IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE MR.JUSTICE MOHAMMED NIAS C.P.

WEDNESDAY, THE 10TH DAY OF AUGUST 2022/19TH SRAVANA, 1944

W.A.NO.1596 OF 2021

AGAINST THE JUDGMENT DATED 22.11.2021 IN W.P(C).NO.18244/2021 OF HIGH COURT OF KERALA

APPELLANT/PETITIONER:

DIVYAMOL.R.S AGED 36 YEARS ASSISTANT SUB INSPECTOR (MINISTERIAL - 073260253) PRESENTLY RESIDING AT QUARTER NO.A-38, FACT TOWNSHIP, ELOOR, UDYOGAMANDAL, ERNAKULAM, KOCHI, PIN-683 501.

BY ADV.SRI.JOSEPH KODIANTHARA (SR.) BY ADV.SRI.R.KISHORE (KALLUMTHAZHAM)

RESPONDENTS/RESPONDENTS:

- 1 THE DIRECTOR GENERAL CENTRAL INDUSTRIAL SECURITY FORCE, CISF HEAD QUARTERS, 13 CGO COMPLEX, LODHI ROAD, NEW DELHI-110 003.
- 2 THE INSPECTOR GENERAL (SOUTH SECTOR) CENTRAL INDUSTRIAL SECURITY FORCE, CHPT CAMPUS, CHENNAI, PIN-600 009.
- 3 THE DEPUTY INSPECTOR GENERAL (SOUTH ZONE) CENTRAL INDUSTRIAL SECURITY FORCE, BASANT NAGAR, CHENNAI, PIN-600 090.
- 4 THE GROUP COMMANDANT, CENTRAL INDUSTRIAL SECURITY FORCE, CISF GROUP HEAD QUARTERS COCHIN, BLOCK-C, KENDRIYA BHAVAN, CSEZ P.O., COCHIN, ERNAKULAM DISTRICT, KERALA, PIN-682 037.
- 5 THE DEPUTY COMMANDANT CISF UNIT BPCL-KR, IRUMPANAM P.O., ERNAKULAM, KERALA,

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PIN-682 309.

- 6 UNION OF INDIA. REPRESENTED BY THE SECRETARY TO GOVERNMENT OF INDIA, MINISTRY OF HOME AFFAIRS, NEW DELHI, PIN-110 003.
- 7 THE SECRETARY, MINISTRY OF PERSONNEL, PUBLIC GRIEVANCES AND PENSIONS, GOVERNMENT OF INDIA, NEW DELHI-110 001.
- 8 ANURAG SHARMA, ASSISTANT COMMANDANT,CISF UNIT BPCL COCHIN, ERNAKULAM,KERALA,PIN-682 309.

BY SRI.MANU S., ASG OF INDIA BY ADV.SRI.P.BENNY THOMAS

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 01.08.2022, THE COURT ON 10.08.2022 DELIVERED THE FOLLOWING:

<u>'C.R.'</u>

JUDGMENT

A.K. Jayasankaran Nambiar, J.

The facts of the instant case bring to the fore a classic instance of how a litigant, with the help of clever lawyers, can successfully tweak the law and the legal system in her favour, and avoid transfers and postings that form an integral part of her conditions of service. The appellant protagonist is an ASI/Clerk in the Central Industrial Security Force (CISF) and she has managed to continue in the home station at Kochi for nearly a decade, much to the chagrin and exasperation of her employers who are charged with administering a disciplined and uniformed force.

THE FACTS IN BRIEF:

2. The appellant joined the service of the CISF in the rank of Head Constable/Clerk on 22.09.2007 under a compassionate appointment scheme. Her father was a Naik in the CISF who died in an ambush by armed militants, while on duty at Nagaland. She was promoted as ASI/Clerk and posted in Cochin on 24.01.2008. She continued as such till 31.10.2013 and thereafter she was posted at the CISF unit in Cochin Port Trust with effect from 1.11.2013. In June 2015, when she was transferred to Vishakapatnam by an order dated 06.06.2015, she approached this Court through W.P.(C).No.18515 of 2015 that was disposed with a direction to the respondents to consider a representation preferred by her against the transfer. The respondents considered her representation favourably and cancelled the order of transfer by relying on the applicable guidelines for transfer that envisaged, *inter alia*, that in cases where a husband and wife were both in Central Government service, they had to be retained in the same station as far as possible. She thus continued in Cochin till 2017.

3. It is significant that the appellant's husband is employed in the Fertilisers & Chemicals (Travancore) Limited, a Central Public Sector Undertaking that has offices only in Kerala, and hence if the guidelines are treated as mandatory and invariable, the appellant can never be transferred out of Cochin. By an order dated 16.03.2017, the appellant was transferred to NTPC, Kudigi (Karnataka). She impugned the said order through W.P(C).No.9392 of 2017 that was disposed with a direction to the respondents to consider a representation that she had preferred against the transfer. When the said representation came

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to be rejected by the respondents, she once again approached this Court through W.P(C). No.16682 of 2017 contending *inter alia* that by virtue of the specific provisions in the guidelines, she could not be transferred to a station other than one where her husband was posted. This time around, the Court found no reason to interfere with the order of transfer, more so when she had been continuing in Kerala for more than 8 years, and in the Cochin unit for more than 3 years and 8 months. The Court also found that no mala fides had been established by the appellant and therefore the transfer order could not be assailed, more so when it pertained to the transfer of an employee in a disciplined force. The learned Judge, however, directed the respondents to consider her case for a re-transfer to Cochin as and vacancies available Cochin when were at the unit. after accommodating the officers who were awaiting such transfers, without waiting for the appellant to complete three years at the transferred station.

4. The appellant thereafter joined service at Kudigi on 6.7.2017. Immediately thereafter, however, the respondents considered her request for re-transfer and posted her back at the BPCL unit in Cochin by an order dated 22.09.2017. She reported for duty at the BPCL unit with effect from 07.10.2017. Significantly, even during her three month tenure at Kudigi, she effectively worked there only for three days, as the remaining period was covered by the leave and joining time that she had availed during her posting there. It was while she was working at the BPCL unit in Cochin that by the order dated 03.09.2021, impugned in the writ petition, she was transferred to the CISF Unit attached to the ONGC in Narsapur (Andhra Pradesh).

THE CHALLENGE IN THE WRIT PETITION:

5. In the writ petition preferred by her, the challenge to the transfer order was premised on the grounds that (i) as per the extant guidelines, she was entitled to a protection from transfer outside of her home state since she was offered appointment on compassionate grounds (ii) the transfer order was punitive in nature in that it was in response to a sexual harassment complaint that she had preferred against the 8th respondent Assistant Commandant (iii) the transfer order being issued mid-term and not as part of a general transfer order, the respondents were obliged to furnish cogent reasons for the untimely transfer (iv) as per the extant guidelines she was entitled to be posted at the same station as her spouse who was working in a Central PSU with offices only in Kerala (v) there were many vacancies of ASI/Clerk in Ernakulam and she could be accommodated in one of them, more so when other senior ASI's were available to be

transferred out of Cochin and (vi) the transfer order would visit her and her family with untold hardship and affect her family life as also the education of her children.

THE STAND OF THE RESPONDENTS:

respondents, the averments in the writ petition were traversed *inter* alia by pointing out that (i) as per the extant guidelines the petitioner was liable to be posted at any place within her 'home sector' and this included any place within the southern sector comprising the States of Pradesh, Karnataka, Kerala, Tamil Andhra Telengana, Nadu, Puducherry and Lakshadweep (ii) The petitioner could not always rely on the provision in the guidelines that provided for a posting in the same station as her spouse for that would effectively result in the petitioner being immune from a transfer while in service (iii) out of her total service tenure of 13 years and 11 months as on 04.09.2021, she had spent 13 years and 4 months in Cochin based units alone (iv) the petitioner had not submitted any formal complaint regarding sexual harassment by the 8th respondent although the respondents had put in place a comprehensive complaint mechanism for redressing such grievances through its Circular No.09/2014 issued under Letter No. (267) dated 26/27 March 2014 (v) the 8th respondent was in no way

6. In the statement and counter affidavit filed on behalf of the

connected with the transfer order issued to the petitioner (vi) the petitioner had been subjected to disciplinary proceedings in which orders of punishment had been passed by the 8th respondent which the petitioner had accepted by not pursuing the matter further through any proceedings initiated before the appellate authority and (vi) no fundamental or other right of the petitioner had been infringed by the transfer order as it was one that was passed in the exigencies of service and in public interest.

WHAT THE LEARNED SINGLE JUDGE HELD:

7. The learned single Judge who considered the matter found that the petitioner did not establish the allegation of mala fides in relation to the transfer order. As regards the allegation that it was the sexual harassment complaint against the 8th respondent that triggered the transfer order against her, the learned Judge found that the petitioner had not filed any formal complaint in the matter nor mentioned anything about such harassment in the representation preferred against her transfer. Under the said circumstances it was found that the allegation of sexual harassment, having been raised for the first time only in the writ petition, did not merit consideration. As for the other grounds urged by the petitioner in her writ petition, the learned Judge found that the provisions in the guidelines would not

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come to the aid of the petitioner in resisting the transfer order, which was found to have been issued in the exigencies of the service. The writ petition was accordingly dismissed.

SUBSEQUENT EVENTS:

8. After the judgment in the writ petition was pronounced, a submission was made on behalf of the writ petitioner that inasmuch as she had not reported for duty at the transferred station despite expiry of the joining time, the period of absence be treated as eligible leave. The learned single Judge took note of the said submission and directed the respondents to consider the request of the petitioner favourably and further granted the petitioner 5 days time to comply with the transfer order. However, the appellant/writ petitioner did not comply with the transfer order within the time granted by the learned single Judge but chose to prefer this writ appeal immediately thereafter.

9. The writ appeal was admitted by this Court on 30.11.2021 and, despite taking note of the submission made on behalf of the respondents that pursuant to the transfer order impugned in the writ petition, the appellant had been relieved from service and a substitute had joined in her place, ordered that the operation and enforcement of the transfer order be kept in abeyance as against the appellant. The respondents were also directed to explore the possibility of provisionally retaining the appellant in Cochin. Thereafter, by an order dated 14.02.2022, this Court directed the respondents to post the appellant in a vacancy at the CISF unit attached to the Cochin International Airport at Nedumbassery, subject to the outcome of the writ appeal. Accordingly, the appellant was posted at the CISF unit at Nedumbassery by an order dated 21.02.2022 and she is continuing there.

10. In the appeal, the thrust of the averments is towards establishing a case of victimization against the appellant. Emphasis is laid on the allegations regarding sexual harassment that was urged in the writ petition and the submission is essentially that the learned single Judge did not consider the gravity of the said allegations, and the effect they had of influencing the transfer order that was impugned in the writ petition.

THE ARGUMENTS OF COUNSEL:

11. The learned Senior Counsel Sri. Joseph Kodianthara, duly assisted by Adv.Sri.R.Kishore, appearing on behalf of the appellant, refers us to the correspondence between the appellant and the 8th respondent, as also the punishment orders passed by the 8th respondent against the appellant to contend that there was harassment meted out to the appellant by the 8th respondent. He also contends that insofar as the specific allegations of sexual harassment in the writ petition have not be rebutted in any counter affidavit filed on behalf of the 8th respondent, the said allegations have to be seen as accepted by the 8th respondent. He also refers us to the documents that show the results of a counseling session undergone by the appellant in the presence of the 3rd respondent to suggest that the latter had even threatened the appellant with a transfer if she did not mend her ways. Emphasizing that the impugned transfer was one ordered mid-term, the learned senior counsel argues that while it is well settled that this court will not ordinarily interfere with orders of transfer that are necessitated in the exigencies of a service, a transfer that was untimely and ordered mid-term had to be scrutinized carefully to see whether it was punitive in nature. He argues that in the instant case, it was so, since the chain of causation from the raising of the allegation of sexual harassment to the transfer order stood clearly established.

12. *Per Contra*, it is the submission of Sri. S. Manu, the learned Assistant Solicitor General appearing on behalf of the respondents,

that there was no scope for interfering with the judgment of the learned single judge. He takes us through the documents showing the basis for the disciplinary proceedings initiated against the appellant by the 8th respondent to highlight the fact that the appellant, who was merely a Clerk in the Accounts department of the CISF, had taken it upon herself to adjudicate upon the validity of the claims put in by the 8th respondent for sanction of various monetary benefits. Towards that end, she had even disobeyed clear instructions by the higher authorities that had recommended the sanctioning of the claims preferred by the 8th respondent. In the disciplinary proceedings that followed, she refused to prefer replies to the charge memo's issued to her, despite specific instructions to that effect from her superior officers. She had also not impugned the penalty orders before the appellate authority. The said facts, according to the learned ASG, clearly pointed to undisciplined conduct on the part of the appellant who was a member of a disciplined force. As regards the allegations of sexual harassment raised against the 8th respondent, it is pointed out that the stray mention of an incident of sexual harassment, during a telephone conversation with a superior officer, that was recorded by the appellant without informing the former or obtaining his consent, cannot be relied upon to substantiate her contention, more so when

there were no steps taken by the appellant to pursue the matter thereafter. It is argued that the appellant not having pursued the matter of alleged sexual harassment, either through the lodging of a formal complaint with the authorities concerned, or even mentioning the same in her representation against the transfer order almost five months later, it was not open to her to attribute malafides in the passing of the transfer order. This is more so when the 8th respondent, against whom the allegation of sexual harassment is raised, had no role to play in the transfer of the appellant. Lastly, the learned ASG relies on the decisions in Major General J.K. Bansal v. Union of India and Others - [(2005) 7 SCC 227], Bank of India v. Jagjit Singh Mehta - [(1992) 1 SCC 306], Union of India and Others v. Sri Janardhan Debanath and Another - [(2004) 4 SCC 245], Basheer J. v. State of Kerala & Others - [2010 (3) KHC 701] and S.K.Nausad Rahman and Others v. Union of India and Others -[AIR 2022 SC 1494] to contend that inasmuch as the transfer order was passed in the exigencies of service and for administrative convenience, there was no warrant to interfere with the same in proceedings under Article 226 of the Constitution of India.

13. We have considered the rival submissions, perused the pleadings on record and taken note of the judgments relied upon by

the learned counsel on either side. Before we proceed to analyse the facts in the instant case, we deem it apposite to notice the law on the subject.

WHAT THE LAW SAYS:

14. It is now a fairly well settled principle of service law that the power to transfer an employee in a transferable service, is within the prerogative of the employer for it is he who knows best where an employee should be deployed for an effective discharge of his/her duties for the establishment¹. This is more so in a uniformed service where the exigencies of service include matters relating to the maintenance of discipline within its ranks². It is by recognizing this inherent freedom in an employer that courts have generally adopted a hands-off approach in matters of transfer of an employee while in service, and interfered with orders of transfer only in the rare instances where the transfer is seen as vitiated by statutory violations, mala fides, either factual or legal, or where the transfer is seen as ordered by way of punishment without first holding any disciplinary proceedings to establish the guilt of the employee.

¹ Shilpi Bose v. State of Bihar - 1991 Supp. (2) SCC 659; Union of India v. S.L.Abbas - 1993 (4) SCC 357; National Hydroelectric Power Corporation Ltd v. Shri Bhagwan - 2001 (8) SCC 574

² Major General J.K.Bansal v. Union of India & Ors - 2005 (7) SCC 227; Major Amod Kumar v. Union of India - 2018 (18) SCC 478

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15. In a disciplined force such as the CISF, there may arise cases where the continuance of the employee in a particular station is detrimental to the maintenance of discipline at that station, and in such cases it may seem prudent to the employer to transfer the employee to a different station so that the twin objectives of maintaining discipline at one station, whilst simultaneously availing the service of the employee at another station, are achieved without casting any aspersion on the character or conduct of the employee. The intention behind the transfer, in such cases, is not to punish an employee but to relocate him/her in order to maintain discipline within the force. Such transfers, in our view, do not call for interference from courts because they are merely measures taken by an employer in the exigencies of the service and for efficient administration thereof. There is no prejudice caused to an employee in such cases because there is no stigma cast on him/her through the order of transfer, which would affect his/her future prospects in the particular service.

16. It is also the law that for the purposes of effecting a transfer, there need not be any enquiry conducted to first ascertain whether there was misbehaviour or conduct unbecoming of an employee, for to hold otherwise would frustrate the very purpose of transferring an employee in public interest or exigencies of

administration to enforce decorum and ensure probity. The question whether an employee could be transferred to a different division is a matter for the employer to consider depending upon the administrative necessities and the extent of solution for the problems faced by the administration.³

OUR FINDINGS:

17. On an analysis of the facts in the instant case, we find the appellant to be a person who relentlessly portrays herself as a victim of circumstances with a view to avoid a posting outside of Cochin. In almost every representation preferred by her against orders of transfer issued to her, from the time of her appointment in the force on compassionate grounds, she has never hesitated to highlight the fact that her appointment was on compassionate basis consequent to the death of her father while in service, and further, that as per the guidelines in force she has to be posted at a place where her husband is posted. The fact that her husband is working in FACT Ltd, a Central Public Sector Undertaking with no office outside of Kerala, has allowed her to conveniently rely on the guidelines to effectively stall all such transfer orders issued to her in the past, that envisaged a posting outside Kerala. When in 2017, her attempts at stalling a

 $^{3\,}$ Union of India & Ors. v. Sri Janardhan Debanath & Anr – 2004 (4) SCC 245; Basheer J v. State of Kerala & Ors. – 2010 (3) KHC 701

transfer to Kudigi failed, she joined duty at the said place only to be transferred back to Cochin three months later, pursuant to a request preferred by her for such re-transfer. Even during the three months that she was posted at Kudigi, she effectively worked there only for three days as the rest of the period was covered by the leave and joining time availed by her.

18. It is no doubt true that the accommodation granted to her by the respondents herein contributed to a large extent to the benefit of the extended tenure at Cochin that the appellant obtained. However, rather than expressing gratitude to her employer for the indulgence shown in the past, she appears to have inculcated a certain arrogance while discharging her duties at the workplace. A perusal of the documents produced by her along with the writ petition, to substantiate her contention that the transfer order was vitiated by mala fides, clearly reveals the manner in which, as a mere clerk in the Accounts department of the respondent force, she arrogated to herself the role of a superior officer deciding upon the validity of a claim for monetary benefits (LTC) put in by the 8th respondent, who was an Assistant Commandant and therefore her superior officer. Her duty as a Clerk was merely to forward the claim of the 8th respondent, together with her remarks if any, to the competent authority for

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processing. Instead, what she did was to stall the processing of the said claim by noting various objections, even after the superior officers of that department had noted in the file that the claims could be processed without any need for obtaining further clarifications (See: Ext.P8 Note Sheet). Not surprisingly, her conduct invited disciplinary proceedings against her, at the instance of the 8th respondent, and eventually led to punishment orders being passed against her, none of which were challenged by her in appellate proceedings. Even in the disciplinary proceedings she remained non-co-operative by refusing to file replies to the charge memo before the 8th respondent, choosing rather to file the reply before another superior officer who was not the disciplinary authority. Although the said officer informed her that the reply was to be given to the 8th respondent, she refused to do so and the penalty orders were passed *ex parte*.

19. We find from a perusal of the pleadings in the instant case that the above incidents of misconduct by the appellant did play a significant role in the decision of the respondents to transfer the appellant to Narsapur, and we find nothing wrong in it. We do not think that merely because the respondents took note of the misconduct of the appellant at the workplace, the transfer order issued to her can be seen as punitive in nature and therefore vitiated. On the contrary, we are inclined to view the transfer as a prudent measure taken by the respondents to maintain discipline at the workplace. This is especially so when we find that the respondents herein are charged with administering a disciplined force.

20. The other grounds of challenge raised by the appellant against the transfer order are also legally unsustainable. Her allegation of sexual harassment as against the 8th respondent is not one that was ever established. Her representations before the various superior authorities, against the 8th respondent, were essentially complaints against him for initiating disciplinary proceedings against her on charges that she felt were wholly unjustifiable. However, her action of accepting the penalties imposed on her in those proceedings, without challenging them before the appellate authority, effectively rendered those complaints baseless. As regards her allegation of sexual harassment, it is significant that there was only a stray mention of an incident of sexual harassment, that too during a telephone conversation with a superior officer that was recorded by the appellant without informing the former or obtaining his consent. That apart, the appellant did not pursue the matter thereafter, either through the lodging of a formal complaint with the authorities concerned, or even

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mentioning the same in her representation against the transfer order almost five months later. It was by noticing these facts that the learned single judge found that the charge of sexual harassment did not deserve consideration. We see no reason to take a different view.

21. As for the contention that the applicable guidelines were violated while transferring the appellant to Narsapur, we see no merit in the same. There is nothing in the guidelines that mandates a retention of the appellant in Cochin for the entire tenure of her service with the respondents. It is significant that the guidelines speak of retention only in the home sector, which for the appellant is the southern sector comprising of the States of Andhra Pradesh, Karnataka, Kerala, Telengana, Tamil Nadu, and the Union Territories of Puducherry and Lakshadweep. Her reliance on the guideline that envisages a posting in the same station as her spouse is also not justified. As observed by the Supreme Court in a case relating to the transfer of a bank employee⁴:

"5. There can be no doubt that ordinarily and as far as practicable the husband and wife who are both employed should be posted at the same station even if their employers be different. The desirability of such a course is obvious. However, this does not mean that their place of posting should invariably be one of their choice, even though their preference may be taken into account while making the decision in

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⁴ Bank of India v. Jagjit Singh Mehta - 1992 KHC 753

accordance with the administrative needs. In the case of All India Services, the hardship resulting from the two being posted at different stations may be unavoidable at times particularly when they belong to different services and one of them cannot be transferred to the place of the other's posting. While choosing the career and a particular service, the couple have to bear in mind this factor and be prepared to face such a hardship if the administrative needs and transfer policy do not permit the posting of both at one place without sacrifice of the requirements of the administration and needs of other employees. In such a case the couple have to make their choice at the threshold between career prospects and family life. After giving preference to the career prospects by accepting such a promotion or any appointment in an All India Service with the incident of transfer to any place in India, subordinating the need of the couple living together at one station, they cannot as of right claim to be relieved of the ordinary incidents of All India, Service and avoid transfer to a different place on the ground that the spouses thereby would be posted at different places. In addition, in the present case, the respondent voluntarily gave an undertaking that he was prepared to be posted at any place in India and on that basis got promotion from the clerical cadre to the Officers' grade and thereafter he seeks to be relieved of that necessary incident of All India Service on the ground that his wife has to remain at Chandigarh. No doubt the guidelines require the two spouses to be posted at one place as far as practicable, but that does not enable any spouse to claim such a posting as of right if the departmental authorities do not consider it feasible. The only thing required is that the departmental authorities should consider this aspect along with the exigencies of administration and enable the two spouses to live together at one station if it is possible without any detriment to the administrative needs and the claim of other employees."

22. The above observations apply with added rigour when the employment is in a disciplined force and the statutory provisions governing the force mandate that an employee can be posted in any place within or outside India (See: Section 15 of the Central Industrial Security Force Act, 1968). We are also not persuaded to accept the contention of the learned senior counsel that inasmuch as the transfer is ordered mid-term it should be viewed with suspicion. For the reasons already stated, the transfer of the appellant in the circumstances noticed above is justified and can only be seen as necessitated in the interests of maintaining discipline in the force.

23. The upshot of the above discussion is that we see no reason to interfere with the judgment of the learned single Judge impugned in this appeal. We therefore vacate the interim orders passed in this appeal and dismiss the appeal. The respondents are free to relieve the appellant from her present posting at Nedumbassery and direct her to report for duty at Narsapur forthwith, after allowing her the normal joining time granted to transferred officers in the force.

The Writ Appeal is dismissed.

Sd/-A.K.JAYASANKARAN NAMBIAR JUDGE

Sd/-MOHAMMED NIAS C.P. JUDGE

prp/