

MANU/DE/4149/2015

IN THE HIGH COURT OF DELHI

W.P. (C) 10861/2015

Decided On: 01.12.2015

Appellants: Aravendra Kumar
Vs.

Respondent: Union of India and Ors.

Hon'ble Judges/Coram:

S. Ravindra Bhat and Deepa Sharma, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: H.S. Tiwari and Srishti Kaul, Advocates

For Respondents/Defendant: Ankur Chhibber, Advocate

Subject: Civil

Acts/Rules/Orders:

National Trust For Welfare Of Persons With Autism, Cerebral Palsy, Mental Retardation And Multiple Disabilities Act, 1999 - Section 2(j), National Trust For Welfare Of Persons With Autism, Cerebral Palsy, Mental Retardation And Multiple Disabilities Act, 1999 - Section 2(o); Persons With Disabilities (equal Opportunities, Protection Of Rights And Full Participation) Act, 1995 - Section 2(a) (i), Persons With Disabilities (equal Opportunities, Protection Of Rights And Full Participation) Act, 1995 - Section 2(i)(vi), Persons With Disabilities (equal Opportunities, Protection Of Rights And Full Participation) Act, 1995 - Section 2) (t), Persons With Disabilities (equal Opportunities, Protection Of Rights And Full Participation) Act, 1995 - Section 26; Right Of Children To Free And Compulsory Education Act 2009 - Section 2(ee)

Disposition:

Disposed off

JUDGMENT

S. Ravindra Bhat, J.

W.P.C 10861/2015 & C.M. No. 27960/2015

1. The petitioner is aggrieved by the movement order dated 14.11.2015 which asked him to report to Pathankot. He states that his 12 year old daughter suffers from multiple disabilities i.e. Global Developmental Delay with severe Mental Retardation to the extent of 90%.

2. The petitioner has annexed copies of the medical reports of his daughter which show acute disability to the extent of the child's inability to perform activities of daily living without command, motor restrictions affecting all the limbs and developmental delay. She is under the active treatment and management of the Army Hospital (Research and Referral, Delhi Cantt.). The petitioner states that she is undergoing rehabilitation in the special "Asha School" and that taking her out of the familiar environment is likely to impede and endanger her further progress.

3. He relies upon the previous order of this Court dated 10.09.2014 in W.P.(C) 5097/2014 whereby this Court had recorded the withdrawal of the previous posting order on compassionate grounds. Learned counsel relied upon the policy dated 09.04.2012 (regarding

posting of JCOs/OR with paraplegic/spastic/differently abled children for specialized treatment) which recommends that in cases where army personnel are parents of spastic/paraplegic/differently abled children who require special medical attention, they should be given special accommodation. Para 2 (d) of the policy particularly provides as follows:

" 2 (d) With no restriction on the number of extn case for further extn after recommendation of med. auth. will be fwd to the concerned Line Dte for approval by Head of Arm/Service. In such cases, the indl will furnish an 'Adverse Career Certificate'."

4. This court on the previous dates of hearing considered the peculiar problems of the petitioner and as well as the needs of the force and required the respondents to come with options. The respondents had indicated that the petitioner may seek choice posting either at Babina, Jhansi, Ambala and Chandi Mandir. It was stated that all these places have the facility of Asha Schools, which can be utilized by the petitioner's daughter. The petitioner, on the other hand, contended that even though these places have the facility of Asha Schools, his daughter is now adjusted and accustomed to the care of personnel in the Army Research and Referral Hospital establishment in Delhi and therefore it would be difficult for him to report elsewhere.

5. The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 ["NTWP Act"] sets the threshold of "severe disability" as eighty percent (See Section 2(o) read with Section 2(j)). The petitioner's child suffers from ninety percent mental retardation and therefore qualifies as a child with "severe disability" under the NWTP Act.

6. Under Section 2(ee) of the amended Right of Children to Free and Compulsory Education Act, 2009 ("RTE"), a child with disability includes a child with "severe disability" as defined in Section 2(o) of the NWTP Act.

7. Section 2(i)(vi) of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 ["PWD Act"] too recognises mental retardation as a disability and the PWD Act [Section 2) (t)] sets the threshold of forty percent to qualify as a person with disability.

8. The petitioner's child has rights that flow from each of these social welfare legislations. In Pramod Arora v. LT. Governor of Delhi, [W.P.(C) 1225/2014, decided on 03.04.2014], this Court has recognised that children with special needs have a wider right to free education that prevails over the RTE.

9. The PWD Act prescribes by Section 26 that:

"The appropriate Governments and the local authorities shall-

(a) ensure that every child with a disability has access to free education in an appropriate environment till he attains the age of eighteen years;

(b) endeavour to promote the integration of students with disabilities in normal schools;

(c) promote setting up of special schools in Government and private sector for those in need of special education, in such a manner that children with disabilities living in any part of the country have access to such schools;

(d) endeavour to equip the special schools for children with disabilities with vocational training facilities."

10. Under Section 2(a) (i) of the PWD Act, the Central Government is the 'appropriate

government' in relation to the Central Government, or any establishment wholly or substantially financed by that Government. However, public employers like the Armed forces, Central Armed Police Forces, Railways and other large establishments have universes of their own and they bear special responsibility by virtue of Section 26. Their duty toward children with disabilities to ensure their access to (free) education in an appropriate environment necessarily means that they manage their personnel in a manner that their wards have access to appropriate education.

11. The right of a child with disability to freely access education will be impeded if she is forced to move where there are no provisions for her special needs (as a result of her parents being transferred to such a place). As the child is dependent on her guardians/parents, the practical exercise of her right to free education is also dependent on her parents'/guardians' employment conditions.

12. Taken to the extreme, this logic will entail that a public employee with a child with special needs can never be transferred to a remote place without appropriate facilities. However the specific enforcement of the child's rights shall have to depend on the considerations at hand in any given case, and it will be incumbent upon the organisation to determine a workable solution in each case. A few factors that we can point out at this stage are:

1. the availability of resources for the child's rehabilitation and education.
2. the number of years that the personnel has been serving in a particular posting.
3. the impact that the move will have on the child.
4. the manpower needs of the organisation.
5. the extent or severity of the disability.

13. In the hearing today, it was suggested by the petitioner that instead of the current posting order he may be accommodated at Mathura where two Asha Schools are located. This course was not acceptable to the respondent who emphasised that the petitioner has been in Delhi for the last five years and that his services could be needed elsewhere.

14. In the circumstances, the petitioner who was present in court agreed that the other course would be to substitute the proposed posting with one requiring him to report in a field area in which event he would be permitted to retain the residential accommodation in Delhi.

15. In view of the submissions made and in line with the policy dated 09.04.2012 as well as the fact that the petitioner has been in extension in Delhi in accordance with the policy, this Court hereby directs the respondents to withdraw the impugned order dated 14.11.2015 and issue a fresh one within a week from today indicating which field posting the petitioner would have to report for. The respondents shall grant at least 30 days reporting time to the petitioner in accordance with their policies. The petitioner shall be allowed to retain the residential quarters under his occupation for the next three months, effective from the date of the fresh posting order. The petitioner's application for alternative residential accommodation in line with the Army's policy shall be given priority in processing and residential accommodation according to his entitlement as a personnel serving in field area shall be allotted to him after expiry of the three months.

16. The writ petition and the pending application are disposed of in terms of the above directions.