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PRESERVED

CENTRAL ADMINISTRATIVE TRIBUNAL
ALLAHABAD BENCH
ALLAHABAD

Dated: THIS THE 18 DAY OF ~~AUGUST~~^{Sep}, 2005.

Original Application No. 858 of 2005.

HON. MR. K. B. S. RAJAN, MEMBER (J)

Vijay Shankar Sah, resident of Pilibhit By-pass Road, Post Office Rohilla Khand University, Bareilly-243006.

... Applicant

(By Adv: Shri Shyamal Narain)

V E R S U S

1. Union of India through the Secretary Ministry of Human Resources Development, Department of Education, Government of India, New Delhi.
2. The Navodaya Vidyalaya Samiti (An Autonomous Organisation of Ministry of Human Resources Development, Department of Education, Govt. of India, New Delhi) through the Commissioner, A-28, Kailash Colony, New Delhi.
3. The Deputy Commissioner, Navodaya Vidyalaya Samiti, Lucknow Region, Lekhraj Panna, 3rd floor, Sector-2, Vikas Nagar, Lucknow-U.P.
4. Dr. Mrs. Sudha Sharma, Deputy Commissioner, Navodaya Vidyalaya Samiti, Regional office, Lekhraj Panna, 3rd Floor, Sector-2, Vikas Nagar, Lucknow-U.P.
5. The Principal/Principal Incharge, Jawahar Navodaya Vidyalaya, Hathora Buzurg, Shahjahanpur, U.P.

.....Respondents

(By Adv: Shri N.P. Singh)

O R D E R

The applicant, having come out victorious in challenging one transfer order issued by the Respondents has now been back again agitating

against another transfer order. In the earlier OA No. 380/03, wherein the applicant had challenged his transfer from Shahjehanpur to Shillong, this Tribunal had quashed and set aside the order of transfer vide order dated 04-03-2005. The logical sequence of the aforesaid order of the Tribunal was the withdrawal of the earlier transfer order, vide order dated 13-06-2005 issued by the Headquarters of the Navodaya Vidyalaya Samit. But, even before the ink of the signature dried, the respondents have now slapped the applicant with another transfer order, this time, of course not to a far off place, but comparatively to a nearby place, i.e. Siddharth Nagar U.P. Malafide and arbitrariness are the spinal grounds alleged by the applicant in this O.A.

2. A vignette of the facts of the case giving a bird eye view of the background of the case being felt essential at this stage, the same is given in a tabular form as hereunder:-

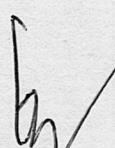
Date	Event
18-11-1997	Applicant was appointed at J.N.V., Mirzapur as Trained graduate teacher (Maths)
25-03-2000	On account of ill-health of his parents, the applicant moved a request, in prescribed format, seeking transfer to either Bareilly or Pilibhit or Shahjahanpur.
05-07-2000	Order of transfer passed transferring the applicant, on request, to J.N.V., Shahjahanpur
06.11.2002	Applicant was temporarily attached to J.N.V., Bahraich.
16.11.2002	Applicant complied with the aforesaid order of temporary attachment and joined at J.N.V., Bahraich.
25.01.-2003	Applicant was again temporarily attached to J.N.V., Pilibhit vide an order dated 25.1.2003.

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31.03.- 2003	Applicant was re-posted to Shahjahanpur vide an order of even date.
05-04-2003	Applicant was served with a transfer/relieving order dated 4.4.2003 stating that he had been transferred to an undisclosed J.N.V in Shillong Region.
10-04-2003	Applicant filed O.A.No.380/03 challenging his transfer to Shillong Region.
17.04-2003	Applicant's transfer to Shillong was stayed by the Tribunal.
10. 01- 2004	A Charge memo was issued to the applicant containing three Articles of charges.
16.12.2004	Applicant was suspended pending the ongoing inquiry proceedings.
04.03.2005	Applicant's O.A. No.380/03, filed against his transfer to Shillong, was allowed by this tribunal holding that his transfer was punitive and malafide.
13.06.2005	An order was issued, stating that in compliance of the tribunal's judgment and order dated 4.3.2005, the applicant's transfer order dated 31.3.2005, transferring him to Shillong, had been withdrawn.
21-07-2005	The applicant was given a copy of the transfer order dated 20.6.2005 (impugned in the present O.A.) wherein it was stated that the suspension order dated 16.12.2004 was being withdrawn and upon revocation of suspension, he was being posted at J.N.V., Siddharth Nagar.

3. The applicant has challenged the above transfer
order dated 20-06-2005, purportedly received - nay,
served upon him only on 21st July, 2005.

4. An overdose of pleadings (both necessary and
redundant in character) has been brought on records,
by both the parties in their respective pans of the
balance i.e. in the OA, followed by counter and the
retort to the counter. Reason for such a bulky
volume of the application, given by the counsel for
the applicant at the time of hearing was that this
case requires a broad background of the case so as
to hammer home his point of malice in law and the



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victimization of the applicant on the sole ground that he has approached the Hon'ble Tribunal for justice. As said Lord Denning in *Jones v. National Coal Board*(1957) 2 QB 55, 64: (1957) 2 All ER 155: (1957) 2 WLR 760 (CA) - "let the advocates one after the other put the weights into the scales - the 'nicely calculated less or more' - but the judge at the end decides which way the balance tilts, be it ever so slightly. This is so in every case and every situation."

5. The spinal issue is the transfer which has been fastened with the order of revocation of suspension of the applicant and as per the counsel for the applicant the seminal catalyst of this indecent and hasty transfer is his recent victory in the earlier O.A. filed against the transfer to Shillong. Hence, he had given the entire background of the case, by referring to the interim order dated 17-04-2003 as well as the final order dated 04-03-2005 and the following observations/findings therein have been specifically pressed into service:-

(a) Order dated 17-04-2003 : "The respondents have not been able to convince me that the impugned relieving order dated 4-4-2003 is not a punitive order."

(b) Order dated 04-03-2005: (i) "He" (the counsel for the applicant) "could demonstrate that it was because of his fault finding attitude and uncompromising attitude and for this reasons, he was temporarily attached either to Bahraich or Pilibhit. He could demonstrate that his temporary attachment was in way of a punishment and not on administrative ground."

(ii) I have no doubt in my mind that though the officers have not been impleaded by name the

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allegation of malafides or biased attitude can be gathered in the facts from the pleadings. In view of this, the preliminary objections on this count is negatived."

(iii)thus the claim of the respondents that his intra-region transfer are need-based are not corroborated and I find that the transfer is punitive in nature. Next contention of the applicant is his transfer to Shillong Region is equally punitive and is vitiated by malafide intention of the respondents. I am inclined to agree with the contention of the counsel for the applicant. If one has regards to the number of transfers whether it is intra-region or is inter-region, one is bound to conclude that the applicant is made to suffer the pain of many transfers in a short spell of within three years. Attending circumstances regarding his transfer to Shillong Region which does not even specify the school to which he is posted reflects the malafide intention on the part of the respondents. It is more so when it is viewed in the context of his first transfer from Mirzapur to Shahjanpur at his own request on the ground of illness of his parents.

(iv) In view of the decisions mentioned above, and the proposition of law laid down by the Apex Court I have no doubt that the fact situation of the case in hand would definitely lead to reasonable inference of malafide intention on the part of the respondents.

6. The counsel for the applicant submitted that the sting with which the respondents had acted in passing the earlier transfer orders has been again utilized in the present transfer order and this time, with much more venom of vengeance just because the applicant has come out victorious in his earlier O.A. He had made attempts to demonstrate that in the counter some of the averments/statements/submissions are in the nature of disregarding the finding of the Tribunal which is contumacious. He had submitted that the timing of certain actions taken by the respondents, such as



issue of the first charge sheet, putting the applicant under suspension, current transfer order and issue of second charge sheet would demonstrate that they have become intolerant over the quashing and setting aside of the earlier transfer order and thus, malafide is writ large on the very face of the impugned order. To substantiate the act of malafide, the applicant has also submitted that despite his clear information to the respondents about his residential address during the summer vacation, the respondents had chosen to remit the subsistence allowance to Shahjehanpur with a view to ensuring that the applicant did not get the same at the appropriate time; Same is the case with reference to the issue of the impugned order at the very same address of the sender when the institution was undergoing vacation and to the knowledge of the respondents the applicant was not available there. Non payment of subsistence allowance has also been raised as a ground to prove malafide.

7. The respondents have contested the O.A. At the very outset, the counsel for the respondents had raised the preliminary objection of jurisdiction. According to the learned counsel for the respondents, the applicant's place of posting during the period of suspension was Lucknow and the impugned order also emanated at Lucknow and as such, it is the Lucknow Bench that has jurisdiction and Allahabad Bench does not enjoy the jurisdiction to

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try this case. Secondly, the counsel for the respondents submitted that the applicant has not exhausted his departmental remedy and as such provisions of Sec. 20 of the A.T. Act, 1985 have not been complied with.

8. First a decision over the preliminary objections. True, the place of posting of the applicant during the period of suspension was Lucknow and that the order too sped from Lucknow; but according to the counsel for the applicant, the finer aspect lies in the fact that once the suspension order is revoked, his place of posting springs back to its original position i.e. Shahjehanpur and it is Allahabad which has the jurisdiction. As the applicant has been working in Shahjehanpur, as per Rule 6 of the CAT (Procedure) Rules, 1987, the territorial jurisdiction is dictated by the place of work and Allahabad is the appropriate Bench, argued the learned counsel for the applicant. I find sufficient merit in the submission made by the counsel for the applicant. The OA has been filed after the revocation of suspension. The applicant had been attached to Lucknow Region during the currency of suspension and the moment suspension is revoked, the said attachment to Lucknow Regional office ceases and the applicant is back again to Shahjehanpur and there is no need to pass a separate order in this regard. Thus, question of territorial jurisdiction is

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decided in favour of the applicant. As regards exhaustion of departmental remedy, Section 20 is not inflexible inasmuch as it provides that normally statutory remedies should be exhausted. There are a number of decisions holding that non exhaustion of departmental remedies cannot non-suit an applicant, as the case has to be viewed depending upon the situation and urgency in each case. In the instant case, the sequence of events is such that applicant's moving the Tribunal without availing of the departmental remedies is fully justified.

9. The counsel for the respondents has vehemently argued that the order of transfer has been issued by the competent authority and as such the same cannot be questioned. Further, there can be no malafide that could be attached to the Dy. Commissioner; it has also been argued that there having been serious complaints against the petitioner when he was serving in Shahjehanpur, it was a decision taken on administrative ground not to retain the applicant at Shahjehanpur and hence the applicant has been transferred. It has also been argued that charge sheet has been issued against the applicant.

10. Arguments have been heard and the documents perused. Though the counsel for the applicant, during the course of arguments insisted upon the fact of non payment of subsistence allowance and the same was denied by the respondents, as this case is

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one against transfer, the issue relating to subsistence allowance is not considered at all. At best, if the contention of the applicant is true, the same may be an additional points adduced by the counsel for the applicant in support of the ground of malafide. Nothing less; nothing else.

11. As regards the competence of the authority to issue transfer order, there is no dispute and as such, the challenge is not over the competence of the authority which passed the transfer order but only the bonafide in the exercise of power in issuing the order of transfer.

12. As regards the contention that there can be no malafide that could be alleged against the Dy. Commissioner, the counsel for the applicant has rightly argued that malice in law is the spine of the case. It is the abuse of the power of the authority that had been tested for its legal validity. In this connection, reference to the decision of the Apex Court in the case of *State of Punjab v. Gurdial Singh, (1980) 2 SCC 471*, wherein it has been observed:

6. *The question, then, is what is mala fides in the jurisprudence of power? Legal malice is gibberish unless juristic clarity keeps it separate from the popular concept of personal vice. Pithily put, bad faith which invalidates the exercise of power — sometimes called colourable exercise or fraud on power and oftentimes overlaps motives, passions and satisfactions — is the attainment of ends beyond the sanctioned purposes of power by simulation or pretension of gaining a legitimate goal. If the use of the power is for the fulfilment of a legitimate object the actuation or catalysation by malice is not legicidal. The action is bad where the true object is to reach an end different from*

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the one for which the power is entrusted, goaded by extraneous considerations, good or bad, but irrelevant to the entrustment. When the custodian of power is influenced in its exercise by considerations outside those for promotion of which the power is vested the court calls it a colourable exercise and is undeceived by illusion. In a broad, blurred sense, Benjamin Disraeli was not off the mark even in law when he stated: "I repeat . . . that all power is a trust — that we are accountable for its exercise — that, from the people, and for the people, all springs, and all must exist". Fraud on power voids the order if it is not exercised bona fide for the end designed. Fraud in this context is not equal to moral turpitude and embraces all cases in which the action impugned is to effect some object which is beyond the purpose and intent of the power, whether this be malice-laden or even benign. If the purpose is corrupt the resultant act is bad. If considerations, foreign to the scope of the power or extraneous to the statute, enter the verdict or impel the action, mala fides or fraud on power vitiates the acquisition or other official act.

13. The earlier order of this Tribunal clearly manifested that the respondent's act in attaching the applicant at two places in quick succession and their posting the applicant at Shillong have all smacked malafide. The counsel for the applicant rightly pointed out certain portions in the counter to demonstrate that the observations of the Tribunal made in the earlier order are unpalatable to the respondents. And, in so far as the transfer to Siddharth Nagar is concerned, there has been no justifiable ground that could be surfaced from the pleadings or the arguments.

14. In fact, the reason given by the respondents that there have been serious complaints and hence the applicant has been transferred apart from the issue of charge sheet,



is sufficient to hold that the transfer order is punitive. It is settled law that when a transfer order is punitive, the same cannot stand judicial scrutiny. In the case of *State of U.P. v. Siya Ram*, (2004) 7 SCC 405, at page 407 wherein the applicant had contended that the transfer order is punitive which has been accepted by the High Court, the Apex Court has held, "*It has to be noted that the High Court proceeded on the basis as if the transfer was connected with the departmental proceedings. There was not an iota of material to arrive at the conclusion. No mala fides could be attributed as the order was purely on administrative grounds and in public interest*". In the instant case there is a clear admission by the respondents that the reason for transfer is the complaint and the charge sheet already issued against the applicant. On this ground itself, the transfer order is liable to be set aside.

15. The counsel for the respondents has relied upon the following decisions:-

- (a) (1993) 4 SCC 357 : 1994 SCC (L&S) 230 : (1993) 25 ATC 844 : AIR 1993 SC 2444 Union of India and Others Vs. S.L. Abbas.
- (b) Commissioner, K.V.S. vs Anasuya Pathak, CA No. 6459/2002 decided on 30-09-2002
- (c) *Kendriya Vidyalaya Sangathan v. Damodar Prasad Pandey*, (2004) 12 SCC 299, at page 300 :

In the case of S.L. Abbas, the Apex Court has held as under:-

"7. Who should be transferred where, is a matter for the appropriate authority to decide. Unless the order of transfer is vitiated by mala fides or is made in violation of any statutory provisions, the court cannot interfere with it. While ordering the transfer, there is no doubt,

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the authority must keep in mind the guidelines issued by the Government on the subject. Similarly if a person makes any representation with respect to his transfer, the appropriate authority must consider the same having regard to the exigencies of administration. The guidelines say that as far as possible, husband and wife must be posted at the same place. The said guideline however does not confer upon the Government employee a legally enforceable right."

In the case of Damodar Pandey, the Apex Court has held as under:-

3. Respondent 1, while working as a teacher in Sanskrit in Kendriya Vidyalaya Sangathan, (AOC) Jabalpur, M.P. questioned his transfer to J&K. Smt Sushila Pandey, Respondent 5 in the present appeal was transferred to Jabalpur in place of Respondent 1. Respondent 1 filed original application before the Central Administrative Tribunal, Jabalpur (in short "Tribunal"). The transfer order was mainly assailed on the ground of alleged mala fides and to be a punitive transfer issued in colourable exercise of power. The Tribunal noticed that the allegations of mala fides were not established and the transfer was not vitiated on any score. Plea of the present Respondent 1 that he and wife should be posted at same place was also held to be not acceptable. It was observed that the situation where the husband and the wife can be kept together would always depend upon the availability of vacancies and administrative exigencies. It was noted that present Respondent 1 and his wife had worked together for nearly 17 years at a particular place. It was noticed that Respondent 5 had worked in J&K for about 15 years and she was being given a posting to come back to M.P. i.e. to her original place of posting. The original application was dismissed. The order of dismissal was challenged before the High Court of M.P. at Jabalpur. The High Court noted that there was no reason to disturb the transfer of the 5th respondent and also held that there was no illegality in the order of transfer so far as Respondent 1 is concerned. After having come to such a conclusion, the High Court gave a direction that present Respondent 1 shall be given a posting in the State of M.P. It is this part of the direction given by the High Court which is assailed by the appellant Kendriya Vidyalaya Sangathan. There is no appearance on behalf of the respondent. There was an interim order of stay passed by this Court on 19-3-2004 so far as the order of the High Court is concerned.

4. Transfer which is an incidence of service is not to be interfered with by courts unless it is shown to be clearly arbitrary or visited by mala fide or infraction of any prescribed norms of principles governing the transfer (see Abani Kanta Ray v. State of Orissa¹. Unless the order of transfer is visited by mala fide or is made in violation of operative guidelines, the court cannot interfere with it (see Union of India v. S.L. Abbas²). Who should be transferred and posted where is a matter for the administrative authority to decide. Unless the order of transfer is vitiated by mala fides or is made in violation of any operative guidelines or



rules the courts should not ordinarily interfere with it. In *Union of India v. Janardhan Debanath*³ it was observed as follows: (SCC p. 250, para 9)

"No government servant or employee of a public undertaking has any legal right to be posted forever at any one particular place or place of his choice since transfer of a particular employee appointed to the class or category of transferable posts from one place to another is not only an incident, but a condition of service, necessary too in public interest and efficiency in the public administration. Unless an order of transfer is shown to be an outcome of *mala fide* exercise or stated to be in violation of statutory provisions prohibiting any such transfer, the courts or the tribunals normally cannot interfere with such orders as a matter of routine, as though they were the appellate authorities substituting their own decision for that of the employer/management, as against such orders passed in the interest of administrative exigencies of the service concerned. This position was highlighted by this Court in *National Hydroelectric Power Corpn. Ltd. v. Shri Bhagwan*⁴."

5. In the present case, the Tribunal categorically came to hold that *mala fides* were not involved and the High Court did not disturb that finding. That being so, the High Court's further direction that Respondent 1 shall be posted somewhere in M.P. is clearly not sustainable. No reason has been indicated to justify the direction. That part of the order of the High Court is vacated. Appeal is allowed to the aforesaid extent. No costs.

16. The decision in the case of *Anasuya Pathak* was based upon the fact that the respondent therein had been transferred for the first time after 16 years and as such, the transfer order cannot be interfered with.

17. The above cases are nowhere near the facts of the present case. Here is a case, where the authorities acted in quick succession in transferring the applicant to various places, which had been held by the Tribunal as totally illegal. The authorities who had issued the charge sheet should have waited for the completion of the proceedings and their own admission is that due to serious complaints the applicant has been transferred. This amounts pre-deciding the issue of complaints and the transfer cannot but be held to be punitive. Again, telescoping the ratio professed by the

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Apex Court in the case of Gurdial Singh upon the case of the applicant, and in particular on the background as contained in the earlier order of this Tribunal dated 4-3-2005 in OA 380/03, the act of victimization by the respondent upon the applicant is naked and apparent and the transfer order, therefore, is legally unsustainable.

18. In the result, the O.A. succeeds. The order dated 20-06-2005 in so far as it relates to transfer of the applicant to Siddharth Nagar is hereby quashed and set aside. The respondents are directed to allow the applicant to perform his duties at Shahjehanpur. His transfer in future should be strictly as per the guidelines on transfer as is applicable to other employees.

19. Under the above circumstances, there would be no order as to costs.


MEMBER-J

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