

8

CENTRAL ADMINISTRATIVE TRIBUNAL,
CUTTACK BENCH, CUTTACK

4

ORIGINAL APPLICATION NO. 510 OF 1999
Cuttack this the 18th day of February, 2000

Jagannath Mohapatra

Applicant(s)

-Versus-

Union of India & Others

Respondent(s)

(FOR INSTRUCTIONS)

1. Whether it be referred to reporters or not ? Yes.
2. Whether it be circulated to all the Benches of the Central Administrative Tribunal or not ? NO.

Somnath Som
(SOMNATH SOM)
VICE-CHAIRMAN
18.2.2000

9
CENTRAL ADMINISTRATIVE TRIBUNAL,
CUTTACK BENCH, CUTTACK

ORIGINAL APPLICATION NO. 510 OF 1999
Cuttack this the 18th day of February, 2000

CORAM:

THE HON'BLE SHRI SOMNATH SOM, VICE-CHAIRMAN

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Jagannath Mohapatra
aged about 40 years
S/o. Gopinath Mohapatra,
Divisional Accounts Officer
(D.A.O.) Grade - T) - at present
residing at Baseli Sahi (Aleilana)
PO/Dist/Town: Puri

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Applicant

By the Advocates : M/s.G.A.R.Dora
J.K.Lenka
G.Rani Dora
S.P.Mishra

-Versus-

1. Union of India represented
through the Comptroller and
Auditor General of India
10-Bahadur Saha Zafar Marg
NEW DELHI - 10001
2. Principal Accountant General
(A AND E) Orissa, Bhubaneswar
Dist: Khurda
3. Dy.Accountant General(Works Account)
Office of the Principal Accountant General
(A AND E), Orissa, Puri Branch
At/Po/Dist: Puri

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Respondents

By the Advocates : Mr.A.K.Bose
Sr.Standing Counsel
(Central)

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ORDER

MR. SOMNATH SON, VICE-CHAIRMAN: In this application under Section 19 of the Administrative Tribunals Act, 1985, the applicant has prayed for setting aside the transfer order at Annexure-A/2 and for direction to Res.2 and 3 to allow him to continue in his previous post by setting aside the relieve order. The third prayer is for direction to respondents to post the applicant to any of the Division mentioned in Para-4(VII) of the Original Application as Divisional Accounts Officer, Gr.I.

2. The case of the applicant is that he joined in 1982 as Divisional Accountant and was promoted to the post of Divisional Accounts Officer, Gr.II in the scale of Rs.5550-9000/- on 21.12.1990. The post of Divisional Accounts Officer, Gr.II is borne in Group C non-Gazetted service. In order dated 22.9.1998(Annexure-A/1) the applicant was promoted to the post of Divisional Accounts Officer, Gr.I in the scale of Rs.6500-10,500/- with effect from 1.10.1997. The post of Divisional Accounts Officer, Gr.I is classified as Group B Gazetted post. The applicant has stated that according to Para-14.09 of the W.A.D. Manual dealing with transfer of Divisional Accountants it is provided that Divisional Accountant should not be kept for a longer period than three years in any particular Division and if for any special reason, a change cannot be made, this should be brought to notice of the Senior Deputy Accountant General(Works) for orders so that the Divisional Accountant may be transferred as soon as possible. It is also provided that frequent transfers should be avoided as it is not conducive to efficiency or economy. It is submitted that the applicant was transferred and posted to National Highway Division,

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11 Berhampur on 31.7.1997. He has not completed the normal tenure of three years. Yet in order dated 16.7.1999(Annexure-A/2) he has been transferred to Rural Water Supply and Sanitation Division, Nowrangpur while eight other Divisional Accounts Officer, Gr.I, whose names have been mentioned by the applicant are continuing in different Divisions even though they have completed three years in the concerned Divisions. The applicant has stated that he was posted thrice to undivided Koraput District in agency areas. Besides he was also posted to Baudh, Phulbani and Paralakhemundi, which are agency areas. It is submitted that applicant's wife is suffering from chronic illness and is under medical treatment from 1989 and his old sickly parents are bed ridden. The applicant has been relieved in order dated 7.8.1999(Annexure-A/3) and he is on leave since then. Government of Orissa in Rural Development Department in their Order dated 18.6.1999 vide Annexure-A/4 has sanctioned one temporary post of Divisional Accounts Officer for Rural Water Supply and Sanitation Division, Nowrangpur in the scale of Rs.5550-9000/- with effect from the date the post is actually filled up. The applicant has stated that he is currently in the higher scale of Rs.6500 - 10, 500/-. He is prepared to go on posting to any P.W.Division like Kurda, Cuttack, Puri, Bhubaneswar and Dhenkanal. In the context of the above facts he has come up in this petition with the prayers referred to earlier.

3. Respondents in their counter have stated that the applicant has been posted at Nowrangpur which is not an agency area. They have also stated that in accordance

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with decision of Hon'ble Supreme Court, Courts cannot interfere in the matter of transfer if there is no malice in the order of transfer. The applicant has nowhere mentioned anything about malice. Respondents have stated that the applicant has pleaded illness of his wife and old ailing parents. As transfer is an incident of service no personal inconvenience will stand in the way of transferred employee. As regards instructions of W.A.D. Manual quoted by the applicant, it has been stated that the said Manual was in use prior to 1984 before bifurcation of Audit and Accounts functions of Comptroller and Auditor General of India. After 1984 a separate Manual is under compilation and transfer and posting of Divisional Accountant cadre is being governed by confidential circular issued by the Comptroller and Auditor General of India as per detailed guidelines issued by the Principal Accountant General every year. Respondents have indicated various postings of the applicant from 1984 onwards and have stated that applicant has never completed three years in any place before his transfer to a new station. In case of all earlier transfers the applicant has never urged any objection on the ground that before completion of three years he has been transferred. Transfer and posting of Divisional Accounts Officer are taken up each year in the months of June and July, but individual's turn for transfer comes ordinarily once in three years. Divisional Accounts Officer is posted to a Division according to his grade and the grade of the Division. The grade of the Division is worked out every year in accordance with the circular issued by the Comptroller and Auditor General

from time to time. As per the latest circular effective from 1999, the grade of a Division once determined will normally be fixed for three years. Accordingly gradation of National Highway Division, Berhampur as well as R.W.S.S. Division, Nowrangpur has been done and the applicant has been transferred to upgraded R.W.S.S. Division, Nowrangpur on 17.7.1999. Respondents have stated that all the aforesaid postings of the applicant were according to gradation of the Divisions and his eligibility. Therefore, there is no illegality or arbitrariness in the action of the Respondents in transferring the applicant. The allegation that some persons have been retained for more than three years in a particular place cannot be a ground for retention of the applicant at Berhampur. Respondents have relied on the decision of the Tribunal in Original Application 540/95 (J.R.Pati vs. Union of India) wherein the Tribunal held that simply because others were retained for more than 10 years, the applicant cannot claim that he should also be retained along with them. It is further stated that Hon'ble Supreme Court have held that transfer is an incident of service and employee has no right for posting in a particular place. Respondents have further stated that letter of Rural Development Department vide Annexure-A/A has no bearing on the transfer of the applicant as the Division was upgraded in July, 1999 and the applicant's status is taken care of while posting him to R.W.S.S. Division, Nowrangpur. It is also submitted that since the transfer of the applicant has a link in a chain transfer, his choice of place cannot be accepted. Respondents have further stated that submission of the applicant in Para-5 of the Original Application that

transfer order dated 16.7.1999 is illegal because of Model Code of Conduct came into force with effect from 11.7.1999 and the prior approval of Chief Election Commissioner has not been obtained is without any merit because the transfer order was operated with the knowledge of the Election Commissioner of the State. They have also stated that the representation filed by the applicant vide Annexure-A/5 has been held to be without any merit and the same was not accepted. On the above grounds respondents have opposed the prayer of the applicant.

3. In his rejoinder the applicant has stated that frequent transfers are violative of Para.14.09 of W.A.D.Manual and is also mala fide. Applicant was transferred and posted at National Highway Division, Berhampur on 31.7.1997 and before completion of three years and only on completion of two years he has been transferred to Nowrangpur Division. He has stated that besides the difficulty of his wife and parents, his daughter is studying in Govt.Girls High School, Puri and it is difficult on his part to shift her during the mid academic session. It is also stated that as the post of Divisional Accounts Officer has been created by the State Government in order at Annexure-A/4, it is the ^{power} ~~duty~~ of the State Government to upgrade the post and as a matter of fact no such upgradation has actually been done. Accountant General has no power to upgrade the post. It is also stated that the post was created only on 18.6.1999 and from that date the post has not been filled up as nobody has joined there, and therefore, this could not have been upgraded within one month in the month of July, 1999. He has also stated that as he is being posted

to a post carrying lesser scale of pay, the Executive Engineer may deny payment of salary in his regular scale as per provisions of Orissa Treasury Code. Lastly it is stated that the entire counter should be ignored as the verificant is not competent to sign the counter as he has not been duly authorised by Res. 1 and 2. On the above grounds the applicant has reiterated his prayer in the rejoinder.

5. I have heard Shri G.A.R.Dora, learned counsel for the petitioner and Shri A.K.Bose, learned Sr.Standing Counsel appearing for the respondents and perused the records.

6. The first point made by the learned counsel for the petitioner is that entire counter should be ignored as the verificant, who is the Deputy Accountant General(Works Accounts) has not mentioned that he has been duly aughorised by Res.1 and 2 to verify the counter on their behalf. It is also stated that transfer order has been passed by the Principal Accountant General(Res.2) as the applicant is a Gazetted Officer and Res.3 has only communicated the order. I have considered the above submissions carefully. The fact that the verificant has not mentioned while verifying the counter that he has been duly authorised by other two respondents to verify the counter on their behalf is merely a technical irregularity if at all. In any case, verificant D.A.G.(Works Accounts), Puri, who is Res.3 is not a stranger to the Original Application. In consideration of this, prayer of the applicant to ignore the counter completely is held to be without any merit and the same is rejected.

14
7. The second point urged by the learned counsel for the petitioner is that the transfer order has been issued out of malafide and on that ground it should be set aside. It has to be noted in this connection that plea of malafide has not been pleaded in the Original Application. This plea has been raised for the first time in the rejoinder after the respondents have pointed out in their counter that applicant has not urged that the transfer order has been issued out of malice. In any case, it is well settled that if mala fide is alleged, the person against whom allegation of malafide is brought has to be arraigned as Opposite Party by name. This not having been done, ²⁰ the plea of malafide cannot be entertained. ^{1 Jdm} The next contention of the learned counsel for the applicant is that he has been transferred even before completion of two years at National Highway, Division, Berhampur. Even going by the instruction as quoted by the petitioner in his Original Application it merely says that the Divisional Accountants should not be kept in a Division for a period longer than three years. ^{Jdm} It is does not provide that before completion of three years an officer should not be transferred. The respondents in their counter have stated that normally a person is transferred only after three years. As it appears from the pleadings there is no specific rule to this effect and therefore, it cannot be said that transfer of an officer before completion of three years in a particular Division, per se is illegal. It is also to be noted that in the past the applicant has been transferred on several occasions even before completion of two years in a Division. This contention of the learned counsel for

the applicant is, therefore, held to be without any merit.

4. Next contention of the learned counsel for the petitioner is that several other persons in the rank of Divisional Accounts Officer, Gr.I, like the applicant are continuing in different Divisions as mentioned by the applicant even after completion of three years. This cannot be a ground for challenging the transfer order of the applicant, because, as earlier noted, rules relied upon by the applicant himself do provide for retention of a person beyond the period of three years and the applicant cannot quote the example of those persons to claim that he should be retained in National Highway Division, Berhampur till he completes three years. The next contention of the learned counsel for the petitioner is that transfer order has been issued on 16.7.1999 and the Model Code of Conduct, because of Lok Sabha Elections came into force with effect from 11.7.1999 and therefore, order of transfer could have been issued only with the prior approval of Chief Election Commissioner. Respondents have stated that transfer order has been operated with the knowledge of the Chief Election Commissioner of the State. It has been submitted by the learned counsel for the petitioner that there is no Chief Election Commissioner in the State and there is only one Officer designated as Chief Electoral Officer and therefore, this contention of the respondents should be ignored. It is a fact that the Chief Electoral Officer of the State works directly under the Election Commissioner of India and therefore, if the transfer order has been issued with the knowledge of the Chief Electoral Officer

18
of the State then the transfer order cannot be challenged on this ground. The fact that the respondents have not mentioned Election Commissioner of the State would not invalide the stand taken by them in this regard. This contention of the learned counsel is, therefore, held to be without any merit and the same is rejected.

9. Last contention of the learned counsel for the petitioner is that post of Divisional Accounts Officer in R.W.S.S. Division, Nowrangpur carries the scale of Rs.5500-9000/- and the applicant is already in the scale of Rs.6500 - 10, 500/- from 1.10.1997. Therefore, he could not have been posted against a post carrying lesser scale of pay. Respondents in their counter have taken the stand that R.W.S.S. Division, Nowrangpur has been upgraded in July, 1999 and the applicant has been rightly posted to that Division. Respondents in their counter have not made any specific averment about the scale of pay of the post of Divisional Accounts Officer, R.W.S.S. Division, Nowrangpur. Applicant has enclosed a sanction order of the Rural Development Department of the State Government sanctioning the said post from the date it is filled up in the scale of Rs.5550-9000/-. This post having been sanctioned by the State Government obviously can be upgraded to a higher scale only by the State Government. There has not been any averment by the respondents that the State Government have upgraded the post and obviously the Principal Accountant General cannot upgrade the post. In the above context it is difficult to accept the contention of the respondents that as the applicant has been transferred in his existing grade of Divisional Accounts Officer, Gr.I he can be posted to R.W.S.S.

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Divisions, Nowrangpur which has been upgraded. Divisions are upgraded taking into account the quantum of work at hand in that Division and various other factors and the contention of the respondents that R.W.S.S. Division, Nowrangpur has been upgraded from July, 1999 must be accepted. But that does not answer the point made by the applicant that post of Divisional Accounts Officer there carries the scale of Rs.5550-9000/- and the applicant being in the scale of Rs.6500 - 10, 500/- cannot be posted against that post. The apprehension of the applicant is that if he is posted against a post carrying lesser scale of pay, then he may have difficulty in getting his salary in the scale of Rs.6500 - 10, 500/-. It may be that the present pay which the applicant was getting during his tenure at National Highway, Berhampur comes within the scale of Rs.5550-9000/-. But that would not justify the posting of the applicant who is enjoying the pay scale of Rs.6550 - 10, 500/- against a post carrying scale of Rs.5550-9000/-. In this view of the matter order of transfer vide Annexure-A/2 is quashed to the extent of posting of the applicant in R.W.S.S. Division, Nowrangpur. The second prayer of the applicant is for allowing him to continue in National Highway, Berhampur. It is to be noted in this connection that the applicant has been relieved from his post at Berhampur on 6.7.1999 and he has approached the Tribunal on 22.9.1999. Thus this part of the order of transfer transferring him from Berhampur has already been given effect to and therefore, he cannot be ordered to continue at Berhampur. This prayer is accordingly rejected. In support of his prayer to continue at Berhampur the applicant has stated that

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his wife is sick and is under medical treatment and his parents are old and sick and in the rejoinder he has mentioned that his daughter is studying in Govt. Girls High School, Puri. From the above it appears that family of the applicant is residing at Puri as his daughter is studying in Govt. Girls High School, Puri. Therefore, his transfer from Berhampur will in no way affect the educational prospect of his daughter. In any case, these are the matters to ^{be} considered by the departmental authorities and not by the Tribunal. In consideration of the above, while I quash the posting of the applicant to R.W.S.S. Division, Nowrangpur, the respondents are directed to give a posting to the applicant against the post of Divisional Accounts Officer, Gr.I carrying the scale of Rs.6500 - 10, 500/- which the applicant is currently enjoying. This order should be issued within a period of 15(Fifteen) days from the date of receipt of this order. While giving a fresh posting order to the applicant, respondents, if so advised, may take into consideration the averment made by the applicant in the Original Application that he has already served in Koraput District on three occasions earlier.

With the above observations and directions, the Original Application is disposed of, but without any order as to costs.

Somnath Som
(SOMNATH SOM)
VICE-CHAIRMAN 2000

B.K. SAHOO