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CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI.

O.A.NO.529/93.

Date of decision:23.3.93.

J.S. Rana.

..Applicant.

Versus

Union of India
through
The Administrator,
Union Territory of Lakshadweep,
and anr. .. Respondents.

CORAM:

THE HON'BLE MR. N.V. KRISHNAN, VICE-CHAIRMAN(A).
THE HON'BLE MR. B.S. HEGDE, MEMBER(J).

For the Applicant.

..Shri R.K. Kamal,
Counsel.

For the Respondents.

..Shri M.L. Verma,
Counsel.

JUDGEMENT

Hon'ble Shri N.V. Krishnan, Vice Chairman(A).

The applicant is aggrieved by the impugned order dated 12.2.1993 (Annexure A-1) of the Administrator of the Union Territory of Lakshadweep posting him as Labour Enforcement Officer at Calicut, consequent upon the issue of the order dated 27.1.1993 (Annexure A-5) revoking his suspension. He has filed this application praying that the impugned order Annexure A-1 be set aside and quashed. He has also prayed for the following interim reliefs:

"The operation of the impugned order be suspended and the respondents be directed to allow the applicant to occupy official residence at New Delhi on existing terms until the disposal of this case.

The respondent be directed to finalise the disciplinary action within 14 days.

The respondents be directed to pay full pay and allowances for the period of suspension immediately".

2. Notice on admission and on interim relief was issued to the respondents and meanwhile, a direction was issued on 2.3.1993 to the respondents not to dispossess the applicant from the quarter he was occupying till the next date of hearing i.e. 16.3.1993.

3. On that date Shri R.K. Kamal, Counsel of the applicant and Shri M.L. Verma, Counsel of the respondents appeared and the case was heard.

4. It is necessary to briefly state the facts leading to the issue of Annexure A-1 order. The applicant was placed under suspension on 25.3.1987 (Annexure A-2) and a memorandum of charges was issued to him on 21.9.1987 (Annexure A-3). The three articles of charge are connected with irregularities in the engagement of Kumari Vijay Usha-as she then was- as clerk on daily wages in the Liaison Office at New Delhi of the Government of the Union Territory of Lakshadweep. The irregularities relate to violation of procedure of appointment of clerk, nepotism in appointing Kumari Usha who is the sister-in-law of the applicant, drawal of her wages even though she was not actually working as clerk and obtaining acquittance in respect of payment of salary from her without actually making payment to her. It transpires -as will be seen presently- that the charges were framed on the basis of a complaint made by the applicant's wife, Smt. Maya Rana and her sister Kumari Vijay Usha. These are serious charges.

5. The disciplinary proceedings have dragged on and are still incomplete. The applicant has produced a copy of the ordersheet dated 3.7.1992 recorded by the Enquiry Officer (Annexure A-4), which incidentally contains the information referred to above about the persons on whose complaint against the applicant the departmental enquiry was initiated. These proceedings indicate that the prime witnesses are these two ladies, Smt. Maya Rana and Smt.

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Vijay Usha- as she now is- for it is on their complaint that the departmental enquiry was started. Though they have been given oppportunities to tender evidence and the Enquiry Officer had also ensured their attendance by resorting to Section 4(2) of the Departmental Inquiries (Enforcement of Attendance of Witnesses and Production of Documents) Act, 1972, the two witnesses who appeared on 3.7.1992 did not testify. The Presenting Officer of the department, felt that even if another opportunity was granted to Smt. Maya Rana, it could not be ensured that she would depose. In the circumstances, the Enquiry Officer recorded as follows:

"Keeping the above in view, it was felt that no fruitful purpose would be served if the hearing was adjourned to another date. No other witness was presented by the PO since the case is based on the complaint of Smt. Maya Rana and her sister who are apparently not interested in giving their evidence.

The documentary evidence in this case is only two complaints made by the aforesaid two persons, which had been disputed by the CO. As such, the same could not be taken on record. In view of the same the case of prosecution fails Consequently there is no need for a defence case also". (Emphasis supplied)

6. The applicant, therefore, contends that a final order clearing him of the charges should have been passed long back but has not yet been passed. Instead, by an order dated 27.1.1993 (Annexure A-5), the Administrator has passed orders revoking the order of suspension with immediate effect. This order does not contain any direction about the applicant's reinstatement in the post from which he was suspended by the Annexure A-2 order.

7. Subsequently, on 12.2.1993, the impugned Annexure A-1 order was passed by the second respondent i.e. the

Secretary (Administration), for the Administrator, posting the applicant as Labour Enforcement Officer at Calicut.

8. It is contended that the applicant has a right to be reinstated in the post in New Delhi from which he was suspended and only thereafter can he be transferred.

9. The applicant states that he has been suffering from cancer since long and is undergoing treatment in the Safdarjung Hospital, New Delhi. He has produced four medical certificates (Annexure A-6 series) in support of this averment. He pleads that the transfer to Calicut will interrupt the treatment he is receiving and will jeopardise his life.

10. He has also pointed out that the transfer will harm his children's education.

11. It is contended by the applicant that the attendant circumstances as mentioned above surrounding his transfer by the Annexure A-1 order disclose malice in law and, therefore, the impugned order is liable to be set aside.

12. We have heard at length, the arguments advanced by Shri R.K. Kamal, the learned counsel for the applicant and Shri M.L. Verma, the learned counsel for the respondents and perused the records.

13. The learned counsel for the applicant contended that from the surrounding circumstances of the case, it is absolutely clear that the impugned order has been passed mala fide. This is mala fide in law, even though personal malice is not alleged. He has relied on the Tribunal's judgement in **G.S. Bhatia Vs. Union of India (A.T.R. 1987(2) CAT 475)** for this proposition. The respondents have not cared to pass a suitable order clearing him in the departmental inquiry proceedings, despite the findings rendered by the Enquiry Officer in his proceedings dated

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3.7.1992 (Annexure A-4) particularly the emphasised portion of the extract reproduced in para 5 supra stating that the case of prosecution has failed. Therefore, on the revocation of suspension, he ought to have reinstated on the post from which he was suspended. He also stated that as the Annexure A1 order has been passed by the highest authority, viz., the Administrator, no alternative remedy is open to him.

14. Shri M.L. Verma, the learned counsel for the respondents, submitted that on the revocation of suspension the applicant was to be given a posting. No post was available at Delhi. The applicant had worked in Delhi for a very long time ~~before~~ and, therefore, he was posted to Calicut. In reply to our specific query he also pointed out that after the suspension of the applicant in 1987, the post of liaison officer was neither kept vacant nor got managed by giving it to some other member of the staff at Delhi as an additional charge. Instead, the post was regularly filled up by transferring officers from Lakshadweep or other places. As a matter of fact, there has so far been three changes in the incumbency of this post since the applicant's suspension. Therefore, to accommodate the applicant at Delhi, a transfer became inevitable and it was decided to post out the applicant as he has already served for a long time. He also submitted that Calicut was a place where the applicant could continue to get proper treatment for cancer. He denied the allegation of mala fide.

15. He strongly relied on the decisions of the Supreme Court in Gujarat Electricity Board's case (AIR 1989 SC 1433) and Mrs. Shilpi Bose's case (AIR 1991 SC 532) to contend that in matters of transfer it is not for courts to sit in judgement over administrative decisions, even if they resulted in hardship. Orders of transfer passed by

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competent authorities should prevail, unless assailed on grounds of mala fide or contravention of statutory rules. The Supreme Court has held that the proper course was for the employee to prefer a representation to the competent authority against the transfer. He, therefore, contended that the applicant should have joined at Calicut and then made a representation seeking proper redress.

16. We have carefully considered the rival contentions of the parties.

17. The learned counsel for the applicant urged that under Section 20 of the Administrative Tribunals Act, 1985, the aggrieved persons are only required to ordinarily exhaust the alternative remedies which are statutory or specified by departmental instructions. In respect of an order of transfer there is no such alternative remedy. Further, the impugned order has been passed by the Administrator and no appeal lies against it and for the same reason, no representation too lies against it. He, therefore, contends that the only alternative for him was to file this application.

18. This last plea would be appropriate if it is established that the Annexure A-1 order is really passed by the Administrator. It is not. It is passed by the Secretary (Administration) for the Administrator, perhaps, as a delegatee. The applicant has filed three documents all of which have been authenticated by the Administrator himself viz., Annexures A-2, A-3 and A-5 which are respectively the order of suspension, the memorandum of charges and the revocation of suspension. Therefore, the Annexure A1 order not being an order passed by the 'highest authority', a representation can be made, on the learned counsel's own reasoning.

19. The Annexure A1, order of transfer is not a statutory order. The question whether a statutory

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appeal/review lies is not relevant. May be, there is no departmental instruction that against any transfer order, a representation may be made. That does not prevent filing of a representation against a transfer order, irrespective of who has passed it. The representation, if filed, cannot also be refused to be considered on that ground.

20. Rule 20 provides that, ordinarily, alternative remedies should be exhausted. This is especially to be observed where there are provisions for such alternative remedies in the statute, rule or instructions. Where such remedy is not provided, a representation may, nevertheless, be filed, and if such a representation is filed, the alternative remedy would be deemed to be exhausted ordinarily only after the expiry of six months from the date of filing of the representation, if no reply is received within that date. But the question is whether, in such circumstances, the employee has to file a representation and exhaust the remedy.

21. An order of transfer comes into effect immediately, unless a future date is specifically indicated therein. Therefore, a government servant aggrieved by an order of transfer does not, normally, get an opportunity to make a representation and, therefore, he rushes to courts to seek relief. Further, there is no guarantee that, if a representation is made to the competent departmental authority, the order of transfer would be kept in abeyance, at least till the representation is disposed of.

22. Nevertheless, the representation has to be made because the position has now been made clear by various judgements of the Supreme Court which we shall now notice. The learned counsel for the respondents strongly relied on the observations made by the Supreme Court in paragraph 4 of its judgement in Mrs. Shilpi Bose's case (AIR 1991 SC

532) which is reproduced below:

"...We fail to appreciate the reasoning recorded by the High Court. If the competent authority issued transfer orders with a view to accommodate a public servant to avoid hardship, the same cannot and should not be interfered by the court merely because the transfer orders were passed on the request of the employee concerned. The respondents have continued to be posted at their respective places for the last several years, they have no vested right to remain posted at one place. Since they hold transferable posts they are liable to be transferred from one place to the other. The transfer orders had been issued by the competent authority which did not violate any mandatory rule, therefore, the High Court had no jurisdiction to interfere with the transfer orders.

In our opinion, the courts should not interfere with a transfer order which are made in public interest and for administrative reasons unless the transfer orders are made in violation of any mandatory statutory rule or on the ground of mala fide. A government servant holding a transferable post has no vested right to remain posted at one place or the other, he is liable to be transferred from one place to the other. Transfer orders issued by the competent authority do not violate any of his legal rights. Even if a transfer order is passed in violation of executive instructions or orders, the Court ordinarily should not interfere with the order instead affected party should approach the higher authorities in the Department. If the court continue to interfere with daytoday transfer orders issued by the Government and its subordinate authorities, there will be complete chaos in the Administration which would not be conducive to public interest. The High Court overlooked these aspects in interfering with the transfer orders".

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Similarly, in the Gujarat Electricity Board's case (AIR 1989 SC 1433) referred to by him, it is held as follows:

"...Transfer from one place to other is necessary in public interest and efficiency in the public administration. Whenever, a public servant is transferred he must comply with the order but if there be any genuine difficulty in proceeding on transfer it is open to him to make representation to the competent authority for stay, modification or cancellation of the transfer order. If the order of transfer is not stayed, modified or cancelled, the concerned public servant must carry out the order of transfer. In the absence of any stay of the transfer order, a public servant has no justification to avoid or evade the transfer order merely on the ground of having made a representation, or on the ground of his difficulty in moving from one place to the other. If he fails to proceed on transfer in compliance to the transfer order, he would expose himself to disciplinary action under the relevant Rules, as has happened in the instant case. The respondent lost his service as he refused to comply with the order of his transfer from one place to the other".

Thus, it is clear that where the order of transfer cannot be faulted, the Government servant has necessarily to comply with it or, at best, he can make a representation to the Department to have the same modified or cancelled.

The Supreme Court has observed earlier in the case of H.N. Kirtania (1989(4) SLR 9) that "Transfer of a public servant made on administrative grounds or in public interest should not be interfered with unless there are strong and pressing grounds rendering the transfer order illegal on the ground of violation of statutory rule or on the ground of mala fide".

In Rajendra Roy vs. U.O.I. & Anr. (JT 1992(6) SC 732), the Supreme Court observed as follows:

"..It is true that the order of transfer often causes a lot of difficulties and dislocation in the family set up of the concerned employees but on that score the order of transfer is not liable to be struck down. Unless such order is passed mala fide or in violation of the rules of service and guidelines for transfer without any proper justification, the Court and the Tribunal should not interfere with the order of transfer. In a transferable post an order of transfer is a normal consequence and personal difficulties are matters for consideration of the department. We are in agreement with the Central Administrative Tribunal that the appellant has not been able to lay any firm foundation to substantiate the case of malice or mala fide against the respondents in passing the impugned order of transfer. It does not appear to us that the appellant has been moved out just to get rid of him and the impugned order of transfer was passed mala fide by seizing an opportunity to transfer Shri Patra to Orissa from Calcutta. It may not be always possible to establish malice in fact in a straight cut manner. In an appropriate case, it is possible to draw reasonable inference of mala fide action from the pleadings and antecedent facts and circumstances. But, for such interference, there must be firm foundation of facts pleaded and established. Such inference cannot be drawn on the basis of insinuation and vague suggestions. In this case, we are unable to draw an inference of mala fide action in transferring the appellant from the facts pleaded before the Tribunal".

The learned counsel for the applicant has not drawn our attention to any pronouncement of the Appex Court.

It is abundantly clear from these decisions that Courts may interfere with a transfer order if mala fide or contravention of statutory rules is established. Action can also be taken if it is proved that it is neither in administrative or public interest but is to serve a collateral purpose. In most cases, the applicant should seek relief from the departmental authorities by filing a representation.

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23. Keeping in view these observations, we have considered the circumstances in which the transfer has been effected. The learned counsel for the applicant forcibly argued that mala fide in law is involved even if personal mala fide is absent, because the transfer has been made without first passing a proper order concluding the disciplinary proceedings in his favour and giving him all the arrears of salary due in respect of the period of suspension without considering the fact that the applicant is a cancer patient. He, therefore, contends that the order is liable to be set aside.

24. We are unable to agree with him. The facts of the case presented in the application are not sufficient for this purpose. It is not the applicant's case that there is a vacancy at Delhi and yet he is being transferred to Calicut to cause him harm. The post held by the applicant before suspension could not, obviously, have been left vacant for all these years. It has been filled up by regular transfer. Therefore, it could as well be that the respondents were faced with a genuine question as to where the applicant was to be posted on the revocation of the suspension. It could as well be that he was transferred because of his long stay at Delhi. It is quite possible that the respondents had not considered the other aspects relating to the transfer which have been highlighted in the application^{and}/by the arguments of the learned counsel.

25. We are, therefore, of the view that this is a fit case where the applicant ought to first file a proper representation to the Administrator, the first respondent, seeking the relief for which he has approached us. In the circumstances, we are satisfied that this O.A. can be disposed of finally by issuing suitable directions, without going into the merits of the application.

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26. Before we do so, we have to advert to the interim reliefs prayed for. The prayers regarding final orders in the disciplinary proceedings and pay and allowances for the period of suspension do not strictly arise out of the Original Application which seeks to quash the Annexure A1 order of transfer to Calicut. Therefore, we do not propose to issue any directions. That apart, it is open to the applicant to raise these matters in his representation. We only record here that the learned counsel for the respondents submitted, under instructions, that final orders in the disciplinary proceedings will be issued shortly. We also expect that the final orders regarding the manner in which the period of suspension should be regularised and the emoluments to which the applicant is entitled for the above period would also be passed expeditiously in accordance with law.

27. For the aforesaid reasons, we dispose of this application/ ^{at the admission stage} without going into its merits, with the following directions:

(i) The applicant shall send, a detailed representation to/ ^{the Administrator,} the first respondent, within a period of fifteen days from the date of this order setting out all the grounds on the basis of which he claims relief in respect of the impugned Annexure A-1 order of transfer and ancillary reliefs, if any.

(ii) In case such a representation is received, the first respondent shall consider it on merits and dispose it of, in accordance with law, under intimation to the applicant.

(iii) Pending such disposal, the impugned Annexure A-1 order shall remain in abeyance and it will abide by the final order that may be passed by the first

respondent on the representation.

(iv) In case the first respondent decides that the impugned Annexure A-1 order does not require any modification and it is to be enforced against the applicant, the said final order shall remain in abeyance for a period of fourteen days so as to enable the applicant, if so advised, to approach the Tribunal for relief against such final order.

28. The application is disposed of as above.
There will be no order as to costs.

B.S. Hegde
23/3/93
(B.S. HEGDE)
MEMBER (J).

N.V. Krishnn
23.3.93
(N.V. KRISHNN)
VICE CHAIRMAN (A)