

9
OA No. 236 of 2009

Manoj Kumar Das Applicant
Versus
UOI & Ors. Respondents

Order dated 17 September, 2009.

C O R A M

THE HON'BLE MR.JUSTICE K.THANKAPPAN, MEMBER (J)
A N D
THE HON'BLE MR. C.R.MOHAPATRA, MEMBER (A)
.....

Applicant is an employee of the A.G (A& E) Orissa. He was promoted and posted as Senior Divisional Accounts Officer under the Chief Engineer, Rural Works, Bhubaneswar, Dist. Khurda. He was promoted to the post of Senior Divisional Accounts Officer in the year 2005 and the said post comes under Group A service of the Government of India. According to him, he being a Group 'A' Officer, in term of the guidelines, is entitled to be posted against a 'Very Heavy' Division and/or Head of Office, but in gross violation of the said guidelines and without due application of mind, vide order under Annxure-A/7 dated 15.05.2009 he has been posted in the office of the Chief Engineer whereas Shri Satya Narayan Mohanty, made as Respondent No.4 in this OA, though working as Divisional Accounts Officer Grade-I and junior to the Applicant has been transferred and posted under the Executive Engineer R&B Division, Khurda vide order under Annexure-A/8 dated 15.05.2009 carrying 'Very Heavy' duty. Being aggrieved by such

2

action, the Applicant approached this Tribunal praying for the following reliefs:

- “(i) Quash the impugned order of transfer dated 15.05.2009 to the applicant under Annexures-A/7 & A/8 by concurrently holding the same is bad, illegal and not sustainable or maintainable in the eye of law;
- (ii) direct/order the Union Respondent to give an appropriate posting to the applicant as per his entitlement of grade pay in a ‘Very Heavy’ Division in place of the choice of the applicant as per his option dated 30.03.2009;
- (iii) direct/order the Respondents to post the applicant in the office of the Executive Engineer (R&B) Division, Khurda w.e.f. 1.9.2009 and thereby declare that the Respondent No.4 cannot hold the above mentioned post at Khurda as per prescribed policy of transfer;
- (iv) Pass such other order(s)/direction(s) as may be deemed fit and proper in the bona fide interest of justice.”


By way of interim relief he has sought the following direction:

- “(i) Stay operation of the transfer order dated 15.5.2009 under Annexure-A/7 till the final disposal of this Original Application;
- (ii) Pass such other order(s)/direction(s) as may be deemed fit and proper in the bonafide interest of justice and equity.”

The matter was listed on 4th June, 2009 and after considering the submissions made by the parties; this Tribunal passed the following orders:

“Heard Mr.K.P.Mishra, Learned Counsel for the Applicant and Mr. S.B.Jena, Learned Additional Counsel for the Union of India on whom copy of this OA has been served and perused the materials placed on record.

Learned Counsel for the Applicant submits that transfer/posting of the Senior Divisional Accountants Officer /Divisional Accounts Officer etc. has been made in gross violation of the guidelines amounting to exercising power in an arbitrary fashion at the mercy and sweet will of the



Respondents. In support of the above contention, Learned Counsel for the Applicant pin-pointedly focused on the posting of the applicant by stating that the applicant being a Group A officer he ought not to have been directed to hold the charge of a post having lesser status and level than his entitlement. His grievance is that though he exercised his option pursuant to a notice issued by the Respondents giving his choice place of posting but that proved to be an empty formality. According to applicant since there is no other avenue available to him he has approached this Tribunal apprehending his relieve shortly.

Learned Counsel for the Respondents pointed out that as the Applicant has approached this Tribunal without exhausting the remedy by way of making representation against the order of transfer this OA is liable to be dismissed. But Learned Counsel for the Applicant submits that since the applicant questions the very policy of transfer framed by the Department and it involves substantial question of law to be decided by this Tribunal exhaustion of alternative remedy should not be a bar for entertaining this OA.

Similar mater came up for consideration before this Tribunal in OA No. 228 of 2009. In order dated 2.6.2009 this Tribunal disposed of the same by granting liberty to applicant to make representation which shall be considered by the authorities within a specified period. But in the instant case it is seen that since substantial question of law involved in this OA the proper course would be to direct to place the matter before the DB for decision on 29.06.2009. It is so ordered.

Meanwhile, registry is directed **to issue notice to the Respondents to file their counter/show cause if any.** Till then the Respondents are hereby directed that if the applicant has not already been relieved, he shall not be relieved from his present place of posting."

Thereafter the matter came up for consideration on 29.06.2009 and on the request of the Respondents' Counsel seeking time to file counter, the matter was adjourned to 3.8.2009. On 3.8.2009 the matter was again adjourned to 12.08.2009. Meanwhile the Respondent No.4 by filing counter while opposing the contention raised by the Applicant in this OA



has prayed for vacation of the interim order granted by this Tribunal. The matter was listed on 12.08.2009. Learned Counsel appearing for the Respondent No.4 insisted for vacation of the interim order granted by this Tribunal earlier. Having heard Learned Counsel for both sides, this Tribunal passed the following order:

"As requested fifteen days time is allowed to the Respondents' counsel to file counter, if any. Till then interim order passed by this Tribunal shall continue with modification that the interim order shall not affect the posting or taking up the charge of/by the Respondent No.4 to the post to which he is now posted. Call this matter on 01.09.2009."

2. Being aggrieved by the aforesaid order of this Tribunal, Applicant approached the Hon'ble High Court of Orissa in WP (C) No. 12517 of 2009. The Hon'ble High Court of Orissa in its order dated 03.09.2009 disposed of the matter directing as under:

"03.09.2009 Heard Learned Counsel for the parties.

The order dated 12.08.2009 passed by the Central Administrative Tribunal, Cuttack Bench; Cuttack in MA 387 of 2009 arising out of OA No. 236 of 2009 is under challenge.

As is evident from the order, there was an interim order in the OA earlier made by the impugned order the Tribunal modified the same to the extent that the said interim order shall not affect the posting or taking up the charge of/by the respondent no.4 to the post to which he is now posted. The application was posted to 01.09.2009 for further orders. Respondent No.4 before the Tribunal is the opp. Party no.4 before this Court has no objection if the impugned order is set aside. We, therefore, set aside the impugned order and request the Tribunal to decide the OA No. 236/2009 within a period of one week from today.

The writ petition is accordingly disposed of."

L

Thereafter, the matter was listed on 01.09.2009 and 09.09.2009. But at the request of Learned Counsel the matter was adjourned to 11.09.2009. On 11.09.2009 heard the matter at length and posted to 14.09.2009 for giving further consideration on the question of admission. On 14.09.2009 while giving consideration on the question of continuance or other wise of the order of stay granted by this Tribunal earlier, we have also heard Mr.K.P.Mishra, Learned Counsel appearing for the Applicant, Mr. S.B.Jena, Learned Additional Standing Counsel appearing for the official Respondents and Mr. K.C.Kanungo, Learned Counsel appearing for the Respondent No.4 in extenso on the merit of the matter and the matter was reserved for delivery of orders.

3. In the counter filed by the Respondents 1 to 3 besides raising preliminary objection on the maintainability of this OA due to non-exhaustion of the departmental remedy, in regard to merit of the matter it has been stated that option exercised by the Applicant along with others giving their choice place of posting was placed before the Transfer Committee formed in accordance with the guidelines under Annexure-R/1 to consider the transfer and posting of DA/DAO for the year 2009-10. Taking the option exercised by applicant and other aspects into consideration, the committee recommended his name for posting at Mahanadi South Division, Cuttack (a Heavy Division) and accordingly, the applicant was posted. By relying on the decision of the Hon'ble Apex Court in the case of **Union of India and others v S.L.Abas** (1993) 1 25 ATC 844, it has

2

14


been stated that as per the guidelines the applicant is entitled to be posted to a **very heavy** Division but the said guidelines being not statutory in nature will not give any enforceable or absolute right to the applicant to claim his posting to any particular Division or place of his choice. According to the Respondents as the applicant did not complete his minimum term of three years in the post his representation submitted in 2007 seeking his transfer was rejected. He submitted another representation in the year 2008 seeking posting to R&B Division or retention. His case was considered and allowed to continue in the office of the Chief Engineer RW (O), Bhubaneswar as per his request. Likewise in the year 2009 on consideration of his representation and option, the applicant was posted to Cuttack. By relying on the decisions of the Hon'ble Apex Court in the cases of **E.P.Royappa v State of Tamil Nadu**, 1974 (1) SLR 497 (SC); **Chief General Manager (Telecom) N.E.Telecom Circle v Shri Rajendra Ch.Battacharjee**, 1995 (2) SLR (SC 1); **Ms. Shilpi Bose and Ors v State of Bihar and Ors.**, AIR 1991 SC 532; **Union of India and Ors v H.N.Kirtania**, (1989) 3 SCC 445, and **B.Vardha Rao v State of Karnataka and Ors**, AIR 1986 SC 1955, it has been stated that the guidelines framed for posting of DA/DAO to different wings are merely for change in variety and the same does not confer any right upon the DA/DAO to claim their posting in accordance with such guidelines as it does not any way affect the function/dignity of the post of DA/DAO if they are posted to a Division other than their actual entitlement grade and as such the claim of the applicant has no

2

legs to stand especially because it is settled law that no employee has any right to claim any particular place of posting. It has further been stated that the codal provision does not provide for separate accounting rules for separate Wings of the PW Department. Moreover the nature of function in R&B Division and RW Division are the same and the heads of accounts operated in both the wings are same. In the instant case the applicant has worked in RW Wing from 11/97 to 8/05 as such it does not make any difference nor he has been prejudiced even if he is not posted to a R&B Division. Accordingly, Respondents opposed the contentions of the applicant made in this OA and have prayed for dismissal of this OA being devoid of any merit.


Besides reiterating the contentions raised by the Respondent Nos.1 to 3 in their counter, Respondent No.4 in his counter has stated that the applicant was posted in one of the places as per his option exercised by him. There are number of officers in his grade who have been posted in Divisions carrying heavy duty but it is not understood as to why the applicant has only picked him up as Respondent No.4 in this OA. As such according to him this OA is liable to be dismissed for non-joinder of necessary party.

4. It is the contention of the Applicant, in course of hearing, that that the applicant had never worked during his entire 34 years of service under R&B Wing. As per the guidelines, posting ought to have been made on rotation basis to all the Public Works Departments including Roads and



Building. When one post carrying 'Very Heavy' duty will fall vacant w.e.f. 31.08.2009 at Khurda (R&B) the posting of the Applicant to a post carrying only 'Heavy' duty and posting of Respondent No.4 who is not only junior to applicant but also holds lower post to Very Heavy duty post was not only illegal but also discriminatory in nature and, therefore, the applicant is entitled to be posted in an appropriate Division commensurate to his grade pay and as per his entitlement to R&B Division. Further contention of the Applicant is that the posting of the Applicant being violation of the guidelines can be branded as mala fide exercise of power and power exercised mala fide is not sustainable in the eyes of law. Relying on the stand of the Respondents in the counter it was contended by the Learned Counsel for the Applicant that when it has been admitted by the Respondents that the Applicant is entitled to be posted to a post carrying Very Heavy duty, in not giving him posting and allowing Respondent No.4 to hold the post carrying Very Heavy duty amounts to colourable exercise of power only to humiliate the applicant and as such, the applicant is entitled to the relief claimed in this OA. By reiterating the stand taken in the counter, Learned Counsel appearing for official Respondents as also Respondent No.4 opposed the above contention of the Applicant and have prayed for dismissal of this OA.

5. Having given our thoughtful consideration to various submissions made by the parties, perused the materials placed on record. It was fairly submitted by Learned Counsel appearing for the parties that the sanctioned strength of Senior



Divisional Accounts Officers is 47 whereas the number of Very Heavy charges is only 43. In the circumstances, four persons shall always be in excess to be adjusted elsewhere. If the argument of the Applicant is conceded that all the Sr. DAOs have to be given posting in Very Heavy charge, this would exceed the sanctioned strength. We have observed that Annexure-A/7 dated 15.05.2009 has been challenged in the garb of violation of the guidelines in regard to the transfer and posting of similarly situated employees working under the Respondents. As we know Judicial Review of the administrative decision especially in the matter of transfers which are made in public interest and for administrative reasons is no more *res integra*. It has been laid down in a number of decisions of the Hon'ble Apex Court that unless the transfer orders are made in violation of any **mandatory statutory rule** or on the ground of mala fide, judicial review of the said order of transfer is unwarranted. 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 Courts ordinarily should not interfere with the order instead affected party should approach the higher authorities in the Department. It has further been held that if the Tribunal continues to interfere with day to day transfer orders issued by the Government and its subordinate authorities, there will be

L

18

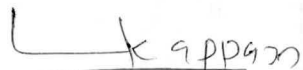
complete chaos in the administration which would not be conducive to public interest. Transfer made in violation of the guidelines in retaining juniors came up for judicial scrutiny in the case of **UNION OF INDIA v N.P.THOMAS**-AIR 1993 SC 1605 wherein Their Lordships of the Hon'ble Apex Court held that infraction of transfer guidelines will not give any right to the Applicant therein to claim his retention when admittedly he was holding a transferable post.


6. We further note that the transfer and posting was made on the basis of the recommendation of a duly constituted committee, taking into consideration the option exercised by the employees and admittedly, Cuttack was one of the places opted by the Applicant. The committee was constituted by high ranking responsible officers. Obviously, the recommendation was only after taking into account relevant factors including the norms evolved by the Department. Which post carries very heavy duty to be manned by whom and what norms to apply in making the assessment are exclusively the functions of the Respondents. Who should be transferred where, is a matter for the appropriate authority to decide. Further posting and transfers of officers cannot be made in a straitjacket manner because promotions and postings of all Sr.DAOs do not take place at one point of time and the norms of transfer i.e. tenure etc. need to be followed. Such an approach is not only irrational but unworkable. It is also not the case of the Applicant that a charge is permanently held to be Very Heavy, Heavy, Medium and Light etc. As such, the plea of the Applicant that he was

19

posted in a **Heavy** duty post instead of **Very Heavy** duty post is a matter of concern for the Department and it is not for this Tribunal to decide and interfere in the order of transfer. But the Applicant straightaway approached this Tribunal by filing the present OA without availing the opportunity of making any representation or appeal if he has any grievance against this posting.

7. In the light of the discussions made above, we find no merit in this Original Application which is accordingly dismissed and as a consequence, the interim order passed on 4th June, 2009 and which is continuing till date stands vacated.


(JUSTICE K. THANKAPPAN)
MEMBER (JUDICIAL)


(C.R. MOHAPATRA)
MEMBER (ADMN.)