



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgement reserved on: 14.05.2024*
Judgement pronounced on:18.07.2024

+ **LPA 133/2024 and C.M. No. 9793/2024**

IRCON INTERNATIONAL LTD Appellant

Through: Mr Debarshi Bhadra, Advocate.

versus

BHAVNEET SINGH Respondent

Through: Ms Padma Priya, Mr Rishabh Sancheti and Mr Garvit Sharma, Advocates.

Mr Rahul Bajaj, Amicus Curiae with Mr Habib Muzaffar, Advocate.

CORAM:

HON'BLE MR JUSTICE RAJIV SHAKDHER

HON'BLE MR JUSTICE AMIT BANSAL

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.:

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I. PREFACE

1. This appeal is directed against the judgment dated 15.12.2023 rendered by the learned Single Judge [hereafter referred to as the “impugned judgement”].

1.1 *Via* the impugned judgement, the learned Single Judge set aside the transfer order dated 22.08.2022 and the relieving order dated 23.08.2022 concerning the respondent, i.e., Bhavneet Singh, who is a differently-abled person.

1.2 The appellant, i.e., IRCON International Limited [hereafter referred to as “IRCON IL”], being aggrieved, has preferred the instant appeal.

2. The moot question which arises for consideration is whether an employer, while passing transfer and posting orders concerning a differently-abled person, is required to keep in mind the provisions of ‘The Rights of Persons with Disabilities Act, 2016’ [hereafter referred to as the “2016 Act”], the rules framed thereunder, and Circulars/Office



Memorandums [OM] issued from time to time by Government of India [GOI] and the Departments and Ministries working under it.

3. There is no gainsaying that the transfer of employees, being an administrative decision, falls within the exclusive domain of the employer since the employer knows best how to use its human resources. The scope for interference by Courts with transfer orders is narrow. Courts interfere with transfer orders if they are tainted by *malafide* intent and/or are contrary to the provisions of a statute or administrative order having a statutory flavour.

3.1 The broad principles captured above apply squarely to non-disabled persons and, to an extent, to a differently-abled person, *albeit* with certain caveats.

3.2 The caveats concerning differently-abled persons are contained in the 2016 Act, the rules framed thereunder, and the Circulars/OMs issued by GOI/Department of Personnel and Training [DoPT] and various Ministries.

4. Thus, broadly, the employer, while passing a transfer order concerning a differently-abled person, will have to bear in mind, amongst others, the following factors:

- i) Firstly, the order should be non-discriminatory.
- ii) Secondly, the concerned employee should, ordinarily, be exempted from rotational transfer.
- iii) Thirdly, at the time of transfer or promotion, a differently-abled person should, preferably, be moved to a place of their preference, subject to administrative constraints, if any.
- iv) The employer should ensure that a differently-abled person is posted to a place where required medical and infrastructural facilities are readily



available.

v) The employer should refrain from posting a differently-abled person to a place that is far away from her or his residence, resulting in, amongst other things, difficulties in commuting between residence and workplace.

5. Keeping the aforementioned broad parameters in sight, one needs to etch out the contours of the present case.

First Transfer Sojourn:

6. The respondent, who, as indicated above, is an orthopedically handicapped person with 72% locomotor disability, joined IRCON IL in the post of Assistant Manager, Human Resources and Management [HRM] section on 15.12.2017, pursuant to an offer made to him on 04.10.2017. The respondent was, initially, posted at IRCON IL's corporate office in Saket, Delhi.

6.1 The record discloses that on 18.12.2018, the respondent's probation was extended by six (6) months, and his employment was confirmed on and about 21.08.2019.

Impediments in career progression:

7. On 17.12.2020, the respondent filed a complaint with the Chief Commissioner for Persons with Disabilities [hereafter referred to as the "Chief Commissioner"]. The principal grievances articulated by the respondent in the said complaint veered around:

- i) Non-issuance of a 'No Objection Certificate' [NOC], which would have enabled him to appear in an interview for a post advertised by another public sector entity, i.e., Hindustan Petroleum Corporation Limited.
- ii) Certain derogatory remarks by the General Manager, HRM, IRCON IL, concerning his physical disability.



8. This triggered an inquiry by the Chief Commissioner's office. The Chief Commissioner's office addressed a communication dated 18.12.2020 to the Chairman and Managing Director [CMD], IRCON IL, concerning the respondent's complaint dated 17.12.2020. The Chief Commissioner's office called upon IRCON IL to furnish a copy of its 'Equal Opportunity Policy' and the details concerning its Grievance Redressal Officer, a requirement stipulated in Section 23 of the 2016 Act.

8.1 The record, as placed before us, does not disclose the result of the inquiry initiated by the office of the Chief Commissioner based on the respondent's complaint dated 17.12.2020.

Recurrent Transfer Travails:

9. With about two years in employment, *via* order dated 30.03.2020, the respondent was sent out on deputation to IRCON IL's wholly-owned subsidiary, i.e., IRCON Infrastructure and Services Limited [hereafter referred to as "IRCON ISL"]. Consequently, the respondent was relocated from IRCON's corporate office at Saket, Delhi, to IRCON ISL's corporate office in Noida.

9.1 About two (2) years later, on 09.03.2022, the respondent was repatriated from IRCON ISL to IRCON IL.

10. In the context of transfers of IRCON IL employees, it would be relevant to note that on 03.08.2022, IRCON IL, took out a Circular calling upon its employees who had completed three (3) years or more at a given location to submit their willingness for transfer. Insofar as employees who had served at one location for five (5) years or more or were about to complete five (5) years, *via* the same Circular, IRCON IL called upon such



employees to mandatorily give their preference for transfer to a different location.

Workplace complications:

11. On 18.07.2022, Counsel for the respondent served on IRCON IL a draft of his writ action, which he desired should be treated as a representation to seek justice.

12. The record discloses that on 08.08.2022, one Mr Manohar Lal, who was working as a nodal officer for persons with disabilities in IRCON IL, made a written request for being replaced. In this communication, he also alluded to the fact that the respondent had assaulted him.

12.1 On that very date, i.e., 08.08.2022, the General Manager-Finance, HRM, IRCON IL, issued a notice to the respondent calling upon him to show cause why he had taken unauthorized leave and failed to mark attendance *via* the biometric mechanism set up in the office.

12.2 The respondent gave his response to the show cause notice dated 08.08.2022 on 16.08.2022. The respondent, in his reply, amongst other things, stated that due to technical glitches in the system deployed by IRCON IL, he had been prevented from registering his attendance, and therefore, the charge levelled against him that he had taken unauthorized leave was incorrect.

12.3 It would be relevant to note in the context of the complaint lodged by the nodal officer that the respondent had assaulted him; two (2) witnesses, on 16.08.2022, informed the concerned authority that the respondent had “threatened” the nodal officer. Thus, the complaint lodged against the respondent appeared to concern verbal assault and not physical assault.



The proverbial last straw on the camel's back:

13. Even while the accusations levelled against the respondent concerning verbal assault and absence from work were pending initiation of a formal inquiry, the respondent, for the third time, was exposed to the possibility of being transferred.

13.1 It is this attempt which is the subject matter of the impugned transfer order dated 22.08.2022. The impugned transfer order dated 22.08.2022 entailed the respondent's movement from IRCON IL's corporate office at Saket Delhi to Bilaspur in Chhattisgarh. As per the impugned transfer order dated 22.08.2022, the respondent was detailed to the HRM section of the Chhattisgarh Rail project.

The buildup to the transfer order:

14. A perusal of the record shows that a few days before the impugned transfer order dated 22.08.2022 was passed, one Mr Gaurabh Nath, an officer of IRCON IL holding the post of Assistant Manager in HRM, Section-III, requested the competent authority to post one HRM personnel holding the rank of Assistant Manager/Deputy Manager to the Chhattisgarh Railway project.

14.1 This request was made by the concerned Assistant Manager on 18.08.2022 at about 02:35 pm.

14.2 On that very date, *albeit* at 05:30 pm, Mr Abheejit Kumar Sinha, Chief General Manager, posted in the HRM section, conveyed that they were not able to relieve the following five (5) officers because they had been given other assignments:

i) Mr Tejaram; ii) Mr Surendra Kumar; iii) Ms Renuka Singh; iv) Mr Gaurabh Nath; and v) Ms Lovely.



15. The request made for deputing HRM personnel to the Chhattisgarh Railway project was actioned by Mr Yogesh Kumar Mishra, CMD, IRCON IL, at 04:02 pm on 22.08.2022. The CMD, IRCON IL, zeroed in on the respondent's name.

15.1 The formal order concerning the respondent's transfer was passed that day, i.e., 22.08.2022, without losing time.

16. Although the respondent, *via* communication dated 23.08.2022, which was sent out at about 08:50 am, made a representation to the CMD, IRCON IL, to recall the impugned transfer order dated 22.08.2022, it had no impact. What made it worse for the respondent was the passing of the relieving order on that very date.

16.1 Notably, in his representation, the respondent broadly raised the following contentions:

- i) The transfer order passed by IRCON IL was imbued with malice and issued in retaliation in response to the email submitted to demand justice.
- ii) Many personnel were due for transfer as per the revised transfer policy framed by IRCON IL.
- iii) The respondent was being singled out as he asserted his rights.
- iv) The respondent was subjected to a transfer for the third time.
- v) Being a differently-abled person, he would have difficulty taking adequate care of himself in Chhattisgarh.

Institution of the Petition:

17. Having lost all hope of receiving a favourable response from IRCON IL vis-à-vis his transfer to Bilaspur, the respondent decided to agitate his legal rights by taking recourse to a writ action. A writ petition was filed by the respondent on and about 25.08.2022.



18. The writ petition came up for hearing for the first time on 26.08.2022, when the learned Single Judge, by way of an interim order, permitted the respondent to report and mark his attendance at the corporate office of IRCON IL located at Saket, Delhi. The Court also indicated that IRCON IL would assign suitable work to the respondent, if otherwise available.

18.1 Accordingly, the concerned personnel in IRCON IL's HRM section, *via* a communication dated 01.09.2022, advised the respondent to mark his attendance in accordance with the interim order dated 26.08.2022.

18.2 In response to the communication, the respondent wrote to a superior officer in the HRM section on 01.09.2022, informing him that he has been using the biometric system for marking attendance.

18.3 It is relevant to note that the interim order dated 26.08.2022 continued to operate till the disposal of the writ petition. As stated above, the writ petition was finally disposed of on 15.12.2023.

Documents that set the trajectory of the case:

19. For adjudication of this appeal, one needs to take note of a set of documents which, in our view, would impact the outcome of the case.

19.1 Firstly, one would like to consider various Circulars/Office Memorandums [OM] issued from time to time that deal with the transfer of differently-abled persons or persons with differently-abled dependents. These OMs/Circulars are dated 15.02.1988¹, 10.05.1990², 11.02.1992³,

¹ OM No. 302/33/2/87, issued by the Ministry of Finance.

² OM No. A.B. 14017/41/90-Estt. (RR), issued by the Joint Secretary, Government of India, to all Ministries and Departments.

³ OM No. E(NG)I-91/TR/13, issued by the Joint Director Estt. (N), Railway Board to the General Manager (P), All Zonal Railways and Production Units.



13.03.2002⁴, 29.04.2003⁵, 31.03.2014⁶, 06.06.2014⁷, 05.01.2016⁸, 29.02.2016⁹, 08.10.2018¹⁰, 07.02.2023¹¹, 05.04.2023,¹² and 02.02.2024¹³.

19.2 Secondly, the Annual Performance Reports (APR) concerning the respondent for the Financial Years (FY) 2017-2018, 2018-2019, 2019-2020, and 2020-2021.

19.3 Thirdly, the medical record of the respondent comprising disability certificates and medical reports, OPD consultation slips, and a rehabilitation certificate is set forth hereafter:

- (i) The disability certificates available on record are dated 17.10.2011 and 21.05.2015.
- (ii) Furthermore, the respondent's physiological condition is captured in the medical report dated 16.12.2020, and two reports of even date, i.e., 09.03.2022.
- (iii) The proof of the respondent's consultation with medical practitioners emerges from OPD consultation slips 16.12.2020, 02.07.2021, 07.03.2022, and 17.03.2022.

⁴ OM No. AB 14017/16/2022-Estt. (RR), issued by the Deputy Secretary, Government of India, to all Ministries and Departments.

⁵ OM No. E(NG)I-2003/TR/7, issued by the Deputy Director Estt. (NG)/Railway Board to the General Manager (P) All India Railways and Production Units.

⁶ OM No. 36035/3/2013-Estt. (Res), issued by the Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training to various governmental bodies.

⁷ OM no. 42011/3/2014-Estt. (Res.), issued by the Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training to various governmental bodies.

⁸ OM no. 42011/3/2014-Estt. (Res), issued by the Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training to various governmental bodies.

⁹ Circular no. 07/2016, IRCON IL institutes a 'Revised Rotation policy'.

¹⁰ OM No. F. No. 42011/3/2014-Estt. (Res), issued by the Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training to various governmental bodies.

¹¹ The court of the Chief Commissioner for Persons with Disabilities (Divyangjan) writes to various government bodies on adherence to the provisions relating to the transfer of Divyang employees.

¹² DPE-GM-0043/2014-GM (FTS-1899), issued by the Department of Public Enterprises to Secretaries of the Administrative Ministries/Departments of CPSEs.

¹³ OM No. 36035/44/2023-Estt(Res-II), issued by the Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training to various governmental bodies.



(iv) The rehabilitation certificate dated 24.08.2022 issued by Prosidio Rehab.

(v) Office order dated 09.08.2018 issued by IRCON IL reimbursing expenses incurred by the respondent for treatment of 'cerebral palsy'.

What do the Circulars say:

20. The sum and substance of the Circulars referred to hereinabove is that differently-abled persons should not be subjected to rotational transfer. If a differently-abled person is required to be transferred, whether on promotion or otherwise, their choice concerning the place of posting should be ascertained by the employer.

How do the respondent's APR's read:

21. A perusal of the respondent's APRs would show that his lowest grade was 'Good' while his highest grade was 'Outstanding'. These grades are on a scale comprising 'Outstanding', 'Very Good', 'Good', 'Fair', and 'Below par'.

21.1 The respondent obtained the 'Outstanding' grade in 2020-2021, the last available APR on record.

Respondent's disability Factor:

22. The disability certificates dated 17.10.2011 and 21.05.2015 establish that the respondent suffers from a 72% permanent locomotor disability, which has impacted his left lower limb.

Respondent's Medical Condition:

23. The medical reports dated 16.12.2020 and two reports of even date, i.e., 09.03.2022, show that the respondent suffered from the following ailments:



- i) Lumbar spondylosis;
- ii) Degenerative changes of the cervical spine: The MRI scan disclosed the following:

“IMPRESSION: -

-Post-operative changes as described above.

-Degenerative changes of the cervical spine.

-Disc bulges seen causing central canal narrowing from C3-4 to C4-5 level.

-Asymmetrical disc bulge seen at C3-4, C4-C5 level, indenting thecal sac with narrowing of right lateral recess.

-Mild disc bulge seen at C5-C6 level, causing thecal sac indentation.”

- iii) Tendinosis in the right shoulder;
- iv) Cerebral palsy.

23.1 The respondent is in frequent consultation with doctors from the Departments of Neurology and Orthopedics in Fortis Hospital in Noida, Uttar Pradesh. This fact emerges from a perusal of the prescription slips: two of even date, i.e., 16.12.2020, and others dated 02.07.2021, 07.03.2022, and 17.03.2022.

II. SUBMISSIONS ADVANCED BY COUNSEL

24. Given this broad backdrop, arguments on behalf of IRCON IL were advanced by Mr Debarshi Bhadra, while Ms Padma Priya made submissions on behalf of the respondent. Besides this, submissions were also put forth by Mr Rahul Bajaj, who was appointed as an *Amicus curiae* via order dated 27.02.2024.

24.1 The Bench sought Mr Bajaj’s assistance in the matter to get a more iterated perspective of the issue at hand.

Submissions on behalf of IRCON IL:

25. Mr Bhadra’s submissions proceeded on the following lines:



25.1 The learned Single Judge had, *via* the impugned judgment, granted relief to the respondent far beyond what was sought. The prayer in the writ petition was to quash the impugned transfer order dated 22.08.2022 and the consequential relieving order dated 23.08.2022. However, the learned Single Judge has directed that the respondent should not be transferred to any other State, given his medical condition and ongoing treatment, as it may hinder his cure.

25.2 The learned Single Judge overlooked the fact that the disability certificate itself revealed that the respondent had a non-progressive permanent disability in the range of 72%, which afflicted only his left lower limb.

25.3 The medical reports refer to ailments such as lumbar spondylosis and scoliosis [degenerative spine], which are not related to the locomotor disability suffered by the respondent.

25.4 There are many private and government hospitals available in Bilaspur, i.e., the place where the respondent is to be transferred. Amongst others, the following hospitals are available at Bilaspur: All India Institute of Medical Sciences, Apollo Hospital, Chhattisgarh Institute of Medical Sciences, KIMS Superspeciality Hospital, Sanjeevani Hospital, and Sri Ram Care Multi Speciality Hospital. There is, thus, nothing on record that would establish that medical treatment of the kind that the respondent receives in Delhi would not be available in Bilaspur. The respondent may be in a position to avail if not better, the same standard of medical treatment which is available to him in Delhi. [See *Manoj Kumar Gupta vs UOI*, 2013:DHC:444].

25.5 The learned Single Judge erred in not appreciating that the employees



cannot choose the place of their posting. The decision as to the place of posting is the prerogative of the employer, which is exercised after taking into account various administrative factors, including the need to depute staff having specific qualifications at a particular place, the staff strength, and the nature of duties and functions that are to be performed. [See *S.K. Tandon vs Export Inspection Council of India & Anr.*, 2011 SCC OnLine Del 5461].

25.6 It is well-established that the Courts do not interfere with transfer orders in the absence of *malafides* or unless such a directive is barred by statute. The 2016 Act does not prohibit the transfer of a differently-abled person. The learned Single Judge has returned no findings of *malafide*. If one were to bear these aspects in mind, it would be clear that impugned judgment is bad in law. [See *Shilpi Bose & Ors. vs St. of Bihar & Ors.*, 1991 Supp (2) SCC 659].

25.7 The fact that other officers were available cannot vitiate the impugned transfer order's legal tenability unless it is based on bad faith or violates a statutory provision. [See *H.K. Chawla Vs Indian Oil Corp*, (2005) 80 DRJ 411].

25.8 The respondent could not have resisted a valid transfer order merely because of "assumed humiliation and/or ego".

25.9 The DoPT Circulars relied upon by the respondent do not apply to Central Public Sector Enterprises [CPSE] such as IRCON IL. [See FAQs available on the DPE website] [See *Madanjit Kumar vs UoI*, 2016:DHC:7563, *Amarjeet Singh Dagar vs UoI & Ors.*, 2022:DHC:847-DB].



Submissions on behalf of the respondent:

26. Ms Padma Priya, on the other hand, has relied mainly upon the impugned judgment in support of the respondent's stand. It was contended that the learned Single Judge had rightly relied upon the provisions of the erstwhile statute concerning differently-abled persons, i.e., 'The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995' [hereafter referred to as the "1995 Act"], The Convention on the Rights of Persons with Disabilities [hereafter referred to as "CRPD"] and the Circulars/OMs issued by DoPT, to form a view that a different approach even in transfer matters had to be employed when it concerned differently-abled persons.

26.1 The learned Single Judge's conclusion that the Circulars/OMs exempted persons who are differently-abled from rotational transfer and should be allowed to continue in the same job where they would achieve the desired performance level was also correct. Furthermore, as rightly concluded, the Circulars/OMs did advise that at the time of transfer or promotion, a differently-abled person's preference concerning the place of posting should be sought, subject to administrative constraints. [See *Net Ram vs State of Rajasthan*, 2022 SCC OnLine SC 1022].

26.2 In matters involving differently-abled persons, rights conferred upon them under Articles 14,15,16 and 21 of the Constitution of India should be preserved and protected. [See *Justice Sunanda Bhandare Foundation vs Union of India*, 2014 14 SCC 383].

26.3 The material on record would show that the respondent requires specialized medical attention, particularly the services of a qualified paramedic.



26.4 The fact that the respondent did not approach the Chief Commissioner in this matter cannot render the writ action untenable in law. The powers of the Chief Commissioner are narrower and limited in scope and content. The Chief Commissioner can make only recommendations that may or may not be accepted.

26.5 The Circulars/OMs relied upon apply to CPSEs. The copies of the Circulars and OMs have been marked to the Department of Public Enterprises [DPE] for issuance of necessary instructions so that all CPSEs follow the guidelines. These guidelines are in the nature of executive instructions, which confer special privileges to a particular class of persons; hence, they would have to be followed by government establishments/CPSEs, being model employers. [See *Swaran Singh Chand v Punjab State Electricity Board*, (2009) 13 SCC 758].

26.6 This Court, in the matter of *VK Basin v. State Bank of Patiala and Ors.*, 2005:DHC:19141-DB, has relied upon OM dated 06.06.2014, which concerned the transfer of disabled persons.

26.7 The statement of objects and reasons contained in 'The Rights of Persons with Disabilities Amendment Bill, 2023' states in no uncertain terms that the principal act, i.e., the 2016 Act, places the responsibility for implementation of rules concerning health, education, and employment of differently-abled persons on the appropriate government and local authority.

26.8 The abrupt and arbitrary action to transfer the respondent in August 2022 to Bilaspur, Chhattisgarh, was preceded by the respondent's transfer on two earlier occasions, i.e., in 2020 and 2022.

26.9. The respondent was neither given the reasons for transfer nor an opportunity for a hearing. The respondent was also not given any feedback



concerning his work by the concerned authorities in IRCON IL. The haste with which the impugned transfer order was passed showed that it was both whimsical and discriminatory. The post in the Chhattisgarh Railway project's HRM section has been vacant since December 2021. IRCON IL failed to provide any reasons for shifting the respondent, a differently-abled person when other non-disabled persons were available.

27. In a similar case concerning another differently-abled person, Mr Sandeep Sharma, a decision was taken in 2018 to transfer him to the Chhattisgarh Rail project. Upon Mr Sharma's complaint to the Chief Commissioner, IRCON IL did not give effect to the transfer order. The Chief Commissioner's observation that differently-abled persons should not be deprived of their legitimate rights was heeded by IRCON IL.

28. The counter-affidavit filed in opposition to the writ petition instituted by the respondent alludes to the quality of work carried out by the respondent. According to IRCON IL, the respondent's work was inconsistent and unsatisfactory. Although IRCON IL has made such an assertion in the counter-affidavit filed in the writ action, its stand cannot possibly be that the transfer was punitive.

29. IRCON IL's action of transferring the respondent is discriminatory. The fact that the action was discriminatory is apparent from the manner in which IRCON IL has applied its Circular dated 03.08.2022. As per the Circular, persons who had remained in a particular location for five (5) years or more were mandatorily required to submit their transfer application. Despite IRCON IL having several persons on its roll who fulfilled this criterion, the respondent was picked up for transfer. This action of IRCON IL was both arbitrary and discriminatory.



30. The appeal has no merit and, hence, should be dismissed.

Submissions on behalf of the *Amicus curiae*:

31. Mr Bajaj, learned *Amicus curiae*, apart from supporting the view taken by the learned Single Judge, and emphasizing the observations made therein, made the following broad submissions.

31.1 The 1995 Act required the State to fulfil the following key objectives so that the rights of differently-abled persons are safeguarded:

- i) Extension of essential medical care.
- ii) Providing employment opportunities.
- iii) Cultivate an environment conducive to their development while eradicating discriminatory practices.

31.2 The 2016 Act stresses non-discrimination, respect for diversity, and acceptance of persons with disabilities; all integral to human diversity and equality of opportunity. [See Preamble to the 2016 Act.]

31.3 Section 20 of the 2016 Act obliges government establishments to provide reasonable accommodations, barrier-free environments, and settings conducive to differently-abled persons. Section 20(5) of the 2016 Act, in particular, requires the formulation of policies for posting and transferring differently-abled persons.

31.4 DoPT's OMs/Circulars dated 10.05.1990, 13.03.2002, and 31.03.2014 provide that persons belonging to Groups A, B, C, and D of government service should be posted near their native place. These OMs also lay down guidelines for providing facilities to differently-abled employees, in particular, exempting them from rotational transfers and exhorting employers to place such persons, at the time of transfer or promotion, at locations of their choice.



31.5 The reason differently-abled persons are exempted from rotational transfers is to prevent unnecessary harassment and to ensure that they work in an environment conducive to their well-being. Besides these reasons, easy accessibility to requisite medical assistance is a primary consideration.

31.6 The submission advanced on behalf of IRCON IL, that the respondent had misbehaved on multiple occasions and that his performance was not up to the mark would have to be dealt with as per procedure established by the law. The allegation levelled against the respondent concerning his misbehaviour/misconduct could not be factored in by IRCON IL while taking a decision on the respondent's transfer as the robustness of these allegations would have to be tested in a properly instituted disciplinary proceeding.

31.7 Insofar as the work performance of the respondent is concerned, IRCON IL must evaluate whether reasonable accommodation was provided to him and whether the gap, if any, in that behalf, impacted the respondent's performance.

31.8 In sum, the insinuation made on behalf of IRCON IL concerning the respondent's misconduct/misbehaviour ought not to be taken into account by the Court as clearly, no formal inquiry has been launched against the respondent, which, if instituted, would have allowed the respondent to defend himself.

31.9 IRCON IL's argument that because it operates in a competitive environment, it cannot exempt the respondent from routine transfer, as it would impact its efficiency, is misconceived. The provisions of the 2016 Act apply to every establishment, including a private establishment. [See 2(i) of the 2016 Act].



32. Section 21 of the 2016 Act requires every establishment to frame an ‘Equal Opportunity Policy’. Rule 8 of ‘The Rights of Persons with Disabilities Rules, 2017 [hereafter referred to as the “2017 Rules”] captures the ingredients of such policy. In particular, Rule 8(3)(c), among other things, states that such policy must give preference in transfer and posting to differently-abled persons. If such obligation is cast on a private establishment, other establishments would also have to do their bit in that behalf.

32.1 Therefore, a public sector undertaking cannot escape from such obligation. An establishment cannot sidestep legal obligations cast upon it under the 2016 Act on the ground that it would be counter-productive if it were to comply with it. The DoPT OM dated 02.02.2024 exempts persons with disabilities from rotational transfer, wherever possible, thus, allowing them to operate in their current roles if they have discharged their duties satisfactorily.

32.2 Additionally, the aforementioned OM recommends that preference *qua* place of posting should be given during transfers and promotions to persons with disabilities, provided it is administratively feasible. Significantly, *via* the said OM, DPE has been requested to ensure that it is made applicable to CPSEs.

32.3 The DPE’s OM dated 05.04.2023 requires CPSEs to strictly comply with the guidelines issued by the Chief Commissioner *via* order dated 07.02.2023. The order of the Chief Commissioner highlights non-adherence to guidelines relating to the transfer of differently-abled employees.

32.4 The Supreme Court’s decision in *Net Ram Yadav’s* case recognises that differently-abled persons cannot be treated on the same footing as non-



disabled persons regarding matters concerning transfer. The judgement holds that a contrary approach would result in treating unequals equally and thus, render such action violative of Article 14 of the Constitution.

32.5 The decision of a division bench of this Court in *Anju Mehra v. Canara Bank*, 2020:DHC:3183, rules that the general law on transfer has been overtaken by the provisions of the 2016 Act, which concerns persons with disabilities. Both the 2016 and the 1995 Acts are enacted to align with commitments made by the country at international Forums and to ensure that equal treatment is accorded to persons with disabilities.

32.6 The submission advanced on behalf of IRCON IL that the provision in the respondent's employment contract had put him to notice that his job was transferable, and therefore, he could not assail the transfer/relieving orders is untenable in law. It is well-established that statutory provisions and government guidelines having statutory flavour supersede such contractual arrangements. [*Sudhanshu Tripathi v. Bank of India*, MANU/MP/0932/2018; *VK Basin v. State Bank of Patiala and Ors*, *Pradeep Kumar Shrivastav v. CBI*, OA No 2233/2017; Order dated 08.02.2018].

III. ANALYSIS AND REASONS

Factual overview:

33. Having perused the record and heard submissions advanced by Counsel for the parties, including the learned *Amicus curiae*, what emerges is the following:

i) The respondent is an orthopedically handicapped person who has a locomotor disability of 72% in his left lower limb.



- ii) The respondent suffers from lumbar spondylosis, degenerative change in the cervical spine, tendinosis in the right shoulder, and cerebral palsy.
- iii) The respondent has been under the care of senior doctors attached to the Department of Neurology and Orthopedics at Fortis Hospital, Noida, UP.
- iv) The respondent must wear a knee-length prosthetic, i.e., ankle foot orthosis [AFO] on his left leg. The AFO requires regular maintenance against wear and tear and supervision by a paramedic.
- v) To maintain the OFO worn by the respondent, he has been visiting a clinic in Delhi for the last eight (8) years. This aspect emerges from a perusal of the contents of the certificate issued by a Senior Clinician. For convenience, the contents of the certificate are extracted hereafter:

“TO WHOMEVER IT MAY CONCERN

This is to certify that Mr Bhavneet Singh, is my patient from the last 8 years. He is suffering with physical disability of lower limb and with some hand dexterity.

He is using Ankle Foot Orthosis with Equinus raise of 4 inch. The orthosis is required maintenance on regular basis.

Mr. Bhavneet Singh is not allowed for excessive exertion. Excessive exertion can lead to increased complications for his limb.

He required regular follow ups.”

34. As regards the respondent’s performance at work is concerned, he has attained grades ranging from ‘Good’ to ‘Outstanding’. As noticed hereinabove, the respondent obtained the ‘Outstanding’ grade in 2020-21, which is the last available APR on record.

35. The record also discloses that there were at least five (5) officers available in the HRM section in Delhi who are, apparently, non-disabled, but were not transferred to Bilaspur.

35.1 More significantly, the respondent’s assertion that several people had remained in one location for five (5) years or more and, therefore, could



have been posted to Bilaspur remains unrebutted.

35.2 According to the respondent, rotating such persons would have aligned with IRCON IL's own Circular dated 03.08.2022.

36. In addition, the Circulars/OMs referred to in paragraph nineteen (19) above clearly state that differently-abled persons should be exempted from rotational transfers save and except when there are administrative constraints. The Circulars/OMs also state that when differently-abled persons are transferred or promoted, it should preferably be to a location of their choice.

The burden to prove administrative exigency not discharged by IRCON IL:

37. Thus, when a transfer order is passed concerning a differently-abled person, the burden to prove that it was triggered due to administrative exigencies or constraints would be on the employer. In this particular case, the employer, i.e., IRCON IL, has not been able to discharge that burden. In our view, a vague averment that the five (5) persons [whose names are mentioned in paragraph fourteen (14) above] were assigned other jobs and hence could not be transferred to Bilaspur was insufficient to discharge the burden placed on IRCON IL. Besides the employees referred to in paragraph fourteen (14) above, the respondent has also taken the position that several other persons who have spent five (5) years or more in one location and therefore, could have been transferred instead of him- is an assertion answered by taking recourse to a bald rebuttal.

Transfer of the respondent violates Circulars/OMs issued by GOI:

38. The respondent has concededly been rotated twice within five (5) years spanning between 2017 and 2022. Although these two transfers were



made between the Delhi and Noida offices at the periphery of Delhi, it can be unsettling for a differently-abled person, such as the respondent. The impugned transfer order seeks to uproot the respondent from Delhi to Bilaspur in Chhattisgarh.

39. As mentioned above, the respondent wears a knee-length prosthetic, which requires regular maintenance. The respondent is afflicted with other medical issues, including a degenerative spine. Therefore, for IRCON IL to relocate the respondent from Delhi to Bilaspur falls foul of the Circulars and OMs referred to hereinabove, in particular, OMs dated 31.03.2014 and 02.02.2024. For convenience, the relevant parts of the OMs are extracted hereafter.

39.1 The OM dated 31.03.2014:

“H. Preference in transfer/posting _

As far as possible, the persons with disabilities may be exempted from the rotational transfer policy/transfer and be allowed to continue in the same job, where they would have achieved the desired performance. Further, preference in place of posting at the time of transfer/promotion may be given to the persons with disability subject to the administrative constraints.

The practice of considering choice of place of posting in case of persons with disabilities may be continued. To the extent feasible, they may be retained in the same job, where their services could be optimally utilised.”

39.2 The OM dated 02.02.2024:

“H. Preference in transfer/posting

As far as possible, the persons with disabilities may be exempted from the rotational transfer policy/transfer and be allowed to continue in the same job, where they would have achieved the desired performance. Further, preference in place of posting at the time of transfer/promotion may be given to the persons with disability subject to the administrative constraints.

The practice of considering choice of place of posting in case of persons with disabilities may be continued. To the extent feasible, they may be retained in the same job, where their services could be optimally utilised.”

[Emphasis is ours]



40. Besides this, these OMs, in our opinion, are binding on IRCON IL, which is admittedly, a CPSE, given the direction contained in OM dated 05.04.2023 issued by the DPE. The OM dated 05.04.2023 mandates the Administrative Ministries/Departments of CPSEs to bring the communication dated 07.02.2023 [which outlined OMs laying down guidelines, *inter alia*, for transfer of disabled persons] to the notice of CPSEs for compliance.

The argument of prejudice advanced by IRCON IL is tenuous:

41. It is important to emphasise that the respondent appears to be a hardworking employee who has consistently improved his performance since his appointment in 2017. Despite this, an attempt was made to muddy the waters by suggesting that the respondent's performance was not up to the mark and he had misbehaved with co-workers. In our view, both submissions are based on pleadings and material which are tenuous, to say the least.

41.1 The APRs, as noted above, belie the assertion made on behalf of IRCON IL that the respondent's performance at work is not satisfactory.

41.2 Likewise, the reference to alleged misconduct/misbehaviour has not morphed into a formal disciplinary proceeding, which it ought to have if there was weight in the allegation of verbal assault made by a co-worker.

42. As correctly argued by Mr Bajaj, if such an inquiry were triggered, the respondent would have an opportunity to place his defence on record. Since no such proceedings have been initiated against the respondent, no cognisance can be taken of such assertions while testing the legal efficacy of the impugned transfer order.



Provisions of law supersede contractual arrangements between IRCON

IL and the respondent:

43. Mr Bhadra also submitted that the transfer was an incident of employment, and given that a specific provision to that effect was included in the respondent's employment contract, he could not have resisted his relocation. This is, in our opinion, is an untenable submission which cannot be sustained.

43.1 A contractual arrangement between parties, including an employment contract, is always subordinate to the legislative framework governing the field occupied by the subject contract. Therefore, very often, protection is granted to one or the other party, which is inconsistent with the arrangement arrived at between contracting parties of their own volition.

43.2 There are several examples of such intercession *via* statutes, such as landlord-tenant agreements and even employment contracts, such as the one obtaining between an employer and an employee who is a differently-abled person. If the terms and conditions of the employment contract executed between an employer and a differently-abled person are found to be inconsistent with the provisions of the 2016 Act, the latter would prevail.

43.3 In this context, noting the provisions of Section 20(5) and Section 21 of the 2016 Act may be helpful. Section 20(5) permits the appropriate government to frame policies for posting and transferring employees with disabilities.

43.4 Section 21 mandates an 'establishment' to notify its 'Equal Opportunity Policy', which would detail the measures it proposes to take under the provisions of Chapter IV of the 2016 Act, which contains provisions for skill development and employment.



44. It is essential to bear in mind that the expression ‘establishment’, which is defined in Section 2(i), includes both ‘Government establishment’ and ‘private establishment’. Furthermore, Rule 8(3) contained in Chapter IV of the 2017 Rules provides as to what the ‘Equal Opportunity Policy’ should include. In particular, sub-clause (c) of Rule 8(3) provides that the ‘Equal Opportunity Policy’ should give preference in transferring and posting to differently-abled persons.

44.1 Therefore, notwithstanding any provision in the employment contract concerning transfer, it will stand superseded and/or be subordinate to the provisions of the 2016 Act and the 2017 Rules in the event it is bedeviled with inconsistency. Thus, the argument advanced by Mr Bhadra that the impugned transfer order passed by IRCON IL should be dealt with by ascribing to the same legal standard applicable to a non-disabled person is a submission that we are unable to accept.

45. In this particular case, we get the sense that the respondent is being transferred because of interpersonal problems with co-workers. IRCON IL, as a model employer, is duty-bound to provide a friendly environment to differently-abled persons such as the respondent so that he can attain his full potential.

46. As a model employer, IRCON IL could arrange training sessions for non-disabled employees to sensitise and help them prepare for their interactions with differently-abled persons.

IV. CONCLUSION

47. Thus, we are not inclined to interfere with the impugned judgment for the foregoing reasons.



48. The appeal is, accordingly, dismissed.
49. Costs are quantified at Rs.20,000/-.
50. IRCON IL will remit the costs to the respondent within two (2) weeks.
51. Before we conclude, we must record our appreciation for the assistance rendered by the Counsel for the parties, i.e., Mr Bhadra, Ms Padma Priya, and the learned *Amicus curiae*, Mr Rahul Bajaj.

(RAJIV SHAKDHER)
JUDGE

(AMIT BANSAL)
JUDGE

JULY 18, 2024