

(2012) 05 DEL CK 0120

In the Delhi High Court

Case No : Writ Petition (C) No. 2648 of 2012 and CM No. 5692 of 2012

Wg Cdr Ajit Kakkar

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 04-05-2012

Acts Referred:

Citation : (2012) 05 DEL CK 0120

Hon'ble Judges : Sudershan Kumar Misra, J;Anil Kumar, J

Bench : Division Bench

Advocate : S.S. Pandey, for the Appellant; Barkha Babbar, Advocate with Wg. Cdr. A.A. Amrite and Wg. Cdr. R. Mohanty, for the Respondent

Judgement

Anil Kumar, J.—The petitioner has sought the quashing of order dated 7th October, 2011 passed by The Air Officer-in-Charge Personnel, Air HQs, Yayu Bhawan, Rafi Marg, New Delhi by which the petitioner has been transferred to Air Force Intelligence School, Pune. The petitioner has also sought the quashing of order dated 30th March, 2012 directing the petitioner to report at Pune by 7th May, 2012. The petitioner has further sought directions to the respondents to consider the case of the petitioner for his retention in Delhi till the completion of Fontan procedure of his daughter or in the alternative to release the petitioner pursuant to his application for premature release made by letter dated 10th April, 2012. The petitioner was enrolled in the Indian Air Force as Airman on 4th April, 1984. On account of his performance, he was granted commission as Pilot Officer on 21st June, 1993 and was posted to 501 SU as Fighter Controller. The petitioner was thereafter, promoted to the rank of Flying Officer on 21st June, 1995 and was further promoted to the rank of Flight Lieutenant on 21st June, 1998.

2. The petitioner contended that his daughter was born on 6th August, 1998 with Congenital Cardiac Heart Disease Mitral Atresia (defective Mitral Valve), Double outlet in right ventricle, and a single ventricle physiology. Therefore, the daughter of the petitioner has underwent Balloon Artrial Septostomy (BAS) on

20th September, 1998 and a Pulmonary Arterial Banding (1st Cardiac Surgery) which was performed on 8th October, 1998.

3. The petitioner pleaded that on account of the difficulties faced by him, the respondents had showed compassion and therefore, he was posted to Delhi on 8th December, 1998.

4. According to the petitioner, his daughter was again admitted on 12th May, 1999 and another surgery of Bi-Directional Glen-Shunt was done on her on 19th May, 1999. An emergency cardiac procedure (3rd open heart surgery) was also performed and the Glen-Shunt was taken out and thereafter, the arterial septectomy was done. On account of the extensive surgery done on her she has remained very weak and fragile. The petitioner further disclosed that her daughter was on palliative management at Escorts hospitals and on the advice of the doctors at AIIMS and the Army Hospital (R&R), her case was accepted at Narayana Hridayalaya, Bangalore.

5. In order to get his daughter treated, the petitioner had requested for a transfer to Bangalore, which was accepted and the petitioner was posted there in April, 2003, where the treatment of his daughter continued at Narayana Hridayalaya, Bangalore. Thereafter, the Re-do glen was performed on the daughter of the petitioner on 14th January, 2004. However, on account of climatic conditions her recovery became difficult and in the circumstances, the petitioner had sought his transfer back to Delhi which was accepted by the respondents and he was transferred to Delhi in March, 2005. On being transferred to Delhi the condition of the petitioner's daughter had improved. Due to the improvement in the conditions of the daughter of the petitioner, she required another surgery of Fontan to complete the surgical treatment and therefore, the then Commandant Army Hospital (R&R) had recommended that the daughter of the petitioner be taken to Bangalore for the Fontan procedure. The petitioner, therefore, again took his daughter to Bangalore on 31st August, 2006. However, due to the Paroxysmal Allergy of the petitioner's daughter, she had to be brought back to the Escorts Hospital, New Delhi for Angiography and Embolisation of Collaterals which was done from 6th November, 2006 to 8th November, 2006.

6. The petitioner, in these circumstances, had sought premature retirement by letter dated 4th July, 2007, however, instead of accepting his application for premature retirement the petitioner was granted extension of tenure in Delhi by letter dated 30th August, 2007. The petitioner contended that though it was clear to him that such extension would not be a permanent solution of his problems, but the petitioner accepted the same to make a balance between his organizational commitments and his personal problems.

7. The petitioner contended that his tenure was extended from 2007 to 2009 and thereafter, from 2009 to 2010 and by letter dated 2nd February, 2010 the respondents had granted another extension of two years till March, 2012 to the

petitioner at Delhi.

8. The petitioner asserted that during this period his daughter has remained under the treatment of Dr.Rajesh Sharma at Escorts Heart Institute at New Delhi, who had come from Narayana Hridyalaya, Bangalore. He also disclosed that for one reason or the other Fontan procedure could not be performed on his daughter and that she is being monitored regularly to ascertain the feasibility of such a procedure.

9. The petitioner has asserted that though the respondents have extended all possible assistance to the petitioner in order to infuse life into his daughter, who despite five extensive surgeries, has not been able to become normal and further surgeries are required. The petitioner contended that it appears difficult for the respondents to accommodate the petitioner any further, and therefore, the petitioner had planned to apply for premature retirement. The petitioner has also submitted that his mother has also been diagnosed to be a patient of cancer, and thus he needs to take proper care of his ailing daughter and his sick mother.

10. In these circumstances, the petitioner has contended that he had received a letter dated 7th October, 2011 transferring him from New Delhi to Pune and to report at his new place of posting on 23rd January, 2012. The petitioner, therefore, sought a personal interview with the ACAS(PO) in order to explain his predicament, which was granted to him on 19th December, 2011. However, on meeting the PDPO he was asked to go to Pune on temporary duty to find out if it would be possible for the petitioner to continue the treatment of his daughter in Pune. In these circumstances, the date of the movement of the petitioner from New Delhi to Pune was also changed to 2nd April, 2012.

11. The petitioner disclosed that a specialist at Pune after going through the documents and medical history of his daughter had categorically opined that the daughter of the petitioner should be treated at Delhi. The petitioner also relied on the medical opinion given by the Escorts Hospital, Delhi stating that the treatment of the petitioner should continue at Delhi, at least till the completion of Fontan procedure which has to take at least two more years. According to the petitioner, even the Army Hospital (R&R) also opined that the treatment of the daughter of the petitioner should continue at Delhi.

12. Since the treatment of the daughter of the petitioner is to continue for substantial period, the petitioner again sought premature retirement on compassionate grounds on 15th February, 2012.

13. According to the petitioner, the request of the petitioner for premature retirement has not been considered on the ground that in terms of HRP Policy, once the posting of the petitioner has been issued, his request for premature retirement would be considered only from his new place of posting.

14. In these circumstances, the petitioner made several representations, however, the petitioner has been ordered to report to his new place of posting.

The petitioner disclosed that the time for joining the new posting at Pune has again been changed to 7th May, 2012 from 2nd April, 2012. In these circumstances, the petitioner has sought the cancellation of his order of transfer and the direction to report to the place of transfer i.e. Pune.

15. The petitioner has also contended that considering the entire medical history of the daughter of the petitioner, he should not be transferred to any place other than Delhi and his application for premature retirement should be considered before transferring him to any place.

16. The petitioner also disclosed that Sqn Ldr Pilli whom the petitioner is supposed to relieve in Pune, too has made a representation for the extension of his tenure at Pune because his posting which was earlier issued to Delhi, has been diverted to Gandhinagar and Bangalore and the said Air Force personnel has also requested for his extension at Pune on the ground that his father is suffering from cancer. In the circumstances, it is asserted that though the posting order has been issued due to administrative constraints, it is working against the human considerations involved in the matter. The petitioner also contended that in the circumstances his request for premature retirement ought to be considered and he should not be transferred before the decision of his premature retirement.

17. The learned counsel for the respondents, Ms.Barkha Babbar who appears on advance notice with Wing. Cdr. A.A. Amrite and Wing. Cdr. R. Mohanty has relied on the alleged policy under which the application of the petitioner for premature retirement cannot be considered unless the petitioner joins the place to where he has been transferred.

18. The learned counsel is, however, unable to give any satisfactory reply as to why the application of the petitioner for premature retirement cannot be considered in these peculiar and special facts and circumstances of the case, as his transfer to Pune, would interfere with the treatment of the petitioner's daughter in Delhi and she would not be able to get the extensive cardiac treatment which she requires and also in view of all the efforts of the petitioner for the past many years, which may be lost if this transfer is effected.

19. The learned counsel for the respondents, on instructions, also showed the apprehension of the respondents that the petitioner may withdraw his application seeking premature separation from service.

20. Considering the facts and circumstances, it is apparent that in case the petitioner joins his place of present posting on 7th May, 2012 the daughter of the petitioner may not be able to get the treatment which she requires in the facts and circumstances and the efforts of not only the petitioner but all the concessions shown by the respondents from time to time up until now for the past many years will also be jeopardized and put to nought.

21. In the circumstances, the petitioner has been able to make out a good case

to direct the respondents to maintain status quo regarding his posting at Delhi till the application of the petitioner for premature retirement is decided by the respondents, considering the peculiar facts and circumstances of the case.

22. After some arguments, the learned counsel for the petitioner, on instructions from the petitioner, who is present in person, has stated that the petitioner undertakes that he shall not withdraw the application seeking premature separation from service dated 10th April, 2012 before the said application is considered and decided by the Premature Separation Service Board (PSSB) or any other Special Board which may be constituted by the respondents in this regard.

23. On the undertaking being given by the petitioner, Wing. Cdr. A.A. Amrite, who is present in person, states that he is authorised on behalf of the respondents to state that considering the peculiar and exceptional circumstances of the present case and as has also been opined by this Court, the petitioner shall not be transferred to Pune and he shall not be directed to report on 7th May, 2012, and status quo in respect of the petitioner shall be maintained as of today till the application of the petitioner for premature separation is decided by the Premature Separation Service Board or any other Special Board which may be constituted by the respondents in this regard.

24. In the circumstances, if the Premature Separation Board or any other Special Board recommends premature separation of the petitioner, the petitioner shall also be entitled for three months preparation time as contemplated under the rules. The petitioner further undertakes that he shall not vary or withdraw the application for premature retirement dated 10th April, 2012 which is pending consideration, and that he shall also not seek more than three months time from the date of the communication of the order accepting his request for premature separation.

25. In case the application for premature separation of the petitioner dated 10th April, 2012 is rejected by the Premature Separation Service Board or any other Special Board constituted in this regard, in that eventuality the respondents shall not implement the order of transfer to Pune and will also not transfer him to any other place for four more weeks, till after the communication of the order of rejection of the application of the petitioner seeking premature separation. The petitioner shall also be entitled to challenge any transfer order which may be operative or which may be passed in case his application for premature separation is not accepted and declined by the Premature Separation Service Board or any other Special Board constituted in this regard.

26. In the totality of the facts and circumstances and the statements made on behalf of the petitioner and the respondents, the transfer order dated 7th October, 2011 and the order dated 30th March, 2012 directing the petitioner to report at Pune on 7th May, 2012 are set aside. It is further directed that looking at the unique and unfortunate circumstances of the petitioner's daughter, the

respondents will not pass any transfer orders transferring the petitioner to any place other than Delhi till the disposal of the petitioner's application for premature separation, and in case it is allowed, the petitioner shall be entitled for three months preparation time thereafter and as has been observed in this order hereinbefore.

27. With these directions, the writ petition is disposed off. This will not be a precedent. The order is announced in open court in the presence of the counsels for both the parties and the petitioner and the respondents' representatives.