
(2021) 07 GAU CK 0021

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 3213 Of 2021

Dharam Nath Giri

APPELLANT

Vs

Union Of India And 5 Ors.

RESPONDENT

Date of Decision : 06-07-2021

Acts Referred:

Constitution Of India, 1950 — Article 226

Rights of Persons with Disabilities Act, 2016 — Section 2(r)

Citation : (2021) 07 GAU CK 0021

Hon'ble Judges : Manish Choudhury, J

Bench : Single Bench

Advocate : R Mazumdar

Final Decision : Disposed Of

Judgement

1. The Court proceedings have been conducted through online court proceeding services due to the prevailing Covid-19 pandemic situation in the State.

2. Heard Mr. R. Mazumdar, learned counsel for the petitioner and Mr. P. Medhi, learned Central Government Counsel (CGC) appearing for all the respondents.

3. The writ petition has been preferred under Article 226 of the Constitution of India assailing a transfer order dated 09.04.2021 issued by the respondent authorities, whereby, the petitioner, a Hindi Teacher, has been transferred from 17 Assam Rifles, Lokra, Assam to 18 Assam Rifles, Chandel, Manipur.

4. Mr. Mazumdar, learned counsel for the petitioner has submitted that both the petitioner and his wife are teachers, serving under the respondent

authorities. Both have been posted at 17 Assam Rifles, Lokra, Assam. They have a child, born on 11.03.2012, who is suffering from Down Syndrome

associated with deficit hearing impairment (40%) with mental retardation and deficit in intellectual functioning. Referring to the impugned order dated

09.04.2021, Mr. Mazumdar has submitted that the said order is a routine/rotational transfer order whereby a large number of teachers have been

transferred from one location to another location. He has further highlighted the facts that the petitioner is a Hindi Teacher and the person who would

be relieving him, is a Junior Teacher. He has further referred to the Communication dated 15.02.1991 (Annexure-7), the Office Memorandum dated

18.02.2000 (Annexure-8), the Office Memorandum dated 06.06.2014 (Annexure-9), the Record Office Instruction no. 01/2016 dated 08.11.2016

(Annexure-12), the Office Memorandum dated 01.09.2017 (Annexure-13) and Office Memorandum dated 08.10.2018 (Annexure-14) to contend that

before effecting any routine/rotational transfer, the authorities ought to have taken into consideration the fact that if the husband and the wife are

working in the same department, the cases of both the spouses are to be generally considered for posting them together to such stations where

required level of the facilities are available to enable them to lead a normal family life and to look after the welfare of their children till the children

attain 18 years of age. He has further submitted that according to this Office Memoranda (supra), the authority effecting the transfer is also required

to take a view regarding exemption of a Government employee who is a care-giver of a dependent child with disability, from routine/rotational

transfer. When the petitioner after receipt of the transfer order dated 09.04.2021, had preferred a representation before the competent authority,

through proper channel, on 15.04.2021 highlighting the difficulties likely to be faced by him and his spouse because of the impugned order of transfer,

the same was not considered at all by the competent authority despite a favourable recommendation in that regard by the Commandant, 17 Assam

Rifles, Assam while forwarding the said representation of the petitioner. Referring to the communication dated 26.06.2021, Mr. Mazumdar has been

submitted that the said representation was purportedly not considered by the competent authority.

5. Mr. Medhi has submitted that there was no mala fide or violation of any statutory provision in effecting the transfer order. By the order dated

09.04.2021, a number of Senior Teachers including the petitioner, had been transferred from one location to another location due to completion of the normal tenure at those particular locations. As such, it is not open to the petitioner to raise any grievance in respect of the impugned transfer order. He has further submitted that the respondent authorities had taken note of the disabled/dependent condition of the child of the petitioner and his wife and accordingly, the tenure of the petitioner's wife had been extended for a further period of 1 (one) year.

6. I have heard the learned counsel for the parties and have also perused the materials on record. 7. Transfer of an employee in a transferable service

is a necessary incidence in the service career of such an employee. It is well settled that effecting transfer of employees is the prerogative of the

competent authority and the Court does not normally interfere with an order of transfer except when the transfer order is shown to be an outcome of

malafide exercise of power, or in violation of any statutory provision, or have been passed by an authority not competent to pass such an order of

transfer. It is also settled that who should be transferred where, is a matter for the competent authority to decide. There are different guidelines

formulated by the Government highlighting different factors required to be considered while affecting transfer. While ordering a transfer, the

competent authority is required to keep in mind such guidelines issued by the Government, from time to time, on the subject. Similarly, if a person

makes any representation with respect to his transfer, the competent authority must consider the same having regard to the guidelines formulated in

that regard and also to the exigencies of administration.

8. In the case in hand, the petitioner has annexed a number of Office Memoranda and also Record Office Instruction, as have been indicated above.

From the Record Office Instruction (supra), it transpires that if the husband and the wife are working in the same department, posting of both spouses

together at the same station where required level of facilities are available, is to be considered to enable them to lead a normal family life and to look

after the welfare of their children especially till the children attain 18 years of age. The Office Memorandum dated 06.06.2014 has formulated that

Government employee who has disabled child, serve as the main care giver of such child and thus, any displacement of such Government employee

will have a bearing on the systematic rehabilitation of the disabled child since the new environment/set up could prove to be a hindrance for the rehabilitation process of the child. In such situation, a Government servant who is also a care giver of a disabled child, may be exempted from the routine exercise of transfer/rotational transfer subject to the administrative constraints. The subsequent guidelines have also highlighted the same position. The Office Memorandum dated 08.10.2018 is on the subject : â?? Exemption from the routine exercise of transfer/rotational transferâ?. It mentions that 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.

9. It appears from the documents annexed to this writ petition that the child of the petitioner, born on 11.03.2012, is suffering from Down Syndrome associated with deficit hearing impairment (40%) with mental retardation and deficit in intellectual functioning. The petitioner and his wife are treating their child at different medical institutions including Lokpriya Gopinath Bordoloi Regional Institute of Mental Health, Tezpur and Composite Regional Centre (CRC), Guwahati. In the letter dated 20.04.2021, the Commandant, 17 Battalion, Assam Rifles while forwarding the representation of the petitioner, had also opined that the child of the petitioner required constant medication and supervision of the parents. He had also recommended for extension of the tenure of the petitioner for a further period of 1 (one) year to look after their mentally retarded son.

10. It does not transpire from a perusal of the communication dated 26.06.2021 that the competent authority had considered the representation submitted by the petitioner on 14.04.2021 by keeping the guidelines, mentioned above, in purview as it has not assigned any reason therein. It simply recorded that extension of one-year tenure in respect of the petitioner was not considered. It does not prima facie appear from the said communication that there was any application of mind on the part of the competent authority when it received the representation as it simply informed that the prayer for extension was not considered. When an employee makes a representation against any order of transfer, the least that is expected

from the competent authority is application of mind to the grievances expressed by the employee before making the decision on such representation.

Application of mind is best demonstrated if the authority making the decision, records the reasons which have led the authority to give the decision in

question. Absence of reasons in the order dated 26.06.2021 passed by the competent authority, in the case in hand, is suggestive of a situation

indicating non application of mind.

11. In view of the observations made above, this Court deems it appropriate to dispose of this writ petition with a direction to the competent authority

to take representation filed by the petitioner on 14.04.2021 on board for re-consideration. While considering the representation, the competent authority

shall also take into account the official guidelines regarding exemption from routine exercise of transfer/rotational transfer, as have been formulated by

the Office Memoranda/Record Office Instruction (supra) by the Government (supra) and shall thereafter, dispose of the same by passing a speaking

order as expeditiously as possible, preferably within a period of 1 (one) month. The order so passed shall be communicated to the petitioner forthwith.

It is further observed that till the representation is disposed of by a speaking order, the order of transfer dated 09.04.2021 in so far as the petitioner is

concerned, shall not be given effect to.

12. With the observations made and directions given above, the writ petition stands disposed of.