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O.A.No. 249 of 2007

Anita Acharya Applicant
Vrs.
Kendriya Vidyalaya Sangathan and others....Respondents

ORDER DATED 21st SEPTEMBER 2007

— motion for relief.
By order dated 10.8.2007 notices of admission and interim relief were directed to be issued to the Respondents and the matter was posted to 17.8.2007 and on the basis of the submission of the learned counsel for the applicant and Shri Ashok Mohanty, the learned Senior Counsel, it was observed that no coercive action would be taken against the applicant for not joining the new place of posting. Thereafter the matter was posted to 17.8.2007 and 23.8.2007 for considering the question of admission and continuance or otherwise of the interim order.

2. On 29.8.2007 when the matter was taken up, the applicant was present in person and the Learned Counsel M/S. S.Mishra, T.K.Prahraj, S.Rath and B.K.Nayak-3 for the Applicant and the Learned Counsel M/S. Ashok Mohanty, H.Tripathy and P.Sahu were absent due to Advocates' strike on Court work before this Bench purportedly on the basis of the CAT Bar resolutions passed without substance or value but violating principles of natural justice too. In this connection, I would like to refer to the decision in the case of Ramon Services Private Limited Vrs. Subash Kapoor and Others, reported in JT 2000 (suppl. 2) Supreme Court 546, holding as follows:

“When the advocate who was engaged by a party was on strike, there is no obligation on the part of the court either to wait or to adjourn the



case on that account. It is not agreeable that the courts had earlier sympathized with the Bar and agreed to adjourn cases during the strikes or boycotts. If any court had adjourned cases during such periods, it was not due to any sympathy for the strikes or boycotts, but due to helplessness in certain cases to do otherwise without the aid of a Counsel."

(Judgement Paras-5 & 14)

"In future, the advocate would also be answerable for the consequence suffered by the party if the non-appearance was solely on the ground of a strike call. It is unjust and inequitable to cause the party alone to suffer for the self imposed dereliction of his advocate. The litigant who suffers entirely on account of his advocate's non-appearance in court, has also the remedy to sue the advocate for damages but that remedy would remain unaffected by the course adopted in this case. Even so, in situations like this, when the court mulcts the party with costs for the failure of his advocate to appear, the same court has power to permit the party to realize the costs from the advocate concerned. However, such direction can be passed only after affording an opportunity to the advocate. If he has any justifiable cause, the court can certainly absolve him from such a liability. But the advocate cannot get absolved merely on the ground that he did not attend the court as he or his association was on a strike. If any Advocate claims that his right to strike must be without any loss to him but the loss must only be for his innocent client, such a claim is repugnant to any principle of fair play and canons of ethics. So, when he opts to strike work or boycott the court, he must as well be prepared to bear at least the pecuniary loss suffered by the litigant client who entrusted his brief to that advocate with all confidence that his cause would be safe in the hands of that advocate."

(Para-15)

"In all cases where court is satisfied that the ex parte order (passed due to the absence of the advocate pursuant to any strike call) could be set aside on terms, the court can as well permit the party to realize the costs from the advocate concerned without driving such party to initiate another legal action against the advocate."

(Para-16)

"Strikes by the professionals including the advocates cannot be equated with strikes undertaken by the industrial workers in accordance with the statutory provisions. The services rendered by the advocates to their clients are regulated by a contract between the two, besides statutory limitations, restrictions, and guidelines incorporated in the Advocates Act, the Rules made thereunder and Rules of procedure adopted by the Supreme Court and the High Courts. Abstaining from the courts by the



advocates, by and large, does not only affect the persons belonging to the legal profession but also hampers the process of justice sometimes urgently needed by the consumers of justice, the litigants. Legal profession is essentially a service oriented profession. The relationship between the lawyer and his client is one of trust and confidence."

(Para-22)

"No advocate could take it for granted that he will appear in the Court according to his whim or convenience. It would be against professional ethics for a lawyer to abstain from the Court when the cause of his client is called for hearing or further proceedings. In the light of the consistent views of the judiciary regarding the strike by the advocates, no leniency can be shown to the defaulting party and if the circumstances warrant to put such party back in the position as it existed before the strike. In that event, the adversary is entitled to be paid exemplary costs. The litigant suffering costs has a right to be compensated by his defaulting Counsel for the costs paid. In appropriate cases, the Court itself could pass effective orders, for dispensation of justice with the object of inspiring confidence of the common man in the effectiveness of judicial system. Inaction will surely contribute to the erosion of ethics and values in the legal profession. The defaulting Courts may also be contributory to the contempt of this Court."

(Paras-24, 27 & 28)

2.1 Keeping in view the aforesaid case law laid down by the Hon'ble Supreme Court, condemning severely such strike as contempt of Court particularly Hon'ble Supreme Court itself and leaving the Ld.Counsels including those representing Government/s at the peril of facing the consequences thereof, the applicant was heard and the available record on hand has been perused for adjudicating the matter.

3. Applicant Smt. Anita Acharya, while working as Head Mistress at Kendriya Vidyalaya No.1, Bhubaneswar (Orissa), being aggrieved by the order dated 7.8.2007 issued by the Assistant Commissioner I/c, Kendriya Vidyalaya Sangathan, Regional Office, Bhubaneswar (Respondent No.2) transferring and posting her to Kendriya Vidyalaya, INS, Chilka, as well



as the order dated 8.8.2007 issued by the Principal, KV-1, Bhubaneswar (Respondent No.2) relieving her of duties with immediate effect, has filed this Original Application praying for quashing the said two orders on the following grounds:

- (i) As no transfer order has been issued by the competent authority, the order of relieve (AnnexureA/8) issued by Respondent No.3 is bad and illegal;
- (ii) The order of relieve (AnnexureA/8) has been issued in order to accommodate Smt. S.K.Kalsi (private Respondent No.4);
- (iii) The husband of the applicant having undergone open heart surgery, the order relieving her from KV-1, Bhubaneswar, is violative of the transfer policy guidelines;
- (iv) As the applicant is left with little more than three years of service to retire on superannuation, the impugned transfer order has been issued by Respondent No. 3 with the sole avowed purpose of bringing her transfer within the scope of the transfer policy guidelines.

4. The Respondents-KVS, by filing a counter, have opposed the prayer of the applicant and have inter alila stated as follows:



(a) Pursuant to the transfer order dated 7.8.2007 (Annexure R/2) issued by the Assistant Commissioner, KVS, Regional Office, Bhubaneswar (Respondent No.3), the applicant has been relieved by the Principal, KV No.1, Bhubaneswar, vide order dated 8.8.2007 (AnnexureA/8). The Assistant Commissioner, KVS, Regional Office, Bhubaneswar, is competent to transfer the applicant.

(b) Respondent No.4, Smt. S.K.Kalsi, who has been posted in place of the applicant, is suffering from Cancer which falls in the PCGR category, in consideration of which Respondent No.4 has been transferred from KV, INS, Chilka, and the applicant has been transferred from KV-1, Bhubaneswar.

(c) The applicant's husband has undergone a Mitral Valve Replacement (MVR) which is different from the Coronary Artery Bypass Graft surgery and the applicant is not immune from transfer under the transfer policy guidelines

(d) The applicant is due to retire in November 2010 whereas under the transfer policy guidelines the persons who are to retire on superannuation up to March 2010 are not liable to be transferred as on the



date the decision was taken by the competent authority.

5 Before proceeding further, I would like to ~~be reminded of~~ the settled position of law in the matter of transfer of an employee and the scope of interference by the Tribunal in such matter. The transfer of an employee holding a transferable post cannot be objected to. The transfer is an incidence of service. The employer is the best judge to decide, to distribute and utilize the services of an employee. Who should be transferred and where ~~is~~ ^{are} ~~the~~ matters for the appropriate authority to decide. Tribunal or Court is not the appellate authority sitting in judgment over orders of transfer. The Court or Tribunal should not interfere with a transfer order which is made in public interest and for administrative reasons unless the order of transfer is vitiated by mala fides or is made in violation of any statutory provisions, or of any prescribed norms or principles governing the transfer. Keeping in view the said settled position of law, I have to consider the contentions raised by the parties.

6. It is the contention of the applicant that the Annexure A/8, the order dated 8.8.2007 relieving her of duties at KV-1, Bhubaneswar, having been issued ^{— by her} ~~by~~ Respondent No.3, in the absence of any transfer order issued by the competent authority, is not sustainable in the eye of law. The Respondents-KVS have refuted the contention of the applicant. Annexure R/2 to the counter filed by the Respondents-KVS is the transfer order dated 7.8.2007 issued by Respondent No.3 transferring



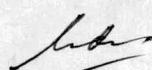
the applicant from KV-1, Bhubaneswar, to KV, INS, Chilka, in public interest. The same has also been shown to have been communicated to the individuals concerned, namely, the applicant and private Respondent No.4. As regards the competency of Respondent No.3, the Assistant Commissioner, KVS, Regional Office, Bhubaneswar, the Respondents-KVS, in their counter, have clearly stated that the Assistant Commissioner (Respondent No.3) is competent to issue the transfer order in respect of the applicant and the private Respondent No.4 on the basis of the recommendation of the Regional Transfer Committee. The minutes of the meeting of the Regional Transfer Committee held on 7.8.2007 have been filed as Annexure R/3 to the counter. The applicant has not disputed the above reply of the Respondents-KVS in her rejoinder filed on 20.8.2007. She has also failed to produce before the Tribunal any material showing that Respondent No.3 is not competent to issue the transfer order in respect of the applicant. In this view of the matter, the contention of the applicant in this regard has no force and is rejected.

7. The next contention of the applicant is that she has been relieved from KV-1, Bhubaneswar, in order to accommodate Smt. S.K.Kalsi (private Respondent No.4). The Respondents-KVS have stated that the private Respondent No.4, who was working at KV, INS, Chilka, has been suffering from Cancer and in consideration of her representation for transfer, the Regional Transfer Committee recommended her transfer and posting to KV-1, Bhubaneswar, in consonance with the transfer



policy guidelines. The applicant has not disputed the suffering of the private Respondent No.4 from Cancer. The applicant has also not stated that the case of the private Respondent No.4 is not covered under the transfer policy guidelines issued by the KVS. In the case of Mrs. Shilpi Bose and others v. State of Bihar and others, AIR 1991 SC 532, it has been observed by Their Lordships of the Hon'ble Supreme Court that if the competent authority issued the transfer order 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 order was passed on the request of the employee concerned. In the light of the observation of Their Lordship and in view of the fact that the private Respondent No.4, who has been suffering from Cancer, has been transferred and posted in place of the applicant for the sake of her medical treatment, I find no merit in the contention of the applicant in this regard.

8. The third contention of the applicant is that her husband having undergone open heart surgery, she should not have been transferred from Bhubaneswar. The Respondents have stated that the type of heart ailment and/or the surgery undergone by the applicant's husband are/is not covered under the transfer policy guidelines. The applicant, in her rejoinder, has stated that the Mitral Valve of the Heart by an artificial metallic is more critical and dangerous than the Coronary Artery Bypass Graft (CABG) surgery included in the transfer policy



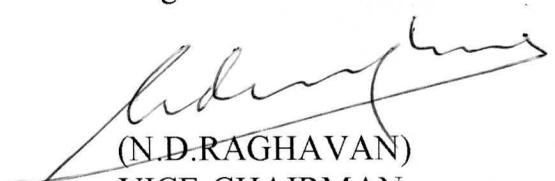
guidelines. The Respondents-KVS, in support of their stand, have filed a letter dated 30.7.2007 (Annexure R/1 to the counter) issued by the Kalinga Hospital, which is the Regional Medical Board for KVS employees. It has been clearly certified in the said letter that the husband of the applicant has undergone a Mitral Valve Replacement (MVR) which is different from the Coronary Artery Bypass Graft (CABG) surgery as included in the transfer policy guidelines. The applicant has not filed a single scrap of paper showing that the report of the said Regional Medical Board for KVS employees, as contained in the letter under Annexure R/1, is not correct, except making a ~~bland~~ assertion to the contrary. In consideration of all this, the contention of the applicant is found to be without merit.

9. The last contention of the applicant is that the Respondent-KVS have willfully and deliberately issued the transfer order with an avowed purpose of bringing her transfer within the transfer policy guidelines and to accommodate the private Respondent No.4 in her place at KV-1, Bhubaneswar, in as much as she is left with ^{- a few} little more than three years of service to retire on superannuation. I have given my anxious consideration to the contention of the applicant and have gone through the transfer policy guidelines of the KVS. There being no bar contained in the transfer policy guidelines to transfer a KVS employees ^{- a few} who are left with little more than three years of service to retire on superannuation and in view of the admitted fact that the private



Respondent No.4 has been suffering from cancer and her posting to KV-1, Bhubaneswar, in the considered view of the Regional Transfer Committee, was found very much essential and on the basis thereof, the said Committee recommended the posting of the private Respondent No.4 in place of the applicant, I find no reason, far less justifiable, to agree with the contention of the applicant.

10. In consideration of all the above, I find no merit in the Original Application which is rejected at the stage of admission itself. No costs.


(N.D.RAGHAVAN)
VICE-CHAIRMAN

fix for pronouncement on
21-09-07 at 2.30 pm.
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Or. off. - 21-9-07

Copy of Order
may be given to
both concerned.

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S.O (J)