p.m. Two children are born out of the said wedlock. The petition concerns Master 'K', who is at present around 10 years of age. The petitioner with her family, is permanently residing at Ponda, Goa.

5. As indicated earlier, 'K' is certified by the competent authority under Section 2(e) read with Section 57(1) of the Disabilities Act to be suffering from mild autism between 40 to 60 percent as a permanent disability in relation to autism. By an Order dated 20.09.2019, the petitioner was transferred from PHQ Panaji to SB Centre, Ponda. By an Order dated 01.06.2020, the petitioner was directed to look after the charge of SB Centre Curchorem. By Order dated 09.09.2020, the petitioner was directed to report to SB(HQ) Panaji, immediately for further duties till further orders. By an Order dated 16.09.2020, the petitioner was directed to continue to work at SB Centre Curchorem, till further orders. On 01.02.2021, the petitioner made representation to the respondent no.2 for sympathetic consideration with a request to revert the said posting from SB Centre Curchorem to SB Centre Ponda. The petitioner was transferred on 16.02.2021 from SB Centre Ponda to AHTU, Margao. The petitioner was relieved from Ponda. On 13.09.2022, the respondent no.2 transferred the petitioner from AHTU Margao to SB Centre Ponda, which was followed by a relieving order dated 26.09.2022.

6. In respect of the petitioner's son 'K', the certificate dated 28.04.2023 says that he is suffering from Autism Spectrum Disorder, a permanent disability now escalated to 70 percent as certified by the Institute of Psychiatry and Human

Behavior, Bambolim, by the Government of India declaring the disorder.

7. By the impugned Order dated 14.02.2024, the petitioner is transferred from the present posting at SB Centre, Ponda to AHTU Panaji. The petitioner made a representation to the Superintendent of Police asserting that she is the mother of said 'K', who is suffering from permanent disability to the extent of 70 percent of Autism Spectrum Disorder. She pointed out that her personal attention is a must for the reason of which the transfer to Panaji may have serious consequences affecting the life and limb of 'K' as a result of the distance and in case 'K' needs immediate attention. The petitioner requested for retaining her at SB Centre Ponda. Another representation was made on 20.02.2024. The present petition was filed, when by an interim order dated 19.03.2024, the impugned order of transfer was stayed.

8. Master 'K' was admitted in St. Xavier's Academy Special School at Old Goa. During the pendency of this petition, the petitioner came to know the results of her son on 29.04.2024 for the academic year 2023-2024 at St. Xavier's Academy Special School at Old Goa. The petitioner was shocked and surprised to learn on being informed that 'K' who was in Class IV was made to sit in Class II and that he is being demoted to ID (Intellectual Deficiency) Unit. Since the education of 'K' should not be affected, the petitioner admitted 'K' to Goa Vidyaprakash Mandals KG and Primary School at Ponda Goa, on 03.05.2024. The said school admitted 'K' in standard IV for the academic year 2024-2025. The petitioner filed a complaint dated 08.05.2024 to the State Commissioner for Persons with Disabilities; the Chairperson of the Goa State Commission for Persons with Disabilities and the Director of Education for the State of Goa, requesting for action against the St. Xavier's Academy Special School at Old Goa, for violating the provisions of the said Act and the Right to Education Act of 2009. This Court allowed the petitioner to amend the petition and incorporate the aforesaid challenge.

9. During the course of the hearing and as the hearing proceeded, pursuant to the suggestions made, the learned Additional Government Advocate Shri Samant, on instructions, genuinely made an attempt to resolve the matter. It was submitted by him that in view of the routine exercise that was necessary to be carried out, the petitioner needs to be transferred. It is submitted that the respondents are ready to accommodate the petitioner at Margao, which is comparatively closer to Ponda than Panaji. It is however submitted that no assurance could be given whether the petitioner could be posted at the SB Centre at Margao. Learned Additional Government Advocate also submitted that the respondents could also consider transferring the petitioner at a field posting in Ponda but in view of the circulars and guidelines relating to transfer, it is not possible for the respondents to retain her at the SB Centre at Ponda. The respondents are proceeding on the basis that the existing circulars/guidelines in the matter of routine transfers have to be followed.

10. According to learned Counsel for the petitioner, the field posting may have its

own set of complications when it comes to attend 'K' in an emergency. It is, therefore, requested that considering the special needs of her child, learned Counsel for the petitioner pleads that the petitioner be retained at Ponda at the SB Centre Ponda.

11. The travelling time between Ponda to Margao, we are informed is around 30 to 35 minutes. Ordinarily, in such circumstances, we would have insisted upon the petitioner to accept the suggestion of learned Additional Government Advocate. Though hesitatingly, the petitioner expressed that she is not averse to a transfer at Ponda but a field posting may have its own challenge given the complications that may arise if she has to urgently attend to her child.

12. An additional affidavit dated 07.08.2024 is filed by the petitioner indicating the compelling reasons why she needs to be in close proximity of 'K'. Paragraph 6 of the affidavit which we refrain from re-producing, compels us to adopt an extraordinary approach even though this is a matter of routine transfer. Paragraphs 7, 8 and 9 of the additional affidavit which indicate the predicament of the petitioner can be re-produced which reads thus :

"7. I say that the present posting at Ponda-Goa allows me to maintain a constant vigil over the said and also enables me to promptly attend the said child when in distress, as and when I receive a call. Further the present posting does not involve investigation or for that matter inquiry where my presence is required at site but only to report to my superiors.

8. However, I am compelled to say that the posting in Margao to any other Department other than the SB Center would require me to attend to all the investigation and inquiries, which will disable me to attend my child at a time of his needs when in distress or emergencies.

9. I say that if I accept the present posting at Margao to that of any other than the SB Centre at Margao-Goa, the same shall entail in me abandoning my Child which would result in unforeseen circumstances."

13. Learned Additional Government Advocate in all fairness and on instructions, submitted that having regard to what is stated in paragraph 6 of the additional affidavit of the petitioner, the concern expressed by the petitioner undoubtedly is genuine. We enquired with the respondents, for our satisfaction, if there is anything adverse reported against the petitioner during her tenure at Ponda at the SB Center. Learned Additional Government Advocate submitted that there is nothing adverse reported against the petitioner and her work is up to the mark. He nonetheless submits that the respondents are bound by the policy of routine transfers which does not permit them to make any exceptions. Learned Counsel for the petitioner accepts that she cannot claim a vested right to be retained at the SB Center, Ponda and administrative exigencies may have to take precedence over her personal difficulties and convenience at some point of time.

14. Given the facts of the present case, we are inclined to quash the impugned

order of transfer on purely humanitarian considerations. We must however bear in mind that transfer is an incident of service and no employee can claim immunity from transfer if such transfer is not in violation of any statutory rules, arbitrary or malafide. It is not the petitioner's case that the transfer is against the provisions governing transfers or that the same is malafide. The petitioner says that her case may be looked at purely from the stand point of the provisions of Disabilities Act and humanitarian considerations.

15. From the materials on record, we are satisfied that 'K' as a result of the disability of Autism Spectrum Disorder faces several challenges. The child feels scared, isolated, depressed and anxious for the same further aggravates this turbulent emotion to harmful behavior, both for himself as well as to others. The child needs extra support to reduce anxiety around changes physically and emotionally in view of what is stated in paragraph 6 of the additional affidavit filed by the petitioner. We do find substance in the contention of learned Counsel for the petitioner in the context of the present facts, that the present posting at Ponda allows the petitioner to maintain a constant vigil over 'K' and also enables her to primarily attend to the child when in need as and when she receives a call. The petitioner's present duty is mainly to report to her superiors. The concern of the petitioner that the child has to be attended immediately when the situation so warrants is genuine. The child cannot just be left in lurch during the time period before the petitioner can reach out to the child in case of an emergency.

16. Undoubtedly, the scope of interference in a transfer is extremely limited especially when the respondents are willing to transfer the petitioner to a nearby posting at Margao which is at half an hour's distance from her residence and from the school where the child is taking education. From the medical certificate on record, we find that the disability of the child is on the rise. The behavioural concerns reported are not within his control.

17. The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, was enacted to give effect to the Proclamation on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region. The Act defines Persons with Disabilities as those having not less than forty percent disability and identified seven categories of disabilities, namely blindness, low vision, hearing impairment, locomotor disability, mental retardation, mental illness and leprosy-cured. Over a period of time, the conceptual understanding of the rights of persons with disabilities has become more clear and there has been world-wide change in approach to handle the issues concerning persons with disabilities. The United Nations adopted its Convention on the Rights of Persons with Disabilities laying down the principles to be followed by the States Parties for empowerment of persons with disabilities. India signed the said Convention and subsequently ratified the same on the 1st day of October, 2007. The convention came into effect on the 3rd day of May, 2008. Being a signatory to the Convention, India has an international obligation to comply with the provisions of the said Convention which required an

entirely new legislation.

18. In 2010, an Expert Committee constituted under the Chairmanship of Dr. Sudha Kaul, Vice-Chairperson, Indian Institute of Cerebral Palsy, Kolkata submitted its report in 2011, suggesting a Draft Bill relating to the Rights of Persons with Disabilities. The draft Bill was extensively debated upon at various levels involving State Governments and Union territories and various stakeholders.

19. The Rights of Persons with Disabilities Act, 2016, was brought into force on 19.04.2017. Section 2(e) defines "certifying authority" means an authority designated under sub-section (1) of section 57. The designated authority under Section 57 has certified the disability of the petitioner's son 'K' suffering from mild autism between 40 to 60% disability which has now increased to 70 percent.

20. Section 2(c) says that "barrier" means any factor including communicational, cultural, economic, environmental, institutional, political, social, attitudinal or structural factors which hampers the full and effective participation of persons with disabilities in society. Section 2(d) says that "care-giver" means any person including parents and other family members who with or without payment provides care, support or assistance to a person with disability. In terms of Section 2(h), the "discrimination" in relation to disability, means any distinction, exclusion, restriction on the basis of disability which is the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field and includes all forms of discrimination and denial of reasonable accommodation. As per Section 2(r) "person with benchmark disability" means a person with not less than forty percent of a specified disability where specified disability has not been defined in measurable terms and includes a person with disability where specified disability has been defined in measurable terms, as certified by the certifying authority. As per the definition clause Section 2(s) "person with disability" means a person with long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others. Section 2(zc) defines "specified disability" means the disabilities as specified in the Schedule

21. It is pertinent to note that 'K' is suffering from more than 40 percent specified disability which presently is to the extent of 70 percent. The Schedule 2(b) to the Disabilities Act specifies that "autism spectrum disorder" means a neuro-developmental condition typically appearing in the first three years of life that significantly affects a person's ability to communicate, understand relationships and relate to others, and is frequently associated with unusual or stereotypical rituals or behaviours.

22. Section 3 is a provision pertaining to equality and non-discrimination. Sub-section (1) of Section 3 ordains that the appropriate Government shall ensure

that the persons with disabilities enjoy the right to equality, life with dignity and respect for his or her integrity equally with others. Sub-section (3) of Section 3 says that no person with disability shall be discriminated on the ground of disability, unless it is shown that the impugned act or omission is a proportionate means of achieving a legitimate aim. Sub-section (5) of Section 3 defines that the appropriate Government shall take necessary steps to ensure reasonable accommodation for persons with disabilities. Section 4 are provisions dealing with Women and children with disabilities. Sub-section (1) of Section 4 stipulates that appropriate Government and the local authorities shall take measures to ensure that the women and children with disabilities enjoy their rights equally with others. Sub-section (2) of Section 4 stipulates that the appropriate Government and local authorities shall ensure that all children with disabilities shall have right on an equal basis to freely express their views on all matters affecting them and provide them appropriate support keeping in view their age and disability.

23. Section 5 stipulates that persons with disabilities shall have the right to live in the community. Section 6 obligates the appropriate Government to take measures to protect persons with disabilities from being subjected to torture, cruel, inhuman or degrading treatment. Section 7 are provisions ensuring protection from abuse, violence and exploitation for which the appropriate Government shall take measures to protect persons with disabilities from all forms of abuse, violence and exploitation. Chapter III deals with provisions relating to measures to promote and facilitate inclusive education and the duties of educational institutions.

24. The Department of Personnel Training has issued Office Memorandum dated 06.06.2014 in respect of posting of Government employees who have differently abled dependants. This was necessitated because there was demand against a Government employee who is a care giver of the disabled child may not have to suffer due to displacement by means of routine transfer/rotational transfers. This demand has been made on the ground that a Government employee raises a kind of support system for his/her disabled child over a period of time in the locality where he/she resides which helps them in the rehabilitation. Relevant in the context are clauses 2, 3 and 4 of the Office Memorandum of 2014.

25. Pursuant to the enactment of the Disabilities Act, 2016, further instructions are issued by the Department of Personnel and Training in supersession of the above mentioned Office Memorandum dated 06.06.2014 with regard to the eligibility for seeking exemption from routine exercise of transfer/rotational transfer. The relevant portion of the Office Memorandum reads thus :

"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.

(ii) The term "Specified Disability" as defined in the Schedule to the Rights of Persons with Disabilities Act, 2016, covers (I) Locomotor disability including leprosy cured person, cerebral palsy, dwarfism, muscular dystrophy and Acid attack victims (ii) Blindness (iii) Low- vision (iv) Deaf (v) Hard of hearing (vi) Speech and language disabilities (vii) Intellectual disability including specific learning disabilities and autism spectrum disorder (viii) Mental illness (ix) Disability caused due to: (a) Neurological conditions such as Multiple sclerosis and Parkinson's disease (b) Blood disorder-Haemophilia, Thalassemia and Sickle cell- disease and (x) Multiple disabilities (more than one of the above specified disabilities) including deaf blindness and any other category of disabilities as may be notified by the Central Government.

26. The Department of Personnel and Training, issued a fresh Memorandum and guidelines are brought into effect from 02.02.2024. The State of Goa adopted the Office Memorandums itself on 18.03.2024 by incorporating the aforesaid guidelines. So far as preference in transfer/posting is concerned, the guidelines provide for the following H preference in transfer/posting, thus :

"H. Preference in transfer/posting

As far as possible, the persons with disabilities may be exempted from the rotational transfer policy/transfer and be allowed to continue in the same job, where they would have achieved the desired performance. Further, preference in place of posting at the time of transfer/promotion may be given to the persons with disability subject to the administrative constraints.

The practice of considering choice of place of posting in case of persons with disabilities may be continued. To the extent feasible, they may be retained in the same job, where their services could be optimally utilised.

I. Exemption from routine exercise of transfer/ rotational transfer in respect of Government employee, who is a caregiver of Person with Disability dependents:

(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.

(ii) The term "Specified Disability" as defined in the Schedule to the Rights of Persons with Disabilities Act, 2016, covers (i) Locomotor disability including leprosy cured person, cerebral palsy, dwarfism, muscular dystrophy and Acid attack victims (ii) Blindness (iii) Low-vision (iv) Deaf (v) Hard of hearing (vi) Speech and language disabilities (vii) Intellectual disability including specific learning disabilities and autism spectrum disorder (viii) Mental illness (ix) Disability caused due to: (a) Neurological conditions such as Multiple sclerosis

and Parkinson's disease (b) Blood disorder- Haemophilia, Thalassemia and Sickle cell-disease and (x) Multiple disabilities (more than one of the above specified disabilities) including deaf blindness and any other category of disabilities as may be notified by the Central Government.

(iii) The term 'Specified Disability' as defined herein is applicable as grounds only for the purpose of seeking exemption from routine transfer/ rotational transfer by a Government employee, who is a caregiver of dependent daughter/son/ parents/spouse/brother/ sister as stated in Para I (i) above. All the Ministries/ Departments are requested to bring the above instructions to the notice of all appointing authorities under their control, for information and compliance. The Department of public Enterprises may ensure to give effect to the above guidelines in all the central public Sector enterprises."

(emphasis supplied)

27. Thus, the State of Goa has issued guidelines for exempting from routine exercise of transfers/routine transfers in respect of Government employee who is a caregiver of a disabled child. We need to profitably note the observations of the Hon'ble Supreme Court in the context of request made for grant of Child Care Leave under Rule 43(c) of the Central Civil Service (Rules) 1972. Their Lordships in *Shalini Dharmani vs. The State of Himachal Pradesh & Ors.* in its order dated 22.04.2024 in Special Leave to Appeal (C) No. 16864/2021 in paragraph 7 observed thus :

"7. The participation of women in the work force is not a matter of privilege, but a constitutional entitlement protected by Articles 14, 15 and 21 of the Constitution; besides Article 19(1)(g). The State as a model employer cannot be oblivious to the special concerns which arise in the case of women who are part of the work force. The provision of Child Care Leave to women sub-serves the significant constitutional object of ensuring that women are not deprived of their due participation as members of the work force. Otherwise, in the absence of a provision for the grant of Child Care Leave, a mother may well be constrained to leave the work force. This consideration applies a fortiori in the case of a mother who has a child with special needs. Such a case is exemplified in the case of the petitioner herself. We are conscious of the fact that the petition does trench on certain aspects of policy. Equally, the policies of the State have to be consistent and must be synchronise with constitutional protections and safeguards."

28. In the present case, we must mention that the State made every possible attempt to resolve the issue. The respondents however submit that owing to the policy of routine transfer, the petitioner could be posted and accommodated on transfer to a nearby Police Station, but having regard to the nonavailability of vacancies, transfer to SB Center cannot be assured.

29. This Court cannot be oblivious to the special concerns which arise as in the petitioner's case who is a part of the police force. The provisions of the Disabilities Act sub-serves the significant constitutional object of ensuring that

women are not deprived of their due participation as members of the work force. If we do not take the aforesaid view, in the facts of this case, the petitioner may be constrained to leave the work force or face trauma if the impugned order is given effect to despite the special needs of the child.

30. There is nothing adverse reported against the petitioner. The child is in need of the support of his mother. The object of the Disabilities Act can be effectuated only if the petitioner is in close proximity to the child. The present facts are such that the child had to be re-admitted to the school in Ponda else he would have suffered demotion by two standards. The petitioner's transfer outside Ponda in the present facts will be a barrier in the way of the child's full and effective participation and inclusion in the society.

31. The petitioner's transfer on completion of a tenure is a routine transfer. There are no compelling administrative exigencies brought on record in the present case necessitating such a transfer.

32. It is not as if the administration will in any manner be prejudiced if the petitioner is retained at Ponda. We do appreciate that we have very limited scope in interfering with administrative matters, transfer being essentially an administrative function which should be best left to the respondents. In ordinary course, we could have directed the respondents to consider the case of the petitioner for retention at Ponda favourably. The facts of the case are such that the special needs of the child far outweigh the guidelines requiring the routine transfer especially when there are no compelling administrative reasons to transfer the petitioner from her present place of posting. The child's Autism Spectrum Disorder has escalated to 70 percent and hence it is imperative that the petitioner is retained at Ponda SB Centre where she is presently posted to avoid any untoward situation to the child.

33. It is in the peculiar facts of this case that we are inclined to quash and set aside the impugned order. In our opinion, retaining the petitioner at Ponda at SB Centre will help in achieving a balance between the petitioner's effective participation in the work force as well as taking care of the special needs of the child which ultimately subserves the object of the Disabilities Act.

34. We make it clear that in future, depending upon the administrative exigencies and considering the special needs of the child, it will always be open for the respondents to take appropriate decision on her transfer. Learned Counsel for the petitioner submitted, on instructions, that he does not wish to press for the other reliefs prayed for in the petition.

35. The petition is allowed in terms of prayer clause (b). There shall be no order as to costs.