
(2012) 01 AHC CK 0672
In the Allahabad High Court
Case No : Writ A No. 50823 of 2011

Suresh Kushwaha

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 12-01-2012

Acts Referred:

Citation : (2012) 01 AHC CK 0672

Hon'ble Judges : Sunil Ambwani, J;Manoj Misra, J

Bench : Division Bench

Final Decision : Allowed

Judgement

1. We have heard Sri Ashok Kumar for the petitioner. Sri Praveen Kumar Jaiswal appears for the respondents.
2. The petitioner is serving as a Junior Commissioned Officer (JCO), 501 ASC Bn. and was posted at Patiala. By this writ petition, he has prayed for directions, to quash the order dated 20.7.2011, by which representation made by him and his wife under the orders of this Court dated 16.5.2011, in Writ Petition No. 28176 of 2011, has been allowed after asking him to submit a fresh choice of posting, to the extent that he was permitted to request for posting for any unit located at Kolkatta or Lucknow on medial grounds, to be considered on merits.
3. Sri Praveen Kumar Jaiswal appearing for the respondents states that the petitioner's fresh application for his transfer was considered, and that he has been posted by order dated 20.11.2011 to Kolkatta. He submits that the High Court at Allahabad may not entertain the writ petition, for lack of teritorial jurisdiction.
4. The petitioner is a permanent resident of Village Kahaon, Post Andila, District Deora. His son Master Siddharth aged about 17 years was born with special deformity and handicap, commonly called cerebral pasly, diagnosed as "KCO Spastic Diplgia with Plevis Obliquity with Limb Contractures". The petitioner and his wife are taking care of their son. The family is living in District Deoria in U.P.

He is undergoing regular treatment in All India Institute of Physical Medicine and Rehabilitation, Mumbai, and Holy Family Hospital, St. Andrews Road, Bandra (West) Mumbai, where the petitioner was posted from 2003-2006. These hospitals have special facilities for the children suffering with the disease, which is not available in any of the Command Hospital of the Indian Army. The child was advised, and is required to undergo three major operations during his childhood, so that his bones attain required density. A special surgical procedure was performed on him on 21.1.2011 at Holy Family Hospital, St. Andrews Road, Bandra (West) Mumbai, detailed as follows:-

Shelf osteotomy (stahelis) of hip and derotation of distal osteotomy on 21-Jan-2011 under epidural.

Osteomyelitis of hip on 21-Jan-2011 under spinal.

5. Learned counsel for the petitioner submits that his son has to undergo two more operations within a short span of few years. He has only three and half years, to serve. If he is allowed posting at Mumbai, he will be able to do the best for his child to lead normal life.

6. In pursuance to the directions of this Court dated 16.5.2011, Brigadier, OIC Records, Bangalore by his order dated 20.7.2011, considered the petitioner's application. He found that earlier the petitioner's wife had approached the Armed Forces Tribunal, Regional Bench at Lucknow, which was dismissed on 6.1.2011, on the ground of jurisdiction. The Armed Forces Tribunal Act has not been conferred jurisdiction to consider the matters of transfer and posting. The petitioner approached the High Court at Allahabad in Writ Petition No. 28176 of 2011, in which an order was passed on 16.5.2011, to decide his representation. In paragraphs 6 to 9 of his order the OIC Records has considered the petitioner's prayer as follows:-

3. In response to the request dated 16 Oct 2010 submitted by your wife, Smt. Manju Kushwaha, received vide AWWA Note No. AWWA/1001/D/Posting dated 26 Oct 2010, Integrated Headquarters of Ministry of Defence (Army) Q/ST-12, vide letter No. 77301/LLP/Q/1/ST-12 dated 15 Nov 2010, requested your wife to advise you to put up an application for posting on medical grounds through prescribed channel for posting to Kolkatta or Lucknow, having requisite medical facilities, if declared.

4. The matter was earlier also raised by your wife in the Hon''ble Armed Force Tribunal, Regional Bench at Lucknow (OA No. 265/2010), which was dismissed on 06 Jan 2010 on the ground of jurisdiction.

5. It is further highlighted that no fresh application was received from you prior to disposal of Civil Miscellaneous Writ Petition No. 28176/2011, file by you in Hon''ble High Court of Judicature at Allahabad, which was disposed off by the Hon''ble High Court of Judicature Allahabad on 16 May 2011, with the directions that "the petitioner is permitted to file a certified copy of this order along with

fresh representation annexing the copy of earlier one for redressal of his grievance within a period of fifteen days from today. On receipt of the move so permitted, it will be the concern of the competent authority to look into the matter and to pass appropriate orders on merits in accordance with law, preferably within a period of two months from the date of receipt of the move if the same has not already been decided"

6. On receipt of the copy of the aforesaid order dated 16 May 2011, a letter dated 24 May 2011 had been received from Shri Ashok Kumar, Advocate on your behalf. Subsequently, an application dated 29 June 2011 has also been received from your side. On both these applications, requests have been made for posting to Mumbai only, without indicating any other station/new station.

7. In this connection, it is relevant to add that you were also interviewed by the Officiating Commanding Officer, 501 ASC Bn. in the presence of the Coy Commander and advised to re-submit fresh application for posting on compassionate grounds in light of directions given by Hon"ble High Court of Allahabad. During the interview, you have intimated that fresh representations annexing copy of earlier request for redressal of grievances has already been submitted by your counsel to the respondents. You were, however, again advised to re-submit a fresh application with new station, if any, where-in you have declined to forward fresh application with new stations and pressed for consideration of your earlier application only.

8. Your request for posting to any unit located in Mumbai, contained in letter dated 24 May 2011 and 29 June 2011 has been examined afresh by the competent authority, It has been observed that since you have already availed tenure at CFL Mumbai from Feb. 2003 to Mar 2006, your posting to any unit at Mumbai will be back to the same command and station within six years. This will be against the laid down policy. It has further been observed that you have not indicated any other station either in letter dated 24 May 2011 *ibid* or the subsequent application dated 29 Jun 2011, which is not in accordance with Paragraph 17 of the existing policy on the subject.

9. In view of the position explained above, it is hereby conveyed that the competent authority has not found it administratively feasible to acceded to your request for posting to any unit at Mumbai, however, your request for posting to any unit located at Kolkatta or Lucknow on medical grounds, if made, can be considered on its merit."

7. The petitioner has joined at Kolkatta.

8. It is submitted by the Learned Counsel, appearing on his behalf, that rules and policies are to govern normal situations and circumstances. There are always exceptions, and that the petitioner"s request for posting at Mumbai, to help his son, should not have been turned down, unless it was shown that the application was not bonafide, and that the petitioner has any other alternative treatment for his son. He submits that the request was not turned down on valid grounds. The

petitioner had demonstrated before the Commanding Officer that the medical facility requires for his son, is not readily available at any other hospital and that it would be most beneficial for his son, suffering from the special disability to undergo the remaining two major surgical procedures at the same hospital at Mumbai.

9. There are several issues, raised in the matter, including compassion to the child, the rights of the petitioner, to treat his case as an exception. The petitioner's son was born as a differently able child. Our country has made rapid advances in medical treatment, but unfortunately the medical facilities are not available at all places. During the tenure of his posting at Mumbai, the petitioner got an opportunity to get his son treated, and that his son had undergone operations, to be followed up with two more procedure, which requires recourse to intensive post-operative treatment including physiotherapy.

10. A citizen of India joining the Army, has to live a disciplined life. He is required by the nature of his job to be more committed to serve than any other person in Civil services. The option to serve the country, does not take away the rights of such person, to be treated fairly. The Army could do well to consider petitioner's request for the benefit of his son, to post him at Mumbai.

11. We find that the insistence of the respondent on which the petitioner had to change his choice of posting was nothing but coercion to which he had to succumb when his request was turned down. The Army has a record of treating its personnel as human being, and to respect their responsibilities towards their families. We believe that soldiers can serve the nation with more commitment and devotion, if they are reassured that the Army will understand and will take care of their bonafide needs.

12. The writ petition is allowed. The order dated 20.7.2011, is set aside. The Respondent are directed to consider petitioner's request afresh in the light of the observations made by us, within a month from the date of receipt of representation along with a copy of this order.