

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

PRINCIPAL BENCH : NEW DELHI

OA 499/93

Date of decision: 21-10-93

Shri M.K. Sharma .. Applicant

Versus

Delhi Admn. & Ors. .. Respondents

CORAM:

Hon'ble Shri C.J. Roy, Member (J)
For the applicant .. Shri Jog Singh, Counsel
For the respondents .. Shri Virendra Mehta, Counsel

JUDGEMENT

The applicant has assailed the order dated 16.2.1993 issued by the Deputy Commissioner of Delhi, Delhi Administration transferring him from Delhi Administration to Police Training School (PTS in short), Jharoda Kalan.

2. The facts leading to the filing of the application are that the applicant joined as Prosecutor on 1.1.73 and was transferred to the Directorate of Prosecution, Delhi Administration on 1.4.1974. Later on he was promoted as Senior Prosecutor/Additional Public Prosecutor and posted in the Crime Branch at Patiala House with effect from 19.10.1992. The applicant alleges that the impugned order has been issued without obtaining his consent. He further alleges that he belongs to a separate cadre under the Directorate of Prosecution and that he has no training or experience or aptitude to perform the duties of a lecturer in the PTS where the police officers have no legal background. He also apprehends that his posting to PTS by force will be a disadvantage for the future career as his ACR shall be written by the police authorities who are ignorant about the functioning of prosecutors.

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3. The applicant further avers that he is staying near U.P.Border in East Delhi and his present transfer to PTS located in West Delhi near Haryana border would involve a journey of 50 KMs one way.

4. Hence this application praying for quashing the impugned order dated 16.2.93 and for allowing him to continue his present assignment in the Crime Branch of New Delhi Courts at Patiala House.

5. The respondents have filed their counter stating that the posting/transfer of the applicant was done with the approval of Secretary(Home). They aver that the post of Sr. Prosecutor of PTS and Prevention of Food Adulteration Directorate (PFA in short) is included on the strength of Directorate of Prosecutor and is transferable among that Directorate, PTS and PFA and that the transferred incumbent is eligible for training allowance @ 15%. They deny that it is a deputation post.

6. The respondents further aver that it is not at all obligatory for the Government to seek the consent of the applicant as he can be posted anywhere in the Union Territory of Delhi. They claim that the order of transfer issued by the Deputy Commissioner of Delhi is bonafide and legal and is done with the approval of Home Secretary. They deny that the applicant has made any representation against the impugned transfer order.

7. The applicant has filed a rejoinder denying the averments made by the respondents and reasserting what he has stated in his application.

8. I have heard Shri Jog Singh, learned counsel for the applicant and Shri Virendra Mehtra, learned counsel for the respondents and perused the records.

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9. According to the promotion order, the applicant is Additional Public prosecutor. As per the R/Rules, while working in the Directorate of Prosecution, he is responsible to the Director of Prosecution who in turn is under direct control of the Lt. Governor. If the applicant puts in three years in the said grade, he is promoted as Public Prosecutor and his CRs will be written by the Director of Prosecution, whereas if he is transferred to a teaching job, his CRs will be written by the Deputy Commissioner of Police, Delhi and it is possible that his chances of promotion would be blocked, because serving as Senior Teacher will not help him in promotion to the post of Public Prosecutor even if he completes three years service which will not be counted for promotion and that his status will be reduced.

10. The fact that he will be paid extra allowance for the senior teacher job is not a solace for him. The applicant is willing to be transferred even from Patiala House Court to any other court in the same post. His consent is not obtained in the instant case.

11. Section 24(6) of the Code of Criminal procedure, 1973, reads as follows:

Notwithstanding anything contained in sub-section (5), where in a State there exists a regular Cadre of Prosecuting Officers, the State Government shall appoint a Public Prosecutor or an Additional Public Prosecutor only from among the persons constituting such Cadre:

Provided that where, in the opinion of the State Government, no suitable person is available in such Cadre for such appointment that Government may appoint a person as Public prosecutor or Additional Public prosecutor, as the case may be,

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from the panel of names prepared by the District Magistrate under sub-section (4).

12. Here in this case the applicant is originally posted as Assistant Police Prosecuting Officer and promoted as Additional Public Prosecutor which is recognised as a separate cadre under the Criminal Procedure Code Section 24.

13. My attention was drawn to a case of similar nature decided by this Tribunal on 30.7.93 in OA 2909/91 wherein it has been held that "we make it clear that appointment of Public Prosecutor shall take place except in accordance with Section 24". Similarly, it was also held in OA 653/92 decided on 15.10.92 by this Tribunal that "...transferring the petitioner to different cadre is not sustainable in law". For this, reliance was made in the case of Prakash R. Borker Vs. UOI & Ors. SLJ 1984(1)61 decided by the Bombay High Court wherein it is held that "we are of the opinion that the FR 15 does not permit transfer of a government servant from one cadre to another cadre without his consent".

14. It has further been held in OA 2307/92 decided on 16.10.92 in the case of Ram Phal Sharma Vs. Lt. Governor, Delhi Admn. that "the cadre of an employee can not be changed without ascertaining his willingness".

15. In the case of CWP No.484/1979 of Delhi High Court decided on 15.2.80, His Lordship has discussed as follows: (page 16-18 of the typed judgement)

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"With the coming into force, with effect from 1.4.74, the provisions of the Code of Criminal Procedure, 1973, it became necessary to transfer the administrative control of prosecution Branch from the Inspector Gen. of Police to Delhi Administration. By a letter dated 29.3.74, the posts of Senior Prosecutors under Delhi Admn. were created. The approval of the Lt. Governor, Delhi to transfer the administrative control of Police to Secretariat of Delhi Admn. was conveyed. Nine posts of Senior Prosecutors and 59 posts of Prosecutors were created in the permanent basis gazetted posts in Delhi Admn. The existing post of Sr. Prosecutors (9) and Prosecutors (59) in the Prosecution Branch of Delhi Police were simultaneously ordered to be kept in abeyance. The expenditure involved was directed to be debited to the Head of "Secretariat General Services" and a sub-head of 'Prosecution wing' was directed to be opened. Similarly, the post of Director of Prosecution and Chief Prosecutors were created by the Lt. Governor in the orders contained in the letter dt. 12.4.74.

"Recruitment Rules for the posts of Director of Prosecution and Chief Prosecutors were notified on 5.4.75 in exercise of the powers conferred by the provision to articles 309 of the constitution. The R/Rules for these posts were amended and again notified on 7.11.77. The number of posts of Director of Prosecution is notified as and that of Chief Prosecutors are specified as 5. The number of posts of Chief Prosecutor was subsequently amended by a similar notification dated 24.5.79 and the posts now are 7. The R/Rules for the posts of senior Prosecutors and Prosecutors were notified on 27.1.78 in exercise of the powers conferred by the provision to Articles 309 of the constitution. The number of posts of Senior Prosecutors is 11 and that of Prosecutors is 62. The number of posts of sr. prosecutors was amended by notification dated 23.3.79 from 11 to 15. The number of posts of prosecutors was amended by a notification dated 4.1.79 from 62 to 70. The R/Rules provide the method of recruitment to the post of prosecutor as by direct recruitment. Recruitment to the post of senior prosecutor is by promotion of prosecutor with three years service in the grade rendered after appointment thereto on a regular basis. Recruitment to the post of Chief Prosecutor is by promotion of senior prosecutor with two years service in the grade rendered after appointment thereto on a regular basis. Recruitment to the post of Director of Prosecution is by promotion failing which by direct recruitment. In case of promotion, it is of Chief Prosecutors with five years service in the grade rendered after appointment thereto on a regular basis. It is clear from these provisions that there is a regular channel from the lowest post to the highest post in the prosecution wing of Delhi Admn. Sectt. Seniority list of the prosecutors, Senior Prosecutors and Chief Prosecutors have been prepared after inviting objections and has been published. The statutory recruitment rules give the classification of the posts.

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The classification of post of Director of Prosecution is General Central Services Group A Gazetted non-Ministerial. The classification of post of Chief Prosecutor is also General Central Service Group A Gazetted Non-ministerial. The classification of the post of Prosecutor is General Central Service Group B Non-ministerial.

"Budget estimates for the year 1975-76 onwards have been placed on the record. Under the heading of Administration of Justice, provision has been made for the prosecution wing. The main head of the expenditure is under Secretariat, Central Services"

16. In the case of Ramadhar Pandey Vs. State of UP in CA No.1478-79/93 decided on 30.3.93 (reported in 1993/25/ATC/Part I) their Lordship of Supreme Court held that "Additional Transport Commissioner transferred to ex-cadre post of Joint Secretary, Transport Department - Notwithstanding equation of pay and status, in absence of material on record to show the transfer to be in public interest, such transfer, held, unsustainable - UP FR, Clause 2(b) (as amended in 1981) - Cadre".

17. The word 'cadre' as defined in FR 9(4) means "Strength of the service or a part of service sanctioned as a separate unit".

18. After going through the rulings, I hold that the applicant holding a cadre post can not be transferred to another cadre post without his consent. Also he can not be transferred under the pretext of 'public interest' unless it is proved that it is done in 'public interest'. Besides, the respondents are not able to dislodge the case of the applicant by producing rebuttal evidence against the Recruitment Rules, so they stand there as it is.

19. Under the circumstances, I hold that the transfer is not in public interest even though the respondents allege that all the persons who are earlier

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posted against the impugned post are stated to have given their consent, whereas the applicant has not given his consent. I also hold that the transfer is in violation of Section 24(6) of the Code of Criminal Procedure, 1973.

20. Therefore, I hold that the applicant has made out a case and the transfer order dated 16.2.93 is quashed. No order as to costs.

W. Roy
(C.J. Roy)
Member (J)