

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
NEW DELHI.

11

O.A. No. 1174/97
T.A. No.

17/12/97
DATE OF DECISION 17/12/97

Harish K. Dogra Applicant(s)
(Sri M.P. Raju) Advocate
Versus

Union of India Respondent(s)
Sri N.S. Mehta Advocate

(For Instructions)

1. Whether it be referred to the Reporter or not? *Yes*
2. Whether it be circulated to all the Benches of the Central Administrative Tribunal or not?

(Dr. Jose P. Vergara)
vc(3)

(12)

CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

O.A. 1174/1997

New Delhi this the 17th Day of December, 1997

Hon'ble Dr. Jose P. Verghese, Vice Chairman (J)
Hon'ble Shri K. Muthukumar, Member (A)

Shri Harish K. Dogra,
Consular General,
Consulate General of India,
Istanbul, Turkey

Petitioner

(By Advocate: Shri M.P. Raju)

-Versus-

1. Union of India,
through Shri Salman Haider,
Foreign Secretary,
Ministry of External Affairs,
Govt. of India,
South Block, New Delhi.
2. Shri M. Venkataraman,
JS and formerly JS (AD),
Ministry of External Affairs,
Govt. of India,
South Block, New Delhi.
3. Shri Amit Dasgupta,
Director (Finance),
Ministry of External Affairs,
Govt. of India,
South Block, New Delhi.
4. Shri R.M. Abhyankar,
Ambassador of India,
Turkey,
C/o Ministry of External Affairs,
Govt. of India,
South Block, New Delhi

(By Advocate: Shri N.S. Mehta)

ORDER

Hon'ble Dr. Jose P. Verghese, Vice Chairman (J)

The petitioner in this case is a Joint Secretary to the Govt. of India belonging to the Indian Foreign Service (IFS) presently posted as Consul General of India in Istanbul, Turkey. He was posted in the said capacity by an order dated 24.11.1994 and assumed charge on 29.7.1995. By an order dated 11.9.1996, the petitioner was recalled and was asked to finalise his travel plans to come back to Delhi at the

earliest. Subsequently by an order dated 8.1.1997 the said order was deferred till July, 1997. The petitioner is seeking a direction from this court to set aside the orders of recall dated 11.9.1996 by which he was posted to headquarters, as well as the order dated 8.1.1997 by which the respondents refused home leave fare to the applicant and the order dated 10.4.1997 by which his representation against the said order were rejected by the Additional Secretary.

2. The petitioner was challenging these above said orders on the ground that the impugned order was not a mere order of transfer in public interest, rather it was a punitive recall amounting to premature termination of his assignment, causing irreparable damage to his reputation and character, serious consequences for his professional career, gross financial loss, irreparable damage to his son's education and grave consequences on his health. It was also the contention of the petitioner that the premature recall of the petitioner to headquarters in this manner irrespective of the fact that one may call it a transfer or recall, is arbitrary and unreasonable action, and as such are in violation of fundamental rights contained in Articles 14, 16 & 21 of the Constitution of India. The petitioner has also challenged the vires of the provisions of Rule 8 (2) of the Indian Foreign Services (PLCA) Rules stating that the rules as interpreted by the respondents are ultra vires and unreasonable and as such the same needs to be quashed, declared as illegal and set aside.

3. Further elaborating the punitive nature of recall order, the petitioner submitted that the petitioner is being punished for no fault of his, rather it was only as an aftermath of 2 staff members entering into physical brawl in the privacy of the Consulate, after office hours, even when there were no witnesses and the respondents have wrongly held the petitioner to be responsible and passed above said punitive recall order. It was also alleged by the petitioner that the respondents have wrongly blamed the petitioner for the above said incident stating that ultimate responsibility falls on him as the head of the team, and the respondents have failed to appreciate that the ultimate responsibility may be that of the respondent no. 4 who is the Ambassador himself and the respondents were totally wrong in fixing the responsibility on the petitioner alone.

4. It was further alleged by the petitioner that the provision to recall is contained in para 8 of the above said rules and under Sub-para (ii) of the said rule, the Ministry is empowered to recall an officer under various circumstances. In the context, it is found that the Ministry have recalled him for the reason mentioned at sub para (ii) and (iv) of clause (2) of para 8, namely, on the basis of allegation that the petitioner has brought or is likely to bring India into disrepute or the petitioner has occasioned or is likely to occasion breach of security regulation of Govt. of India or a danger to security. The said clause(2) of para 8 is reproduced herebelow:

(2) If the Ministry are satisfied that the conduct of an officer posted abroad or of any member of his family or any person living with him and under his general control--

- (i) has prejudiced or is likely to prejudice the maintenance of friendly relations between India and a foreign country; or
- (ii) has brought or is likely to bring India into disrepute; or
- (iii) has caused or is likely to cause embarrassment to the Government of India; or
- (iv) has occasioned or is likely to occasion a breach of the security regulations of the Government of India or a danger to security; or
- (v) has occasioned or is likely to occasion the commission of an act which may constitute an offence under the Indian Penal Code; or
- (vi) involves moral turpitude; or
- (vii) involves a serious breach of the Conduct Rules of his service,

the Ministry may compulsorily recall the officer to India.

5. It was further submitted by the petitioner that by an order dated 11.8.1994, Ministry of External Affairs has issued Standing Instructions that the tenure of posting of

the present station where the petitioner is working will henceforth be 3 years instead of 2 years and in the circumstances recall of the petitioner without assigning any reason, in the context described above, would be an arbitrary and unreasonable order.

6. After notice, the respondents filed their reply on 23.5.1997 and in the additional reply on 30.5.1997 the respondents stated that the fact of transferring the petitioner back to headquarters is purely administrative action, well within the provisions of the Rules and the same is done in public interest. They further admitted that from the facts available on records that the CGI in Istanbul was not being run in a manner required to project India's image abroad and in an adequate and proper manner. The present situation was not an ordinary one but was a crucial lapse which may jeopardize the country's respect and honour in a foreign state and the petitioner as a head of the office cannot absolve himself of the key responsibility of maintaining congenial and decent atmosphere in his office. It was further stated that the Ministry had sent a special team to investigate into these facts and after receipt of the report from the special team only that the Ministry decided to change the entire team working in Istanbul and as such no special malafide against the petitioner alone is contemplated. It was further stated that the said decision of the Ministry was on the basis of the recommendations given by the special team in their report, in order to maintain decency and decorum at CGI Istanbul.

7. On the question of who is ultimately, responsible for the incident that took place within the premises of CGI, it was stated it is the petitioner who is responsible for running of the Consulate and who has to maintain decency and decorum of his office and the respondent 4, namely the Ambassador to Turkey is only an overall head, even though he is also responsible for leading and supervising of the offices under him.

8. It was further submitted on behalf of the respondents that under Rule 15 clauses (1) and (2), of the Indian Foreign Service (Conduct and Disciplinary) Rules, 1961, a member of the service shall be liable at the discretion of the Govt. of India to serve at any place in the world. It shall be within the discretion of the Govt. to decide whether any member of the service shall serve abroad or in India and no member of the service shall be entitled as of right to a posting abroad or in India as the case may be. It was further submitted that under para 24 of Part I of the Indian Foreign Service Rules, (PLCA) 1961, namely, the period of posting of a member of the service on each category of posts shall be as specified by the Govt., namely the period of posting can be curtailed or extended by the Govt. in the exigencies of public service. Para 24 is reproduced herebelow:

"24. Classification of stations and home leave passage.

- (1) All Missions and Posts abroad shall be classified into five categories as Category A*, Category A, Category B, Category C and Category C*
- (2) The normal period of posting of a member of the Service at each category of post shall be as specified by the Government.

The normal period of posting may be curtailed or extended by the Government in the exigencies of public service."

9. Thus it was submitted by the respondents that the recall of the petitioner is only by way of transfer permissible under law and by no stretch of imagination the same can be termed as a punitive recall. It was also submitted that the said transfer of the petitioner cannot be said to be under para 8 of the IFS (PLCA) Rules and to say so would be misleading fact. It was submitted that in the case of the petitioner his transfer back to headquarters was not determined by the provisions of para 8 rather it was based on provision of para 24. Further it was stated that the respondents were permitted under the rules to change the entire team in the circumstances of the case and as such the orders passed cannot be an arbitrary one, nor can it be violative of Articles 14, 16 and 21 of the Constitution of India.

10. Even though the petition was filed on 15.5.1997 and since some interim orders were passed, the respondents had filed the reply urgently and we proceeded to hear the matter finally and hence this quick decision. The respondents had submitted that they were anxious to get the interim orders vacated in the interest of justice.

11. We heard both the parties, gone through the pleadings and records produced by the respondents. The respondents claiming that the recall/ transfer of the petitioner, under whatever nomenclature it maybe known has been passed under Rule 24 of the IFS Rules, 1961. According to the said rules as reproduced hereabove, the period of posting of a member of the service, is required to be

specified by the Govt. The petitioner has shown that appropriate standing orders have been passed in this regard stating that reference to place of posting of the petitioner, his period of posting is 3 years and the same is so notified in accordance with the power given to the respondents under clause (2) of the rule 24. The said clause gives discretionary power to the respondents to fix the period of posting in the exigencies of service and the standing orders passed in this regard will have to be considered as guidelines having the force of law since the same has been issued in furtherance to the discretionary power given to the respondents under clause (2) of rule 24. It goes without saying that a plain reading of clause (2) of rule 24 shows that it is mandatory for the respondents to issue the period of posting under the said sub rule and since the discretionary power given to the respondents is coupled with duty, the 3 year period fixed by the respondents in their wisdom, is a binding guideline as far as the exercise of power contained in clause (2) of rule 24 is concerned.

12. Clause (2) of rule 24 also gives an additional discretionary power that the normal period of posting may be curtailed or extended by the Govt. in the exigencies of public service. Thus once the respondents fixed the mandatory period of posting as 3 years, the respondents are further given a very wide discretionary power to ignore the same by curtailing or extending the same with only one condition that the same shall be in the exigencies of public service.

13. We have considered whether the orders passed by the respondents in this case can be said to be in the exigencies of public service or not so that the same can be held to be in accordance with clause (2) of Rule 24. We are afraid, it is not so, for the reason that if it is so, the respondents would have given the reason for passing such order on the face of the order itself. Moreover, in view of the admitted facts by the respondents that the recall/transfer order has been passed on the basis of the report of the special team and its recommendation which went into those unsavory incidents that took place within the premises of CGI, the recall/transfer order is conspicuous in not ^{the reason} showing on the face of the order, the reason for passing such an order. The absence of a reason in the circumstances, has rendered the order of recall/ transfer in the circumstances of the case as an arbitrary one and the same needs to be quashed as the same is in violation of principles contained in Article 14 of the Constitution of India.

14. We are of the firm opinion that where a tenure of 3 years have been fixed in accordance with the process given under the rules, a premature transfer/ recall without assigning any reason on the face of the order itself cannot be presumed to be one passed in the exigencies of service. The reasons must have been stated to cut short the statutorily determined tenure and that reasons should establish some reasonable nexus between "exigencies of service" as well as cutting short of the declared tenure. In the absence of the same, we are of the opinion as in the present case, such an exercise of power, would become arbitrary exercise thereby violating the principles contained in Article 14 of the Constitution of India.

15. In view of the submissions made by the petitioner, we also do not want to ignore the fact that the power to recall an officer prematurely, cutting short of the prescribed tenure is contained in Rule 8 as well. It was submitted by the petitioner that the respondents had in fact passed a recall order in the case of the petitioner as it was done in the case of other members of the team, recalling them prematurely. It seems to be an after-thought that the respondent found that the grounds available for recall of other the members of team was not available against the petitioner and it was under such circumstances that the respondents have taken a different stand subsequently and orders in the case of the petitioner for recall was begun to be considered as a transfer order.

16. There is some substance in the submission of the petitioner.. In fact the power to recall an officer before the end of the tenure is a subject matter of Rule 8 and one of the several conditions stated therein needs to be fulfilled before an order of recall can be passed against an officer. Some of these grounds mentioned in Rule 8 seems to be available against the other members of the team on whose behalf recall order has been passed while the same was not available in the case of the petitioner. In the circumstances of this case, the exercise of power to transfer/ recall has become a colourable exercise of power in as much the power exercised by the respondents ostensibly for the purpose for which it was conferred but in reality for some other purpose. Mukherji J in Gajapathi vs. State of Orissa, AIR 1953 SC 375 held that the doctrine of colourable exercise of power does not always involve any question of bonafide or malafide on the

part of the parties. It is enough to show that the power given was exercised ostensibly for the purpose not shown to have been authorised by the statute. The above said case was not referring to any administrative authority but the same was addressing a case referring to legislative authority. In any event, the ratio of the said case is applicable to the case at hand.

17. Similarly, in Jeevani Kumar vs. First Land Acquisition Collector, the Hon'ble Supreme Court has almost quoted the doctrine of colourable exercise of power with that of the mala fide. In the said case Govt. was said to have alternative power either to acquire a property for public purpose or to requisition for a limited period. In the purported exercise of power to requisition, the government permanently deprived the owner of his rights to property. Holding the act of requisition as mala fide and colourable exercise of power, the Supreme Court observed:

"Where one is repository of two powers that is power of requisition as well as power of acquisition qua the same property and if the purpose can equally be served by one which causes lesser inconvenience and damage to the citizen concerned unless the repository of both the powers suffers from any insurmountable disability, user of one which is disadvantageous to the citizen without exploring the use of the other would be bad not on the ground that the Government has no power but on the ground that it will be a misuse of the power in law."

18. The submission of the petitioner was that initially the orders passed against the petitioner was a recall order, as the same has been passed in the case of all other members of the team and since no reason has been referred on the face of the order, the explanation given in the counter affidavit described

the said action to be an order by way of transfer under Rule 24 cannot be accepted. We do not find that the impugned order of recall/transfer is not a speaking order and it is only in the counter affidavit that the respondents are describing the same as a transfer order under Rule 24. Consistently, the Hon'ble Supreme Court had held that when a public authority passes an order, the said order will have to be read and understood for the purpose stated on the face of the order only and subsequent explanation by way of affidavit cannot be imported into the said order. This view has been confirmed by the Hon'ble Supreme Court in Commissioner of Police Vs. Goverdhan Das Bahri, 1952 SCR 135 at page 140 and in MS Gill vs. Chief Election Commissioner, 1978 2 SCC 272 at page 283.

19. The petitioner's tenure is being completed in July, 1998 i.e. another 7 months to go, the respondents on their own had deferred the recall/transfer order for about 10 months, that is to say an order passed in September 96 has been extended upto July, 97 on their own. It is a known fact that the petitioner on his own has committed no wrong and the ultimate responsibility has been wrongly fixed on the petitioner, alone which we consider cannot be proper in the circumstances of the case. Yet we concede that the respondents could exercise their discretionary power in accordance with the clause (2) of rule 24, we would hereby proceed to acknowledge the said power and grant liberty to the respondents to pass fresh orders under the said rule only in the exigencies of service. While passing the said order, observations contained hereinabove in this para shall be taken into consideration and appropriate orders may be passed after receipt of a copy of this order.

24

20. In the circumstances, the orders of transfer/recall and all other consequential orders passed against the petitioner are quashed. The OA is allowed to the extent mentioned above and no order as to costs.

21. Before parting with this case I will be failing in my duty by not projecting the human face of law as well. On perusal of the file we find that the petitioner is a good, conscious^{- pnt -} officer having a good record of performance and the respondent no. 4 Ambassador's observation referring to Galbrith dictum in his Ambassador's Journal seems to be a wise counsel. When a fresh order is being passed, we do not hesitate to state that the wisdom expressed by the respondent no. 4 may also be taken into consideration.

(K. Muthukumar)
Member (A)

(Dr. Jose P. Verghese)
Vice Chairman (J)

Naresh

Hon'ble Mr. K. Muthukumar, Member (A)

22. With due respect, I find it difficult to associate^{myself} with the observations of my Learned Brother in para 21 above. The Ambassador's observations regarding the applicant including his record of performance etc., are not before us as a part of the record in the judicial files. I, however, agree that the respondents may pass fresh order in the light of our

.14.

observations in para 19 above and the O.A.
is allowed subject to fresh orders being passed
in this behalf within a period of one month
from the date of receipt of a copy of this
order.

No costs.


(K. MUTHUKUMAR)
MEMBER (A)

Rakesh