



सत्यमेव जयते

न्यायालय मुख्य आयुक्त दिव्यांगजन

COURT OF CHIEF COMMISSIONER FOR PERSONS WITH DISABILITIES (DIVYANGJAN)

दिव्यांगजन सशक्तिकरण विभाग/Department of Empowerment of Persons with Disabilities (Divyangjan)

सामाजिक न्याय और अधिकारिता मंत्रालय/Ministry of Social Justice and Empowerment

भारत सरकार/Government of India

Case No: 12719/1022/2021

Complainant : Shri Raunak Singh
Inspector of GST & Central Excise,
Ahmedabad South Commissionerate, — R29064
Ahmedabad-380015

E-mail : singh.raunak07@gmail.com

Respondent : The Chairman
Central Board of Indirect Taxes and Customs, — R29065
North Block, New Delhi-110001

The Commissioner
CGST & Central Excise Zone Lucknow
7-A, Ashok Marg Lucknow — R29066
Lucknow, Uttar Pradesh-2260001

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Email : lkocadrecontrol@gmail.com

GIST OF COMPLAINT:

The complainant Shri Raunak Singh, Inspector of GST & Central Excise, is a person suffering from 50% hearing disability in both ears submitted that he is a permanent resident in Uttar Pradesh. The complainant had joined as an Inspector of Central Excise, in Central Excise department as a direct recruit in the CCA Vadodra Zone under CBEC (now CBIC) on 07.06.2016, after qualifying SSC combined graduate level exam 2014. The complainant is presently working as Inspector of Central Goods and Service Tax & Central Excise, Ahmedabad South Commissionerate under the Cadre Controlling Authority (CCA), Vadodra Zone. The complainant having hearing disability in both ears and suffering a lot of difficulties in day to day life. The person's native place is Kanpur (Uttar Pradesh) and being posted in Ahmedabad (Gujarat), which is a far place from his home town. His wife also died prematurely on 29.06.2020. The complainant is deeply shocked after this incident because of which he is mentally and physically disturbed.

The complainant submitted that his mother is working in the Directorate of Industries of Uttar Pradesh Government. His grandfather is 80 years old. He is also suffering from heart disease and has to take him to doctor for regular check-up.

The complainant further stated that after this incident he wants to live with his family so that he can come out of this shock as soon as possible and take care of himself and his family since his mother is an Govt. employee of Uttar Pradesh Govt. It is very difficult for her to come to Ahmedabad.

The complainant stated that he requested to Pr. Chief Commissioner CGST & Central Excise, Ahmedabad for his transfer to Kanpur on 28.07.2020 but nothing has come up till now. The complainant had also given his representation on 20.11.2017 for Inter Commissionerate Transfer from CCA Vadodra Zone to CCA Lucknow Zone through proper channel on physical handicapped ground. The complainant further submitted that he had already spent almost 5 years in the city Ahmedabad and being a PwD he was forced to live a lonely life.

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(कृपया भविष्य में पत्राचार के लिए उपरोक्त फाईल/केस संख्या अवश्य लिखें)

(Please quote the above file/case number in future correspondence)

The complainant has requested to CCPD to consider his transfer application/representation from CCA Chennai Zone to CCA Lucknow Zone which is a basic right of the disabled person to posting near their native place.

The matter was taken up with the Respondent vide letter dated 27.05.2021 under Section 75 of the RPwD Act, 2016.

In response, Shri Ganesh Chandra Yadav, respondent, Joint Commissioner, CGST & Central Excise Zone Lucknow, vide email dated 23.07.2021 inter-alia submitted that banning ICT by Board was autocratic. ICT (i.e. transfers from one cadre controlling authority to another) of Group 'B' (Non Gazetted) and Group 'C' employees were taking place on the basis of Board's letter no: A.22015/23/2011-Ad.III dated 27.10.2011. Such Inter-Commissionerate transfers were allowed subject to availability of vacancy and certain conditions.

The transfers under ICT from one Cadre Controlling Authority to another are not merely a transfer from one station to another or from one charge to another or change in posting. It entails change in cadre from one Cadre Controlling Authority to another Cadre Controlling Authority. It amounts to fresh appointment/recruitment that adversely affects the seniority in the Zone and distorts the order of merit.

Board also vide its circular F.No. A-22015/117/2015-Ad.IIIA dated 20.09.2018 has already clarified that 'Recruitment Rules, 2016 do not have any provision for recruitment by absorption and accordingly, no ICT application can be considered after coming into force of the Recruitment Rules, 2016.

The respondent further stated that Inspector Cadre recruitment is done by staff Selection Commission and selection is done on all India bases in open competition. Selected candidates are allocated to different Zones on their merit by Merit Cum Preference criteria i.e. candidate who have scored relatively more marks get Zone of their preference against available vacancies. In the past i.e. before the introduction of the Central Excise and Customs Commissionerate Inspector (Central Excise, Preventive Officer and Examiner Group B Posts Recruitment Rule, 2016, candidates, after joining, applied for ICT which was like a backdoor entry in the Zone of their choice circumventing the merit based zone allocation system at the level of SSC at the time of recruitment.

The respondent prayed to the Court of Chief Commissioner for PwDs (Divyangjan) be pleased to out rightly reject the untenable and unwarranted request of the applicant for Inter Commissionerate Transfer which is against standing instructions of DoPT, CBIC and statutory provisions of the Central Excise and Customs Commissionerate Inspector (Central Excise, Preventive Officer and Examiner Group B Posts Recruitment Rule, 2016.

In response, the complainant Shri Raunak Singh Inspector of GST & Central Excise filed their rejoinder by post dated 07.08.2021 submitted the following facts:

The complainant denies all the averments made and contentions raised in the para-wise comments filed by the Shri Ganesh Chandra Yadav.

The complainant stated that due to his serious family problems, he had applied for Inter Commissionerate Transfer from Vadodara Zone, Gujarat to Lucknow Zone, Uttar Pradesh from the place of his present posting to his native place.

The Complainant submitted that the Inter Commissionerate Transfer (ICT) for the employees working as Inspectors is concerned, department does not have a clear policy. Some time they allow ICT then suddenly they discontinue the same.

The complainant joined the service of respondent department on 07.06.2016 after qualifying Staff Selection Commission Combined Graduate Level Examination, 2014. When he had joined the department in the year 2016, ICT was permissible. As per the merit list, he could have been posted in any place of his choice.

The complainant further stated that in group C and A post, ICT is available even today. Group A officer takes less than a month's time to get his ICT order issued. A group C employee may take some time to clear his name but finally, he too gets it. Only the persons holding the post of Inspectors are not entitled to get this benefit. Therefore, the policy of the department is arbitrary, discriminatory and in violation of Articles 14, 16 and 21 of the Constitution of India.

The complainant once again requested and prays to consider his application Inter-Commissionerate transfer on physical handicapped ground.

Hearing: The case was heard via Video Conferencing by Commissioner for Persons with Disabilities on 27.08.2021. The following were present:

- i) Shri Raunak Singh – Complainant
- ii) Smt. Hema Bindu, Joint Secretary (Admn), CBIT– Respondent
- iii) Smt. Priya Ranjan Srivastava, Joint Commissioner-Respondent

Case No 2 : 12761/1022/2021

Complainant : Shri Amit Kumar Lal
Inspector of GST & Central Excise
Ponneri Division, Range-1
Chennai Outer Commissionerate,
R-40, A- 100 Feet, Second Floor,
Mogappair East, Chennai-600037

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Respondent : Office of the Principal Chief Commissioner of
GST & Central Excise, Tamilnadu and Puducherry Zone
26/1, Mahatma Gandhi Road, Nungambakkam,
Chennai-600034

Contact No : 044-28331011
Fax No : 044-28331113

The Chairman
Central Board of Indirect Taxes and Customs
North Block, New Delhi-110001
E-mail chmn-cbic@gov.in

GIST OF COMPLAINT:

The complainant Amit Kumar Lal had joined as Tax Assistant in Central Excise department as a direct recruit in CCA Chennai Zone under CBEC (Now CBIC) on 08.01.2013, after qualifying Staff Selection Commission Combined Graduate Level Exam 2011. Presently the complainant is working as Inspector of Central Goods and Service Tax & Central Excise, Chennai North Commissionerate under the Cadre Controlling Authority (CCA), Chennai Zone. The complainant is suffering and facing a lot of difficulties in his day to day life in Chennai, being

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a person with disability. The complainant further stated that he has no family member or known person living in Chennai who can assist him in his day to day life.

The complainant submitted that he had communicated his grievances and requested for transfer on 24.04.2017 from CCA Chennai Zone to CCA Ranchi Zone through proper channel on physically handicapped ground but there is no positive response from respondents. The Chennai Zone is yet to give him NOC. The complainant requests to CCPD to consider his Inter Commissionerate transfer application/representation from CCA Chennai Zone Ranchi Zone.

The matter was taken up with the Respondent vide letter dated 12.07.2021 under Section 75 of the RPwD Act, 2016.

In response, respondent Shri B. Senthil Velavan, Additional Commissioner vide their letter dated 23.07.2021 submitted that Shri Amit Kumar Lal joined the department as direct recruit Tax Assistant on 08.01.2013 and is presently working as Inspector in Chennai North Commissionerate coming under the jurisdiction of CCA, Chennai. Shri Amit Kumar Lal in his representation has stated that after fulfilling all the terms and conditions as per CBIC Circular F.No. 22015/23/2011-Ad.III.a dated 27.10.2011 and after communicating grievances and requested for transfer from CCA Chennai Zone to Ranchi Zone on physically handicapped grounds, Chennai Zone is yet to give NOC for Inter Commissionerate Transfer ICT to Ranchi Zone. The respondent submitted that even if Shri Amit Kumar Lal was issued with NOC for ICT in 2017 when he applied, he would have had to repatriate back to the parent Commissionerate after the issuance of Board's Circular F.No. A 22015/117/2016-Ad.IIIA dated 20.09.2018 since Board vide the above Circular clarified that the recruitment rules, 2016 do not have any provision for recruitment by absorption and accordingly, no ICT application can be considered after coming into force of the recruitment rules, 2016.

Further, the respondent informed that the complainant had joined the department as direct recruit Tax Assistant on 08.01.2013, he could have applied for ICT in the grade of Tax Assistant and could have proceeded on ICT after completing 3 years of service, but Shri Amit Kumar Lal had waited till he got his promotion to the grade of Inspector and then applied for ICT on physically challenged grounds in 2017.

The respondent further submitted that 14 applications for ICT have been received on physically challenged grounds from Inspectors who have completed the stipulated years of service and all the 14 Inspectors have been issued with NOC for ICT to the Zones they requested for.

In response, the complainant Shri Amit Kumar Lal, filed his rejoinder by email dated 11.08.2021 and submitted that the department does not have clear policy because sometimes they allow ICT then discontinue the same. The Tamilnadu and Puducherry zone vide their letter dated 12.01.2018 fixed the criteria of 02 years for forwarding of representations for physically handicapped. Due to ban on ICT his request was not considered. At present the complainant completed 04 years and 04 months approximately in the cadre of Inspector.

The complainant further submitted that after completion of 2 years of service he was promoted as Executive assistant (erstwhile Senior Tax Assistant) on 01.04.2015. After completion of 3 years of regular service, he had applied for ICT from Chennai zone to Ranchi zone on physically handicapped ground on 12.02.2016 which remains unanswered by CCA, Chennai Zone.

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The complainant did not agree with the comments submitted by the respondent and he again requested to consider his application for Inter Commissionerate Transfer on Physically ground from Chennai Zone to Ranch Zone.

Hearing: The case was heard via Video Conferencing by Commissioner for Persons with Disabilities on 27.08.2021. The following were present:

- i) Shri Amit Kumar Lal- Complainant
- ii) Smt. Hema Bindu, Joint Secretary (Admn), CBIT- Respondent
- iii) Smt. K.V. Murlidharan, Joint Commissioner - Respondent

Case No 3 : **12760/1022/2021**

Complainant : Shri Rahul Srivastava
Inspector of GST & Central Excise
Anna Nagar Division
Chennai North Commissionerate
2054, Newry Towers, 12th Main Road,
Anna Nagar, Chennai-600040
E-mail : Rahul_srivastava.89@rediffmail.com

Respondent : The Chairman
Central Board of Indirect Taxes and Customs
North Block, New Delhi-110001
E-mail chmn-cbic@gov.in

Office of the Chief Commissioner
GST & Central Excise,
Tamilnadu Zone, 26/1, Mahatma Gandhi Marg
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E-mail : cca.estt.section@gmail.com
Contact No : 044-28331011
Fax No : 044-28331113

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GIST OF COMPLAINT:

The complainant Rahul Srivastava is a person suffering from 50% hearing impairment Disability. The Complainant is permanent resident of Keshav Nagar-2, Sitapur Road, Lucknow Uttar Pradesh. He had joined as an Inspector of Central Excise, in Central Excise department as a direct recruit in the CCA Chennai Zone under CBEC (Now CBIC) on 18.04.2016, after qualifying Staff Selection Commission Combined graduate Level Exam 2013. He is presently working as Inspector of Central Goods and Service Tax & Central Excise, Chennai North Commissionerate under the Cadre Controlling Authority (CCA), Chennai Zone. The complainant is a person with hearing disability (PwD) and suffering a lot of difficulties in day to day life in Chennai.

The complainant stated that being a hearing impaired person, it is very difficult for him to understand Tamil language, which does not have any similarity with English or Hindi. It took years of school and home education to train listening ability to understand these two languages. Tamil being a new language with very difficult dialect and pronunciation, it is extremely difficult for him to understand and learn Tamil language. The complainant was recruited under recruitment rules, 2002 which had the provision of transfer after completion of probation period as per request of employee.

The Complainant further submitted that he had completed his probation on 18.04.2018 and as per extant guidelines issued by the then Principal Chief Commissioner of GST and Central Excise, Tamilnadu and Puducherry Zone under C. no. II/3/29/2014-CCA (ESTT) Vol. III

dated 12.01.2018 wherein it was mentioned "ICT request in respect of Physically Challenged Officers should be entertained only on completion of the probation period of two years of service". The complainant had given request for Inter Commissionerate Transfer from CCA Chennai Zone to CCA Lucknow Zone through proper channel on physically handicapped ground on 1.06.2018, 25.06.2018 and 11.07.2018 after fulfilling guidelines as per above cited circular and Central Board of Indirect taxes & Customs, Circular F. No. 22015/23/2011-Ad.III dated 27.10.2011.

The complainant further submitted that he had applied for Inter Commissionerate Transfer on loan basis dated 20.06.2019 to the Principle Chief Commissioner, Lucknow zone wherein they accepted his application under C. No. II (3) CCSC/Loan Basis/Insp/LDO/2017/pt/dated 28.06.2019 based on grant of NOC from Chennai Zone. The complainant has prayed to CCPD to consider his Inter Commissionerate transfer application/representation from CCA Chennai Zone to Lucknow Zone in the light of the DOPT Guidelines.

The matter was taken up with the Respondent vide letter dated 08.07.2021 under Section 75 of the RPwD Act, 2016.

In response, respondent Shri B. Senthil Velavan, Additional Commissioner vide their letter dated 26.07.2021 submitted that even if the complainant was issued with No Objection Certificate (NOC) for ICT in 2018 when he applied, he would have had to repatriate back to the parent Commissionerate after the issuance of Board's Circular F.No. A 22015/117/2016-Ad.IIIA dated 20.09.2018 since recruitment rules, 2016 do not have any provision for recruitment by absorption and accordingly, no ICT application can be considered after implementation of the Recruitment rules, 2016.

The respondent further stated that Inter Commissionerate Transfer in the Grade of Inspectors issued on or after 26.12.2016 (i.e. from the date of enactment of RR, 2016) will be non-est and accordingly any officer who has joined another zone in pursuance of such order shall be treated as a deemed case on loan basis w.e.f. 26.12.2016 and that these officers shall be reverted to their parent zones. Henceforth, in view of the above Circular issued by Board, Shri Rahul Srivastava, Inspector is not eligible for ICT to any zone. The circular is a policy decision of the CBIC and applicable to all categories of Inspectors and not to the Physically Challenged alone. Therefore, there is no discrimination meted out to this candidate. Hence, the respondent informed that there is no action pending from this office with regard to Inter Commissionerate Transfer of Shri Rahul Srivastava to Lucknow Zone.

The respondent further submitted that the complainant had applied for ICT on loan basis to the Principal Chief Commissioner, Lucknow zone and that Chennai Zone is yet to give NOC for ICT on loan basis to Lucknow Zone. In this regard they informed that the this office is not considering any application from officers requesting for transfer on loan basis due to acute shortage of vacancies in the cadre of Inspectors in Chennai Cadre Control Zone.

Another respondent, Priya Ranjan Srivastava, Joint Commissioner, vide their email dated 12.08.2021 submitted that all the instructions of ICT have been superseded by the CBIC Circular F.No. 22.15/117/2016-Ad.IIIA dated 20.09.2018 whereby all ICTs were banned altogether.

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The complainant vide their letter dated 20.06.2019 made an application for ICT which was duly received in this office on 25.06.2019 as advance copy. Since his representation was not received through proper channel, no action was taken on his application on loan basis.

Hearing: The case was heard via Video Conferencing by Commissioner for Persons with Disabilities on 27.08.2021. The following were present:

- i) Shri Rahul Srivastava- Complainant
- ii) Smt. Hema Bindu, Joint Secretary (Admn), CBIT- Respondent
- iii) Smt. K.V. Murlidharan, Joint Commissioner -Respondent

Observation / Recommendations:

1. This court is inundated with the Complaints related to the issue of transfer. Consequently, this court has an opportunity to look into the issues and examine the arguments and objections filed by the Respondents in the past. This court is seizing this opportunity to delineate laws, guidelines and case laws relating to the issue of transfer of divyang employees.
2. First legislation which was enacted by the Parliament related to Persons with Disabilities was Mental Health Act, 1987. The Act contained provisions related to guardianship of Persons with Intellectual Disabilities. It fell short of addressing issue of discrimination with Persons with Disabilities. Thereafter in 1995, Parliament enacted The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. The 1995 Act was enacted to fulfil obligations which arose out of International Instrument. In 1992 Economic and Social Commission for Asia and Pacific Region adopted Proclamation on the Full and Effective Participation and Equality of People with Disabilities. India was signatory to the Proclamation and therefore, Act of 1995 was enacted. Some of the Objectives sought to be achieved by 1995 Act were:-
 - a. To fix responsibility of the state towards protection of rights, provision of medical care, education, training, employment and rehabilitation of Persons with Disabilities,
 - b. To create barrier free environment for Persons with Disabilities,
 - c. To remove any discrimination against Persons with Disabilities in the sharing of development benefits, vis-à-vis enabled persons.
3. Thereafter, in year 2006, United Nations General Assembly adopted UN Convention on Rights of Persons with Disabilities ('CRPD'). India was one of the first countries to sign and ratify the treaty. With ratification of the CRPD, it became obligation of the state to enact new law in furtherance of the commitments under CRPD. In 2016, parliament enacted Rights of Persons with Disabilities Act, 2016. Some of the objectives sought to be achieved by this new Act are -
 - (a) Respect for inherent dignity, individual autonomy including freedom to make one's own choices and independence of person;
 - (b) non-discrimination;
 - (c) full and effective participation and inclusion in society;

- (d) respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
 - (e) equality of opportunity;
 - (f) accessibility;
 - (g) equality between men and women;
 - (h) respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.
4. Enacting statute is first step towards achieving the aforesaid objectives. To achieve these objectives in practical sense, executive formed certain guidelines from time to time relating to different aspects of employment, for instance, recruitment, nature of duties, work environment, promotion, transfer etc.
5. Since in this order this court is concerned with issue of transfer only, hence it is important to list different types of issues and objections which are raised by the respondent from time to time and further to mention related provisions and case laws on the point.
6. Issues related to transfer and posting to divyang employees may be divided into three categories -:
- a) Posting of divyang employee at native place,
 - b) Exemption from routine transfer of divyang employee,
 - c) Posting of employee who serves as care giver of divyang dependant.

STATUTORY PROVISIONS AND GUIDELINES

7. a) ARTICLE 41 of INDIAN CONSTITUTION – The state shall make effective provisions for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and **disablement**.
- b) SECTION 20 (5) OF RPWD ACT, 2016 – Sub Section 5 of Section 20 provides that the appropriate government may frame policies for posting and transfer of employees with disability.
- c) SECTION 20 (2) OF RPWD ACT, 2016 – Sub Section 2 of Section 20 lays down that government establishment shall provide reasonable accommodation, appropriate barrier free and conducive environment to divyang employees.
- d) O.M. No. 302/33/2/87 dated 15.02.1988 issued by Ministry of Finance - This O.M. provides guidelines related to posting of Divyang employees at their native place and exemption of such employees from routine transfer. This O.M. also provides that employees should not even be transferred on promotion if vacancy exists in the same branch or in the same town. Further, this O.M. provides that if it is not possible to retain Divyang employee at his place of posting, due to administrative exigencies, even then he must be kept nearest to his original place and in any case he should not be transferred at far off or remote place of posting.
- e) O.M. No. 14017/41/90 dated 10.05.1990 issued by DoP&T– This O.M. provides that employees belonging to Group C and D must be posted near to their native place.
- f) O.M. No. 14017/16/2002 dated 13.03.2002 issued by DoP&T– This O.M. clarifies rule laid down in O.M. dated 10.05.1990. The said O.M. laid down that Government

employees belonging to Group C and Group D must be posted near to their native place. O.M. of year 2002 further extended this rule for employees belonging to group A and B as well.

g) O.M. No. 36035/3/2013, dated 31.03.2014 issued by DoP&T –This O.M. lays down certain guidelines for providing facilities to divyang employees of government establishments. Under heading 'H' of the O.M. two guidelines with respect to transfer and posting of divyang employees are laid down. Firstly, it is laid down that divyang employees may be exempted from rotational transfer and allowed to continue in the same job where they would have achieved the desired performance. Secondly, the O.M. provides that at the time of transfer/promotion, preference in place of posting may be given to the Persons with Disabilities subject to the administrative constraints.

h) O.M. No. 42011/3/2014, dated 06.06.2014 issued by DoP&T –This O.M. is related to posting of government employees who is care giver of Divyang child. Considering challenges which are faced by care giver of divyang child, this O.M. provides that care giver of divyang child may be exempted from routine transfer/rotational transfer.

i) O.M. No. 42011/3/2014, dated 08.10.2018 issued by DoP&T – This O.M. extended the scope of O.M. dated 06.06.2014. This O.M. lays down that government employee who serves as main care giver of dependant daughter/son/parents/spouse/brother/sister may be exempted from exercise of routine transfer.

ANALYSIS OF THE PROVISIONS & GUIDELINES

8. It is noteworthy that even before Section 20(5) was conceptualised, DoP&T and other departments of the government framed policies relating to exemption of divyang employees from routine transfer and transfer at native place. As rightly laid down in DoP&T O.M. dated 31.03.2014, focus behind exempting from routine transfer or behind giving preference in transfer and posting is to provide an environment to divyang employee in which he can achieve the desired performance and where their services can be optimally utilised. Combined reading of all the guidelines further makes it clear that government's approach on the issue of transfer is progressive and forward looking. In 1990 DoP&T issued O.M. exempting Group C and D divyang employees from routine transfer. This was extended to Group A and B divyang employees in year 2002. Similarly, Ministry of Finance (MoF in short) created an exception for divyang employees in year 1988, long before 2016 Act was enacted. MoF in O.M. dated 15.02.1988 went on to exempt divyang employees from routine transfer even in case of promotion of such employee.
9. Even in case of employee who serves as care giver of divyang dependant, approach is progressive. Till 2018, care giver of divyang dependent child was exempted from routine transfer. By DoP&T OM dated 08.10.2018, divyang dependent spouse/brother/sister/parents were also added.
10. Objective behind exempting care giver must also be understood. DoP&T O.M. dated 06.06.2014, rightly lays down that rehabilitation of divyang dependant is indispensable process which enables divyang person to reach and maintain physical, sensory, intellectual, psychiatric and social functional levels. If care giver of such person would be subjected to routine periodic transfer, it will have adverse impact on the rehabilitation process of divyang

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dependent. It is certain that it is utmost duty of the government employee to serve with utmost dedication. However, this fact does not take away his right to take care of his divyang dependent. Hence, objective behind DoP&T guidelines is to strike balance between the two aspects.

OBJECTIONS AND ISSUES RAISED BY RESPONDENTS IN PREVIOUS SIMILAR COMPLAINTS BEFORE THIS COURT AND CASES BEFORE HON'BLE HIGH COURTS, CENTRAL ADMINISTRATIVE TRIBUNALS

11. ISSUE – Exempting divyang employee from transfer if Service Rules prescribe for mandatory transfer.
12. A case was filed before Hon'ble Delhi High Court in which Respondent Bank submitted that divyang employee cannot be exempted from routine transfer at remote rural branch because as per Service Rules for promotion every employee has to serve for fixed period at rural branch. ANJU MEHRA v. CANARA BANK; W.P. (C) 7927/2020, judgment dated 05.11.2020
13. Court did not accept the contentions forwarded by the Respondent Bank and held that divyang employee must be exempted from routine transfer and posting at rural location. Court relied upon DoP&T O.M. dated 31.03.2014 and held that divyang employee must be exempted from routine transfer. Court also relied upon O.M. No. 69/2018 dated 13.12.2018 issued by Canara Bank, whereby divyang employees with disability percentage of 65% or above are exempted from mandatory service at rural location.
14. ISSUE – Since, transfer is an incidence of service should employee follow transfer Orders without exception?
15. This issue is often raised by the Respondents. Hon'ble Delhi High Court answered this issue in ANJU MEHRA v. CANARA BANK; W.P. (C) 7927/2020, judgment dated 05.11.2020. Court held that this principle is not applicable in cases pertaining to transfer of divyang employees. Court held that when employee is agitating his rights under RPwD Act, 2016 or PwD Act, 1995, principles of general nature are not applicable in such cases because both Acts are enacted in furtherance of international commitments and to ensure equal treatment to Persons with Disabilities.
16. ISSUE – Can an employee be exempted if he was intimated about transferable nature of the job at the stage of joining?
17. Respondents often submit that the employee was intimated at the time of initial recruitment about transferable nature of the job hence, he cannot be exempted from transfer. To support this contention Respondents, rely upon case laws of Hon'ble Supreme Court. Hon'ble court in UNION OF INDIA v. S.L. ABBAS (AIR 1993 SC 2444) and in B.VARDHA RAO v. STATE OF KARNATAKA (AIR 1989 SC 1955) held that transfer is incidence of service and courts must not interfere in transfer issues unless such transfer is vitiated by *mala fides* or is made in violation of transfer policy.
18. The contention has been rejected by various High Courts. Hon'ble High Court of Madhya Pradesh in SUDHANSHU TRIPATHI v. BANK OF INDIA; W.P. No. 148/2017; judgment dated 27.04.2018, hon'ble High Court of Delhi in V.K. BHASIN v. STATE BANK OF PATIALA; LPA No. 74/2005, judgment dated 03.08.2005 and Hon'ble Central Administrative

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Tribunal in PRADEEP KUMAR SRIVASTAVA v. CENTRAL BUREAU OF INVESTIGATION; OA No 2233/2017, Order dated 08.02.2018 held that law laid down in S.L. ABBAS and B. VARDHA RAO is not applicable in the cases related to transfer of Divyang employees. Courts held that transfer policies framed by various government establishments are framed to cover normal circumstances. When divyang employee is challenging his transfer under RPwD Act, 2016 or PwD Act, 1995 or various guidelines which are passed from time to time, such challenge is under special statutes which are enacted in furtherance of international commitments. Further, courts also laid down that when transfer policy is silent on some issue, then government establishment is bound to follow statutory provisions and government guidelines on such issue. Court further laid down that when transfer is not challenged under transfer policy, government establishment is bound to consider the exclusive/special circumstances prevailing at the time of effecting the transfer of the government employee.

19. In V.K. BHASIN judgment, Delhi High Court also held that through in transfer matters court does not sit as court of appeal, but court cannot also lose sight of special legislation, rules and O.Ms. enacted for Divyangjan because objective of these provisions and O.Ms. is to fulfil the international commitments and give equal treatment to Persons with Divyangjan.
20. **ISSUE** – Various O.Ms. related to transfer & posting of divyang employees are of recommending nature and are not binding on the government establishments.
21. Central Administrative Tribunal in PRADEEP KUMAR SRIVASTAVA Case, while relying upon the judgments of Hon'ble Supreme Court in judgments of Hon'ble Supreme Court delivered in SWARAN SINGH CHAND v. PUNJAB STATE ELECTRICITY BOARD; (2009) held that when executive instructions confer special privileges with respect to special circumstances, such guidelines will have to be adhered to and followed by the government establishment as a model employer. Needless to say that all these guidelines are also framed in furtherance of Article 41 of Indian Constitution.
22. **ISSUE**—In case if employee who is care giver of divyang dependent is transferred at any place which has good medical facilities, whether exemption guidelines would not be applicable?
23. O.Ms. dated 06.06.2014 and dated 08.10.2018 and Hon'ble CAT Order in PRADEEP KUMAR SRIVASTAVA provide guiding principles on this issue. In this judgment tribunal analysed O.M. dated 06.06.2014 and distinguished between 'medical facilities' and 'support system'. In O.M. dated 06.06.2014 and 08.10.2018 availability of medical facilities is not the criterion for determining issue of exemption of transfer. As per the two O.Ms. criterion or point of focus is 'rehabilitation process' of the divyang child. Support system and rehabilitation are indispensable process which help divyang to maintain physical, psychological and social levels. Support system does not only mean availability of doctors and medicines, O.M. dated 06.06.2014 provides meaning of 'support system' as a system which comprises of preferred linguistic zones, school/academic levels, administration, neighbours, tutors, special educators, friends and medical facilities. It is certain from the plain reading of the O.M. that medical facilities are just one component of 'support system'. Reason for exempting care giver of divyang dependent is to provide conducive and caring environment and not just medical facilities. Needless to say that when care giver would be

subjected to exercise of routine transfer, it will cause displacement of the divyang dependent as well. Hence, O.M. provides for exemption from routine transfer.

24. It is also to be noted that O.M. dated 06.06.2014 has now been replaced by O.M. dated 08.10.2018, however, O.M. of 06.06.2014 is still relevant to understand the reason for exempting care giver from routine transfer. Moreover, in 08.10.2018 O.M. criterion for exemption has been kept the same, i.e. rehabilitation, change is only made in persons who can be considered as 'dependant'.

25. Other provisions which are helpful in understanding the intent of Rights of Persons with Disabilities Act, 2016 are -:

4. Women and children with disabilities.—(1) The appropriate Government and the local authorities shall take measures to ensure that the women and children with disabilities enjoy their rights equally with others. (2) The appropriate Government and local authorities shall ensure that all children with disabilities shall have right on an equal basis to freely express their views on all matters affecting them and provide them appropriate support keeping in view their age and disability."

16. Duty of educational institutions.—The appropriate Government and the local authorities shall endeavour that all educational institutions funded or recognised by them provide inclusive education to the children with disabilities.

24. Social security.—(1) The appropriate Government shall within the limit of its economic capacity and development formulate necessary schemes and programmes to safeguard and promote the right of persons with disabilities for adequate standard of living to enable them to live independently or in the community: Provided that the quantum of assistance to the persons with disabilities under such schemes and programmes shall be at least twenty-five percent higher than the similar schemes applicable to others.

27. Rehabilitation.—(1) The appropriate Government and the local authorities shall within their economic capacity and development, undertake or cause to be undertaken services and programmes of rehabilitation, particularly in the areas of health, education and employment for all persons with disabilities.

38. Special provisions for persons with disabilities with high support.—(1) Any person with benchmark disability, who considers himself to be in need of high support, or any person or organisation on his or her behalf, may apply to an authority, to be notified by the appropriate Government, requesting to provide high support.

2(d) - "care-giver" means any person including parents and other family Members who with or without payment provides care, support or assistance to a person with disability.

26. Intention of RPwD Act, 2016 is reflected in above mentioned provisions of the Act. These provisions makes it clear that legislature intended to provide supporting environment in terms of health, education, social and psychological support. Hence, O.M. dated 08.10.2018, which provides for exemption of care giver of divyang dependent is framed to achieve intentions and objectives of Rights of Persons with Disabilities Act, 2016 and hence these guidelines are binding on the government establishments.

SOME OTHER CASE LAWS ON THE ISSUE OF TRANSFER OF DIVYANG EMPLOYEE

27. Indian Overseas Bank v. The Chief Commissioner for Persons with Disabilities; Civil Writ Petition No. 14118/2014; judgment of Hon'ble High Court of Rajasthan, dated 24.04.2017 – In this case divyang employee of the Bank was initially posted in Jaipur. Later he was promoted and posted to Mumbai. He approached Chief Commissioner for Persons with Disabilities ('CCPD' in short) for retention in Jaipur. CCPD by its Order dated 01.04.2014 recommended for retention of the employee in Jaipur. Bank failed to implement the Order of CCPD. Employee approached Hon'ble High Court for implementation of CCPD Order. Bank challenged CCPD Order and opposed the petition and contended that promotion policy provides for transfer on promotion of the employees. Court rejected the bank's contention and held that grievance of divyang employees must be considered with compassion, understanding and expediency. Hon'ble court held that the employee must be retained in Jaipur branch even after promotion.
28. Samrendra Kumar Singh v. State Bank of India; Writ Petition No. 5695/2013; judgment dated 17.01.2014 – In this case Petitioner, a divyang employee of the Respondent bank, was posted in Ranchi. Thereafter, he was promoted and was posted in Daltonganj, Jharkhand. Petitioner approached hon'ble High Court for quashing of transfer orders and retention in Ranchi. Respondent bank relied upon its transfer policy and contended that at the time of promotion employees are transferred. Further it was contended that O.Ms. issued by various ministries and departments are of directory nature and are not binding. Hon'ble High Court rejected Respondent bank's contentions and relied upon Ministry of Finance O.M. dated 15.02.1998 and DoP&T O.Ms. dated 10.05.1990 and 13.03.2002. Hon'ble court quashed transfer Orders issued by the Respondent bank and directed for employee's retention in Ranchi.

PRESENT CASE

29. In the present case, three Complainants have filed common Complaint. Grievance of the Complainants is that they have been posted at far away locations from their native place. Respondent has submitted that the Complainants cannot be transferred to their native place because in Respondent establishment Inter Commissionerate Transfer is banned. Native place of the Complainants is situated in zone of different cadre controlling authority. Transfer of Complainants to their native place will amount to Inter Commissionerate Transfer (ICT).
30. Respondent further stated that In Group 'B' and 'C', ICT was taking place on the basis of board circular dated 27.10.2011. Above circular derived its force from Special Provisions of Recruitment Rules of Inspectors CBIC 2002. In year 2016 these Recruitment Rules were amended and thereafter notified. In 2016 Recruitment Rules special provision under which ICT was taking place got omitted.
31. Under 2016 Recruitment Rules, new circular was issued on 20th September 2018. This circular expressly banned ICT and also laid down that all employees who got transferred under ICT from year 2011 till 2018, will be considered on loan till 31st March 2019 and thereafter they shall be relieved to their parent zones.
32. Respondent also contends that DoPT O.Ms. which provide for PwD employees' transfer to their native place are not mandatory in nature. These O.Ms. do not impose binding

obligations. Further Respondent has relied upon the judgment of Hon'ble Supreme Court in UNION OF INDIA v. SOMASUNDARAM VISHWANATH in which the Hon'ble apex court held that Recruitment Rules are Rules made under Article 309 of Indian Constitution. If there is conflict between Rules made under Article 309 and executive instructions then Rules made under Article 309 shall prevail over executive guidelines.

33. Contention of the Respondent related to mandatory or directory nature of government instructions have already been dealt with in the preceding paragraphs. This court rejects this contention that O.Ms. issued by DoP&T are only directory and Respondent is not bound by the same.
34. As far as judgment of Hon'ble Supreme Court in UNION OF INDIA v. SOMASUNDARAM VISHWANATH, contention of Respondent is correct that if there is conflict between Recruitment Rules made under Article 309 and instructions passed by the government, then Rules made under Article 309 supersede government guidelines. In the same judgment, Supreme Court held that if Rules made under Article 309 are skeletal in nature then guidelines made by the government become binding. In this case it is not evident from reading of the Recruitment Rules that issue of PwD employees' transfer was dealt with in the rules. There is no particular provision for transfer for Persons with Disabilities Hence, Recruitment Rules may be interpreted as of 'skeletal' nature with respect to transfer of PwDs and therefore, guidelines of DoPT on the issue of PwD transfer become binding.
35. Moreover, Recruitment Rules relied upon by the Respondent are The Central Excise and Customs Commissionerate Inspector Recruitment Rules 2016, notified on 26.12.2016. These Rules do not prescribe ban on Inter Commissionerate Transfer. As admitted by the Respondent, ban on ICT was imposed by circular dated 20.09.2018 because amended Recruitment Rules of 2016 contained no provision for ICT. Such provision was present in Recruitment Rules prevailing before amended Rules were notified.
36. This court recommends that the Respondent shall review and revise the circular dated 20.09.2018, by virtue of which blanket ban was imposed on Inter Commissionerate Transfer and shall create an exception in matters of Inter Commissionerate Transfer for employees who are Persons with Disabilities. Respondent establishment may continue ban on Inter Commissionerate Transfer of employees not belonging to Persons with Disabilities. However, considering Section 20(5) of Rights of Persons with Disabilities Act, 2016 and various O.Ms. issued under 2016 Act or Person with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, Respondent is recommended to create exception in matter of Inter Commissionerate Transfers for employees belonging to Persons with Disabilities category and transfer the Complainants to their native place. Further, till such time this circular is revised, the respondent may consider to transfer the complainants to their native places on loan basis, to ease their difficulties and allowing them to lead a dignified normal life. This action of the respondent shall prove that the respondent is committed to implementation of RPwD Act 2016 both in letter & spirit.

37. A copy of these orders is also being marked to Secretary, Department of Revenue, Govt. of India for his reference and seeking Cooperation in early implementation of these orders.

38 This case is disposed off


(Upma Srivastava)
Commissioner for
Persons with Disabilities

Dated: 16.09.2021