
(2018) 04 MP CK 0169
In the Madhya Pradesh High Court
Case No : W.P. No.148 OF 2017

Sudhanshu Tripathi

APPELLANT

Vs

Bank Of India & Others

RESPONDENT

Date of Decision : 27-04-2018

Acts Referred:

Right of Persons with Disabilities Act, 2016 — Section 2(1), 2(s)

Citation : (2018) 04 MP CK 0169

Hon'ble Judges : S.C. SHARMA, J

Bench : Single Bench

Advocate : L.C. Patne, Nitin Singh Bhati

Final Decision : Allowed

Judgement

The petitioner before this Court has filed the present petition being aggrieved by the order dated 03.01.2017 passed by respondent No.2 â?" Zonal

Manager, Bank of India, Ujjain Zonal Office.

The facts of the case reveal that the petitioner is suffering from disability and is having 45% of disability. The petitioner was appointed by an order

dated 12.08.2014 on the post of Officer in the Junior Management Grade/Scale-I in the services of Bank of India and he reported his joining on

25.08.2014 at Maxi Branch of Bank of India. He has successfully completed his probationary period on 31.12.2015. The petitioner, who has hardly

completed two years, was transferred by an order dated 03.01.2017 to village Chhipiya Branch, District-Shajapur i.e. to a remote place on the

administrative grounds.

Learned counsel for the petitioner has argued before this Court that the transfer order has been passed only to accommodate respondent No.3. There

was no complaint of any kind against the petitioner and the respondent No.3 is being accommodated in place of the petitioner.

Shri L.C. Patne has drawn the attention of this Court towards the executive instruction issued by Government India to all Public Sector Undertaking

(Annexure-P/3) dated 15.02.1988, which provides for some concession in respect of transfer of physically handicapped persons. He has stated that in

light of the executive instruction issued on the subject, the petitioner should have been permitted to continue at the present place of posting and the

order deserves to be quashed.

In spite of service of notice, there is no appearance on behalf of respondent No.3, however, the Bank has filed a detailed reply. The stand of the Bank

is that the petitioner has completed his probationary period and he has rightly been transferred keeping in view the transfer policy. The respondents

have also stated that when the petitioner was appointed, he was well aware of the fact that he is joining a transferable post and he is certainly not at

all entitled to continue at the present place of posting.

The respondents have placed reliance upon a judgment delivered in the case of Union of India v/s S.L. Abbas reported in AIR 1993 SC 2444 and the

contention of the learned counsel for the Bank is that a transfer order cannot be interfered with by a Court unless it is vitiated mala fides or is made in

violation of transfer policy.

Reliance has also been placed upon a judgment delivered by the Supreme Court in the case of B. Vardha Rao v/s State of Karnataka reported in AIR

1989 SC 1955, wherein the Supreme Court has held that transfer is an incident of service.

The respondents have further stated that they have rightly transferred the petitioner, as he is having 45% of disability (hearing impairment). While

defending the present case, the respondents have gone to the extent in stating that the petitioner carries a mobile phone with him and he is having

hobby of listening music. They have also stated that the petitioner's sister is doing B.D.S., and therefore, petitioner is the personally independent

person and he has rightly been transferred by the respondents. A prayer has been made of dismissal of the present writ petition.

Heard learned counsel for the parties at length and perused the record.

The percentage of disability in case of the petitioner is not a subject matter of

the dispute. Undisputedly, the petitioner is having 45% of disability and he is certainly a person with disability as defined under Section 2 (s) of the Right of Persons with Disabilities Act, 2016.

The earlier law on the subject dealing with persons with Disabilities (Equal opportunities, Protection of Rights and Full Participation Act, 1995) has

dealt with different kind of disability and under Section 2 (1) iv, hearing impairment is also a disability. There is a notification issued by Government of

India dealing with disabled persons dated 15.02.1988 and it provides that physically handicapped persons employed in Public Sector Bank in all cadres

should normally be exempted from the periodical transfer and even in case of promotion they shall be accommodated, in case, the vacancy is available

in same branch, town or city.

The Right of Persons with Disabilities Act, 2016. was enacted by the Parliament with the following objects and reasons:-

â??Statement of Objects and Reasons â?? The persons with Disabilities (Equal Opportunities, Protection of Right 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 per cent, disability and identified seven categories of disabilities, namely,

blindness, low vision, hearing impairment, locomotor disability, mental retardation, mental illness and leprosy-cured.â??

The petitioner undisputedly, is having 45% of disability. The petitioner has completed his probationary period only on 31.12.2015. There was no

complaint against the petitioner and by no stretch of imagination, the petitioner could have been transferred in the manner and method it has been done

in the present case by the respondents/Bank.

The Division Bench of Delhi High Court in a case of disable person, while dealing with the case of transfer of bank employee in LPA No.74/2005 in

the case of V.K. Bhasin v/s State Bank of Patiala and Others decided on 03.08.2005 in paragraphs-16 to 27 has held as under:-

16. The affidavit further goes on to state that an Officer of the Bank who can be transferred throughout India would not be entitled to any indulgence

in the matter of transfer on ground of physical disability. This plea is based on reading of certain circulars. The respondent Bank unfortunately

produced only some of the circulars / office memorandums, while the others had to be produced by the appellant. It would be necessary to reproduce

the circulars / office memorandums :-

(i) "F. NO. 302/33/2/87-SCT(B) Government of India Ministry of Finance Deptt. of Economic Affairs (Banking Division) New Delhi, Dated 15.2.1988

All CES of public Sector Banks And Financial Institutions RBI/NABARD SUB : Posting/Transfer of Physically Handicapped employed in public

sector banks/financial institutions.

Sir, Representations have been received that in view of their physical disability bank employees who are physically handicapped may be exempted

from routine periodical transfers from places of their original postings/ appointment. Earlier the Government had issued instructions vide letter No.

302/33/2/87-SCT(B) dated 31st August, 1987 that BSRBs should endeavor as far as possible to allot the selected physically handicapped candidates to

banks having branches located in or near their home town or village.

The question of their posting/transfer has also been considered in the same context and it has been decided that subject to the administrative

exigencies, the physically handicapped persons employed in public sector banks in all cadres should normally but exempted from the routine periodical

transfers. It has been decided that such persons should not normally be transferred even on promotion if a vacancy exists in the same branch/office,

town/city. When the transfer of a physically handicapped employee becomes inevitable on promotion to a place other than his original place of

appointment due to nonavailability of vacancy, it should be ensured that such employees are kept nearest to their original place of posting and in any

case are not transferred to far off/remote places. This concession would not be available to such of the physically handicapped employees of the

banks who are transferred on grounds of disciplinary action or are involved in fraudulent transactions, etc. The receipt of this letter may be

acknowledged.

Yours faithfully, sd/-

(Y.P. Sethi) Deputy Secretary to the Govt. of India

(ii) "No. A-B 14017/41/90-Estt (RHQ)

Government of India Ministry of Personnel Public Grievances and Pensions Deptt.

of Personnel and Training New Delhi, the 10th May, 1990.

OFFICE MEMORANDUM

Â Subject : Posting of Physically Handicapped Candidates The undersigned is directed to say that a suggestion has been made that physically

handicapped candidates appointed under the Government should preferably be posted in their native places or at least in their native district. The

matter has been examined carefully. It may not be possible or desirable to lay down that physically handicapped employees belonging to Group-A or

Group-B who have all India transfer liability should be posted near their native places. However, in the case of holders of Group-C or Group-D posts

who have been recruited on regional basis and who are physically handicapped. Such persons may be given posting, as far as possible, subject to

administrative constraints, near their native places within the region.

2. Requests from physically handicapped employees for transfer to or near their native places may also be given preference.

3. Suitable instructions may also be issued to all subordinate.

sd/-

(J.S. MATHUR) Joint Secretary to the Govt. of India

(iii) ""GOVERNMENT OF INDIA MINISTRY OF PERSONNEL, PUBLIC GRIEVANCES AND PERNSIONS DEPARTMENT OF

PERSONNEL and TRAINING, NEW DELHI

No. 36033/1/2000-Estt(Res) Dated 18th Feb., 2000 OFFICE MEMORANDUM Sub : Posting of Government employees who have children with

hearing impairment or multiple disability.

1. The undersigned is directed to say that there has been a demand that an employed parent of a child suffering from hearing impairment or multiple

disability may be given posting to their own preferred linguistic / one or State where educational facility for their hearing impaired or multiple disabled

child exists and that too in the same language exists. This demand has been made on the ground that the disabled children may have opportunities of

learning in the single language, as these children cannot cope up with learning their subjects in more than one language, as a result of transfer of their

parents from one State to another.

2. The matter has been examined. Considering that the facilities for medical care

and education of children with hearing impairment multiple disability

may not be available at all Stations, such requests from the parents of a child suffering from hearing impairment or multiple disability, may as far as

possible be considered sympathetically. Where, however, this may not be possible, efforts may be made to accommodate such a Government servant

in the same State to the extent possible.

3. All the Ministries/Departments, etc. are requested to bring these instructions to the notice of all the appointing authorities under their control. sd/-

(L.P. Bhardwaj) Under Secretary of the Govt. of India

(iv) "No. AB 14017/16/2002-Estt.(RR) Government of India, Ministry of Personnel, Public Grievances and Pensions Department of Personnel and

Training New Delhi, the 13th March, 2002 Office Memorandum Subject :Posting of physically handicapped candidates.

Reference this Department's O.M. No. AB14017/41/41/90-Estt(RR) dated 10.5.1990 (copy enclosed) on the above subject. 2. It is clarified that the

guideline contained in para 2 of this Department's O.M. dated 10.5.1990 that requests from physically handicapped employees for transfer to or near

their native places may also be given preference, covers physically handicapped employees in Groups A, B, C and D.

3. Suitable instructions may also be issued to all subordinate offices, etc.

4. Hindi version will follow.

sd/-

(Alok Saxena) Deputy Secretary to the Government of India

(v) "No. 3/4/2004-SCT(B) Government of India Ministry of Finance Deptt. of Eco. Affairs (Banking Division) New Delhi, dated the 14th July, 2004

To, The Chief Executives of all Public Sector Banks / Financial Institutions The Executive Director, Reserve Bank of India, Central Officer, Mumbai

The Chairman, Indian Banks' Association, Mumbai Subject : Posting of physically handicapped employees and employees with mentally retarded

children Sir, It has been brought to the notice of the Government that the Banks are not giving due attention in posting of physically handicapped

employees/employees with mentally retarded children. It is reiterated that the physically handicapped clerical and subordinate staff may be given a

posting, as far as possible, subject to administrative constraints, near their

native places.

Similarly, the employees/officers with mentally retarded children may be posted, as far as possible, taking into account the merits of each case and

subject to administrative constraints, to places where facilities for medical cadre education and rehabilitation of the children are available.

The Banks and Financial Institutions are advised to take into account the difficulties being faced by such employees/officers while deciding about the place of posting.

Yours faithfully, sd/-

(A. THOMAS) Under Secretary to the Govt. of India

17. A reading of the aforesaid circular dated 15.02.1988 would show that even prior to the said Act coming into force, the issue of posting / transfer of

physically challenged employees in public sector banks / financial institutions (the respondent Bank being one such) was dealt with by the Ministry of

Finance. In terms of the circular, every endeavor has to be made so far as possible to allot persons with disability to branches located in or near their

hometown or village. Not only this, such person are exempted from routine periodic transfers except on account of administrative exigencies. The

circular further goes on to record that such person should not normally be transferred even on promotion, if a vacancy exists in the same branch office

and town / city, but in case of such promotion, if the transfer is inevitable, the person is to be kept nearest to his/her original place of posting. Of

course, in case of disciplinary action, the position would be different. Such a circular itself would take care of persons with disability. This circular has

never been superseded.

18. The respondent Bank, however, seeks to rely upon the subsequent office memorandum on 10.05.1990 issued by the Ministry of Personnel, Public

Grievances and Pensions stating that in respect of Group A and Group B posts where all-India transfer liabilities there, it will not be feasible to always

place employees nearby to their original native places. However, in respect of Group C and D posts, posting should be accordingly made. The third

circular is in respect of posting of Government employees, who have children with hearing impairment or multiple disability. This, in our considered

view, would have no application to the case of the appellant.

19. It is the appellant who brought to our notice that even the Ministry of Personnel, Public Grievances and Pensions vide office memorandum dated

13.03.2002 clarified with respect to the earlier memorandum of 10.05.1990 that the guidelines contained in para 2 of the earlier memorandum dealing

with request from physically challenged persons for transfer to or near their native places may also be given preference in Groups A, B, C and D.

Thus, to that extent, 1990 circular was, in fact, modified and yet reliance was placed by the respondent on the earlier circular without bringing to the

notice of this Court the earlier circular. Even 1988 circular was brought to the notice of this Court only by the appellant and, in our considered view, it

was the duty of the respondent Bank to bring to the notice of the Court all the relevant circulars dealing with persons with disability. In so far as the

last circular of 14.07.2004 is concerned, which is issued by the Ministry of Finance, emphasis has been laid on the fact that such preference should be

given in posting. The circular is issued on the basis that the Government has been informed that the banks were not giving due attention to this aspect.

This circular refers to the clerical and subordinate staff. In our considered view, even this circular may not be germane to the issue as nothing has

been brought on record to suggest that the earlier circulars have been given a go-bye. The most important aspect is that the circular dated 15.02.1988

has never been revoked and the same was issued by the Ministry of Finance and to deal with public sector banks like the respondent. The Ministry of

Personnel has issued certain circulars for its officers. It is abundantly clear to us that the clear intent is that the bank must give preference in a nearby

location to the original native place for posting of such persons with disability.

20. The aforesaid, thus, makes it clear that the very premise of the decision of the respondent Bank is erroneous. The affidavit and the decision show

that the circulars are being read as if no preference is sought to be given to persons in Group A and posts, which is fallacious.

21. The other important aspect is that the authorities of the Bank are not to sit in appeal over the medical certificate issued by the competent Medical

Board as the final certificate. Such a certificate in terms of Rule 6 of the said Rules is liable to be accepted by all authorities. The change in the

degree of disability has been done by the competent Board on a representation of the appellant and in accordance with Rule 5 of the said Rules. The

fact that the authority taking the decision considered the matter as if it has to even examine the medical certificate and its validity would show that the very basis of the decision is wrong.

22. In fact, even after the said decision, we gave an opportunity to the respondent Bank to consider the cases in view of the provisions, but it appears that the Bank is adamant and is not willing to follow the memorandums and guidelines. The circular of 1988 and even of 2002 have not even been

considered by the Bank. The approach of the Bank must be deprecated. If the decision taken by the Deputy General Manager is considered, these

aspects would be writ large on its face. The decision is reproduced as under :-

As per the direction of the Hon. Delhi High Court dated 03.05.2005, the case of transfer of Shri V.K. Bhasin was considered afresh.

I have carefully gone through the latest Report dated 26.04.2005, of the Medical Board, Dr. R.M.L. Hospital, New Delhi, I find that the 'Locomotor

Disability' of Shri Bhasin for all practical purposes is only 38.7%, which is less than 40%.

The stated disability of 1.1% in the left shoulder and 1% in the right little finger of the hand cannot be said to have led to substantial restriction of

movement of the upper limbs and therefore could not be regarded as a Locomotor Disability under the 'Persons with Disabilities (Equal Opportunities,

Protection of Rights and Full Participation) Act, 1995'.

I have also noted the disability as reported by the Medical Board. I am of the considered view that the nature of his disability in left lower limb is such

which does not warrant any change in the order of his transfer.

I also observe that Circular dated 14.07.2004 of the Ministry of Finance, read with Circular dated 10.05.1990 of the Ministry of Personnel, Public

Grievances and Pension, makes it amply clear that the officers of the Bank who can be transferred throughout India were not as of right entitled to

any indulgence in the matter of their transfer, on the ground of physical disability. However, the Bank is conscious that while passing transfer orders

of physically disabled persons, care should be taken not to transfer them to such places where adequate medical facilities were not available. It is not

the case of Shri Bhasin that the required medical facilities were not available at Varanasi. In fact, Varanasi, being a divisional head quarter, hosts

ample medical facilities, including a renowned Medical College. Shri Bhasin would

have availability of all medical attendance at Varanasi as and when required by him.

Moreover, the Act and the rules made there under do not provide for any discrimination or special treatment in the matter of transfer of physically disabled persons.

At the time of his accident on 26.05.1997, Shri Bhasin was posted at Delhi, where after he was accommodated at Dehradun. He is continuing in supernumerary capacity at Dehradun from 18.03.1998 and his transfer from Dehradun is overdue. Overstay at the same Branch/Station always creates problems. I also reasonably apprehend, if Shri Bhasin is allowed to continue at Dehradun, certain administrative problems are bound to crop up in the background of present litigation, given his present attitude and conduct with the officers of the Bank. He even accused the members of the Medical Board of bias against him.

The fact that Shri Bhasin has chosen to remain a bachelor, is a matter of personal choice and convenience and cannot by itself be a ground to remain posted at one particular place throughout the service period.

Taking into account the facts and circumstances of his case in totality, I am of the view on merits that the order earlier passed on 16.08.2001 for his transfer to Varanasi does not require any change.

In so far as granting leave and releasing his balance emoluments were concerned, leave have been sanctioned and our Varanasi Branch has been advised to release his emoluments.

sd/-

Deputy General Manager (Delhi)

A reading of the decision, thus, makes it clear that the authority first sat as an appellate authority over the certificate, considered circulars piecemeal

ignoring the circulars of 1988 and 2002 even though they were known to the Bank and had been brought to the notice of the Bank even by the

appellant in these proceedings. It is an admitted position that the appellant is a bachelor and is dependent on his sister living in Dehradun. Even this

aspect is dealt with in an extremely insensitive manner in the decision stating that it is the own decision of the appellant to remain a bachelor.

23. In the written synopsis filed by the appellant, an endeavor has been made to

once again raise the issue of the medical certificate like an appellate authority which is not permissible. A perusal of the certificate even otherwise does not show any a parent mistake. In fact, the plea raised is that the Bank should be permitted to take the nature of disability into account, while observing the guidelines. It has to be appreciated that once a person is certified with permanent disability of more than 40% and is, thus, covered under the provisions of the said Act, this aspect is not germane. There is no doubt that the appellant is only to be considered for transfer to a proximate place to his native place, but the guidelines of 1988 make it clear that such request is to be accepted unless in case of administrative exigency otherwise.

24. The written synopsis also goes on to raise the issue of scope of judicial review. In matters of transfer, this Court does not sit as a court of appeal.

However, where the very basis is erroneous, this Court is entitled to intervene. Totally irrelevant factors have been taken into account as stated above

and the provisions of statutory enactment like the said Act, the said Rules and the Office Memorandum issued in furtherance thereof are sought to be

defeated. One cannot lose sight of the fact that the legislation is in furtherance of international commitments and to give an equal treatment to persons

with disability. All this has been given a go-bye while rejecting the request of the appellant and the Bank insists on implementing the erroneous

decision. In such a case, this Court cannot be powerless to remedy the situation.

25. Nothing has been brought on record to show that it is not possible to accommodate the appellant at Dehradun. It is not a place of posting like

Delhi or Mumbai. The appellant is a bachelor dependent on a sister residing there. The respondent Bank did not even agree when the appellant wanted

to be relieved of the services and is obviously desirous of keeping the appellant as a serving officer. Normally, we would have left it to the respondent

Bank to again take a fresh decision, but seeing the attitude, it would serve no purpose. Further, the appellant was posted in a supernumerary post even

at the stage of transfer from Dehradun. We, thus, consider it appropriate to direct that the appellant should be posted and accommodated at Dehradun

and would continue as such, but in case of administrative exigency of extreme nature arising (which at present looks implausible) posting in nearby

place can always be given in terms of the circular dated 15.02.1988.

26. We, thus, allow the appeal and direct the respondent Bank to post the

appellant at Dehradun within a period of 15 days from the date of this Order.

The appellant has already utilised a large part of his leave as he has been treated on leave. Since the decision of the respondent Bank is totally

erroneous and in ignorance of the circulars / office memorandums, the leave account of the appellant will not be debited from the date of rejection of

the case of the appellant, which was brought to the notice of this Court as 30.05.2005 and, thus, leave would lie to the credit of the appellant w.e.f.

01.06.2005 despite the appellant being on leave and being paid the emoluments for the said purpose.

27. The appeal is allowed in the aforesaid terms with costs of Rs.10,000/-.

The Delhi High Court has dealt with the disability of the person therein. The Delhi High Court has also considered the objections raised by the

employee in respect of disability and has held that the employer cannot set over the disability certificate issued by the competent authority and a

disabled person is entitled for protection keeping in view the Act of 1995, as the Act has been enacted to spell out the responsibility of the State

towards the prevention of disabilities, protection of rights, medical care, education, training, employment and rehabilitation of a person with disability.

In the considered opinion of this Court, as the petitioner undisputedly is a disabled person, is certainly entitled for the protection provided under the Right

of Persons with Disabilities Act, 2016 and various notifications issued by Government of India either under the earlier Act of 1995, which stands

repealed on account of enactment of the Act of 2016. No reason has been assigned for accommodating the respondent No.3 nor any reason has been

assigned for transferring out the petitioner from the branch in question except of making a bald statement that transfer order is a routine transfer done

on account of administrative exigency.

The judgment relied upon in the case of Union of India v/s S.L Abbas (supra) is of no help to the respondents as the transfer order is in violation of the

executive instruction issued by the Government of India and the petitioner enjoys certain benefits flowing out of the Act of 1995 and the Act of 2016.

Reliance has also been placed upon a judgment in the case of B. Vardharao v/s State of Karnataka (supra), wherein it has been held that the transfer

is an incident of service.

No employee can dispute the aforesaid established fact that transfer is an

incident of service, but the fact remains that the transfer has to be done keeping in view the various policies issued from time to time and it should not be vitiated by malafides or should not be contrary to the notification issued by the Government of India or by other authorities.

In the considered opinion of this Court, the transfer order in the present case deserves to be quashed. The another important aspect of the case is that

the respondents while justifying the transfer order have gone to the extent in stating that the petitioner's sister is doing B.D.S. course. The

petitioner is having a mobile. The petitioner's hobby is listening music. The respondents/Bank is having no right to comment upon the personal life

style of the physically handicapped persons. In order to defend the case, the respondents have crossed all norms of decency and human behavior. It is

really very unfortunate that the Officers, who have filed the affidavit do not understand the plight of a human being, who suffers from disability, as

God has been very kind to them and they do not possess any disability. Such remarks against a disable person are unwarranted, uncalled for and the

practice of making such remarks by the respondents is deprecated.

Learned counsel appearing for the respondents/Bank has fairly stated before this Court in future they will be taking all precautions not to make any

personal remarks against disable persons, and therefore, this Court is not imposing any cost in the matter. The respondents should more careful in the

future before making such type of remarks against the disable persons.

Resultantly, the present writ petition stands allowed. The impugned transfer order dated 03.01.2017 is hereby quashed.

A copy of this order be forwarded to the Managing Director of the Bank of India also Certified copy as per rules.