

CENTRAL ADMINISTRATIVE TRIBUNAL

CALCUTTA BENCH

O.A. No. 617 of 1996.

present : HON'BLE DR. B.C. SARMA, ADMINISTRATIVE MEMBER.

ASHOKE KR. CHOWDHURY

VS.

UNION OF INDIA & ORS. (MHA)

For Applicant : Ms. U. Sanyal, Counsel leading
Mr. M.K. Bandopadhyay, Counsel.

For Respondents : Mr. M.S. Banerjee, Senior Counsel.

Heard on : 20.9.96 &
24.9.96.

Date of Order : 24.9.1996.

O R D E R

The applicant is an 'Assistant' functioning in the office of the Regional Director (Eastern Region), Staff Selection Commission, Calcutta and he is in C.S.S. Cadre of Ministry of Home Affairs. He is aggrieved by the impugned Order of Transfer issued on 9.5.1996 transferring from Calcutta to New Delhi. The applicant, however, contends that the said impugned transfer order was passed by the respondents in order to ~~an~~ accommodate one Shri Shourik Saha, who was given offer of appointment letter by the respondents on 22nd November, 1995 with instruction that he should report for duty to Ad.I I(B) Section of the Ministry of Home Affairs, North Block, New Delhi. It is the specific contention of the applicant that said Shri Saha did not join in New Delhi and instead, he went on taking time in order to evade his posting in New Delhi and, ultimately, the respondents have accommodated him by posting him in Calcutta, as a result of which, the applicant had to be transferred to New Delhi. The applicant contends that this

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being the position, the transfer is illegal and it has been passed in colourable exercise of power.

2. It is also the contention of the applicant that no proper transfer order has been passed by the respondents and the impugned Order, dated 9.5.1996, is not a proper transfer order. The other contention of the applicant is that the Regional Director (Eastern Region) S.S.C. Calcutta, is not the competent to transfer him from Calcutta to New Delhi. The competent authority is the Under Secretary to the Govt. of India to pass any transfer order in transferring him to New Delhi. The applicant further contends that the representation had been filed by him on 9.5.1996 & 14.5.1996 but these are still pending and being aggrieved thereby, the instant application has been filed with the prayer that the impugned Order of Transfer may be quashed and set aside and a direction be issued on the respondents not to transfer him from Calcutta to New Delhi on the basis of the impugned transfer order.


3. The application has been opposed by the respondents by filing a reply. The contention^s made by the respondents briefly are that -

According to the Govt. of India instructions, issued vide Department of Personnel & Training Office Memorandum dated 9.8.1995, an offer of appointment given to a candidate recommended by the UPSC/SSC for appointment in Central Services can be kept open for a period of six months. This instruction further provide^s that extension of time for joining the appointment beyond 3 months should not be granted liberally and may be granted only as an exception where facts and circumstances so warrant. An Offer of appointment automatically lapses on the expiry of the period of six months from the date of issue of the original offer of appointment. The request of Shri Sourik Saha for grant of extension

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of time in joining his appointment as an Assistant was considered and decided in the light of the said instructions. It may be stated that Shri Saha was ~~prosecuting~~ ^{prosecuting} studies in the Master of Business Management course at Calcutta University and had sought extension of time for prosecuting his studies. The allegation that Shri Saha exercised influence on the appointing authority for seeking extension of joining time is baseless and motivated. It was decided by the Headquarter of the Staff Selection Commission at New Delhi that the officials, who have put in considerable length of service in Staff Selection Commission (ER), Calcutta, may be transferred to the cadre controlling authority viz. Ministry of Home Affairs in phased manner as and when substitutes report for duty. This decision of the Staff Selection Commission got concurrence of Ministry of Home Affairs i.e. the cadre controlling authority. The letter dated 1st May, 1996 made Annexure 'A-3' to the application was a sequence of the aforesaid decision of the Staff Selection Commission, Headquarter and the applicant was directed to be relieved and Shri Sourik Saha, respondent No. 5, was posted as Assistant in place of the applicant by the Ministry of Home Affairs. The respondents have denied that the posting of Shri Saha at Calcutta was in violation of the Note given in the Employment Notice dated 16th October, 1993. The impugned transfer order was issued on the applicant in consultation with the Ministry of Home Affairs, who is the appropriate authority, by the Staff Selection Commission, Headquarter. Therefore, the respondents have prayed for dismissal of the application on the ground that it is devoid of merit.

4. The applicant has also filed a Rejoinder to the reply which I have perused. The Rejoinder contains certain Order of Promotion dated 9.8.1991 and an Office Memorandum regarding Seniority of Assistants of the C.C.S. cadre of the Ministry of Home Affairs etc.


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5. During hearing, Mrs. Sanyal, Id. Counsel appearing for the applicant submitted that the impugned order of transfer was passed by the respondents in order to show favouritism to Shri Sourik Saha. According to Mrs. Sanyal by dint of the Employment Notice issued by the respondents on 16th October, 1993, as set out as Annexure -1 to the application, the respondents are bound by the Note indicated therein. The Note indicates that "No request whatsoever for posting outside Delhi shall ordinarily be entertained after selection". According to Mrs. Sanyal, Shri Sourik Saha should have joined at New Delhi and there is no reason why he should be posted in Calcutta since there was a Note in the advertisement notice and he had applied in pursuance of that Notice for recruitment in the S.S.C. as 'Assistant'. Mrs. Sanyal also submitted before me specimen Order of transfer issued by the respondents to establish her point that the impugned Order was not a proper transfer order and, therefore, the Order was passed in arbitrary manner. The last contention of Mrs. Sanyal was that although the transfer order has been passed innocuously, the action taken by the respondents in passing the impugned Order constitutes 'malice in law'.

7. In support of her contention, Mrs. Sanyal mostly relied on the decision of the Hon'ble Apex Court in the case of - Express Newspapers Pvt. Ltd. and Ors. Vs. Union of India & Ors. (reported in AIR 1986 SC 872) wherein in para - 118 of the Judgement it is observed by Their Lordships as under :-

"Fraud on power voids the order if it is not exercised bona fide for the end design. There is a distinction between exercise of power in good faith and misuse in bad faith. The former arises when an authority misuses its power in breach of law, say, by taking into account bonafide, and with best of intentions, some extraneous matters or by ignoring relevant matters. That would render the impugned act or order ultra vires. It would be a case of fraud on powers. The misuse in bad faith arises when the power is exercised for an improper motive, say, to satisfy a private or personal grudge or for wreaking vengeance of a Minister as in S. Pratap Singh V. State of Punjab, (1964) 4 SCR 322

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SCR 733 : (AIR 1964 SC 733). A power is exercised maliciously if its repository is motivated by personal animosity towards those who are directly affected by its exercise. Use of a power for an 'alien' purpose other than the one for which the power is conferred is mala fide use of that power. Same is the position when an order is made for a purpose other than that which finds place in the order. The ulterior or alien purpose clearly speaks of the misuse of the power and it was observed as early as in 1904 by Lord Lindley in General Assembly of Free Church of Scotland vs. Overtown, 1904 AC 515, 'that there is a condition implied in this as well as in other instruments which create powers, namely, that the powers shall be used bona fide for the purpose for which they are conferred'...."

Mrs. Sanyal submits that the Respondents have exercised the power of transfer with an ulterior motive and that was to show favour to Shri Shourik Saha and, therefore, in the impugned Order, there is 'Malice in Law' which is clearly unsustainable legally. Mrs. Sanyal also cited the following decisions in support of her contentions made and these are as follows :-

- i) AIR 1993 (1) 1236 - Rajendra Roy Vs. Union of India.
- ii) ATJ 1996 (1) 526 - Vinod Saha Vs. Union of India & Ors.

8. Mr. M.S. Banerjee, ld. Senior Counsel representing the Respondents strongly opposed the contention made by Mrs. Sanyal. According to Mr. Banerjee, there is nothing wrong in the impugned Order of transfer because it has been passed by the competent authority and there is a policy decision also to transfer the Officers who have been staying in Calcutta for a long time to New Delhi and elsewhere. On the point of 'malice in law' Mr. Banerjee cited the definition in the Law Lexicon (P. Ramanatha Aiyar) Reprint Edition 1995. This definition 'Malice in Law' states as follows :-

"Malice in Law" means implied malice.

"Malice in Law" simply means a depraved inclination on the part of a person to disregard the rights of others, which intent is manifested by his injurious acts.

"Malice in law" means an act done wrongfully and wilfully and without reasonable or probable cause, and spite, or a desire to injure another."

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9. Mr. Banerjee also cited a catena of decisions of the Hon'ble Apex Court as well as of the Tribunal and these are as follows :-

- (i) 1991 Supple. II SCC - Shilpi Bose (Mrs.) and Others.
- (ii) AIR 1993 SC 2444 - Union of India & Others Vs. S.L. Abbas.
- (iii) AIR 1964 SC 72 - S. Pratap Singh Vs. State of Punjab.
- (iv) AIR 1979 SC 49 - Smt. S.R. Venkataraman Vs. Union of India and Ors.
- (v) AISLJ 1988(2) (CAT) 448. - Sambhu Charan Hazra Vs. Union of India & Ors.
- (vi) 1988 (4) (CAT) AISLJ 727. - Badrinath Vs. Govt. of Tamil Nadu & Ors.

Mr. Banerjee, particularly, relied upon the case of - S.R. Venkataraman (AIR 1979 SC 49) for making submission on the point of 'malice in law'. According to Mr. Banerjee, there is no constituent of 'malice in law' anywhere in the impugned Order. Mr. Banerjee also cited what has been discussed in the same Judgement by Their Lordships, particularly, the description given by Viscount Haldane in the case - Shearer V. Shields (1914) AC 808 at p. 813 :- which runs as follows :-

"A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far the state of his mind is concerned, he acts ignorantly, and in that sense innocently."

"Thus malice in its legal sense means malice such as may be assumed from the doing of a wrongful act intentionally but without just cause or excuse, or for want of reasonable or probable cause."

Mr. Banerjee submits that it cannot be said that the respondents had passed the transfer order without any just cause or excuse since there was a policy decision taken by the respondents to transfer the long staying persons from Calcutta to Delhi.

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10. I have examined the matter carefully after hearing the submissions made by the learned Counsel for both the parties, perusing records and considering the facts and circumstances of the case. I do not intend to burden the ^{length of the} judgement by having a detailed discussion on the various citations made as above. For the sake of justice whether the impugned Order was passed in a legal manner or not it will suffice if the points taken by Mrs. Sanyal on the point of 'law in malice' is discussed. I note that the applicant has not used the word 'malice' anywhere in the application as pointed out by Mr. Banerjee. However, as Mrs. Sanyal submits, that although the applicant might ^{not} have used the word 'malice' in fact or law anywhere in the application, 'malice in law' is a legal point which can be taken during argument. I agree with Mrs. Sanyal and hence, proposed to adjudicate the matter accordingly.

11. 'Malice in Law' has been defined in in 'Black's Law Dictionary' (Sixth Edn.) as follows :-

"Malice in law. The intentional doing of a wrongful act without just cause or excuse. Lyons V. St. Joseph Belt Ry. Co. 232 Mo.App. 575, 84 S.W. 2d. 933, 944. implied, inferred, or legal malice. As distinguished from malice in fact, it is presumed from tortious acts, deliberately done without just cause, excuse, or justification, which are reasonably calculated to injure another or others."

The Hon'ble Apex Court, has already discussed about the 'Malice in Law' and also cited the observation ~~ma~~ made in the case of - S.R. Venkataraman (AIR 1979 SC 49) to which I have adverted already. It is, therefore, quite clear that the word constitutes 'Malice in Law' - one is to act in a manner wrongful without any just cause or excuse. I, therefore, propose to see whether in the facts and circumstances of the case, the respondents had issued the impugned order of transfer without any

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just or proper excuse.

12. There is no dispute that the applicant has an All India transfer liability. I have also been given to understand that the applicant has been in Calcutta for long years right from the post of L.D. Assistant. Mr. Banerjee further submitted that the statutory - Central Secretariat Assistants Grade Examination Regulations, 1965 which was issued in pursuance of Sub-Rule 9 of Rule 13 of the Central Secretariat Services, 1962 have not been violated by posting of Shri Sourik Saha in Calcutta. I find in this case that there is no transfer order passed by the respondents which is normally passed in the proper form. However, the Order dated 9.5.1996, which has been assailed before me to be a transfer order, is as follows :-

"Consequent upon joining of Shri Shourik Saha, Asstt. in the office of the Staff Selection Commission, Calcutta, Shri Ashok Kumar Chaudhuri, Asstt. is to be transferred to the MHA Ad.I(B) Secn. New Delhi. Since Shri Saha has joined on 8.5.96 (FN) Shri Ashok Kumar Chaudhuri is directed to submit requisition for transfer advance immediately so that he can be relieved."

Therefore, the impugned Order passed on 9.5.1996 is not a transfer Order but it is passed Memo with a direction that the applicant should submit requisition for transfer advance since he is to be transferred. The communication sent by the Under Secretary (Admn) of the D.O.P.T. Govt. of India on 1st May, 1996 mentioned that Shri Choudhury may be transferred to the Ministry of Home Affairs, New Delhi. The question is now, therefore, whether this itself is a transfer order or not. As I have already discussed and as pointed out by Mrs. Sanyal, the regular transfer Orders are issued in a particular form. The communication sent by the Under Secretary on 1st May '96 to the Regional

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Director (ER) SSC, Calcutta is not in that form. Therefore, it is not a usual transfer order. But the Order conveys that ^{Chowdhury} Shri ~~Zaha~~ may be transferred to Ministry of Home Affairs. In Official ~~purpos~~^{passive} ~~ance~~ many decisions are communicated in ~~an~~^{an} ~~ambig~~^{ambig} uous voice. So, I have no doubt that the competent authority had passed the impugned transfer order. To a reasonable man the document indicates that Shri Chowdhury has been transferred. Simply because there is no regular transfer order in the usual form, it will be naive to argue that the competent authority has not issued the said order transferring the applicant (Sri Chowdhury). I am, therefore, of the view ^{that} although there has been no regular transfer order ~~is~~¹ issued in the usual form, the communication sent by the competent authority on 1st May, 1996 shall ~~stand~~^{stand} treated as transfer order and, therefore, on that ground, the impugned Order cannot be assailed. I also find that the said decision was taken by the Under Secretary, Govt. of India, who is a competent authority to transfer Shri Chowdhury from Calcutta to New Delhi. To that extent, the submission of Mrs. Sanyal that the Order was not passed by the competent authority and that it was not a valid order, must fail.

13. I would now deal with whether the said transfer order that has been issued by the respondent-authorities with an ulterior purpose to show some ~~favouritism~~ to Shri Sourick Saha, who has been posted in Calcutta, and whether by doing so, certain guidelines ^{or} or instructions/ rules have been violated. As I have discussed already, the relevant C.C.S. Regulations have not been violated by the posting of Shri Saha in Calcutta in place of New Delhi. It is true that in the notice dated 16th October, 1993, there



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is a Note as below :-

"Since the posts of Assistant (Category (A) to (E) pertain to Central Ministries/Departments; almost all of them are located at Delhi. The recruitment to posts of Asstts. is done on All-India basis. Candidates may, therefore, keep this in mind while sending their applications for the posts of Asstts. No request whatsoever for posting outside Delhi shall ordinarily be entertained after selection."

It is true that the said Note states that the respondents shall not ordinarily consider any request for posting of successful candidate outside Delhi since the posts are meant for Ministries which are located at Delhi but that does not altogether preclude the posting of an appointee outside Delhi. The issue regarding posting of Shri Sourik Saha outside Delhi in Calcutta has not been ^{substantively} challenged before me in this application. The subject matter of challenge in this application is whether the transfer of the applicant from Calcutta to New Delhi has been issued lawfully. Therefore, it is not necessary for me to come to a conclusion whether the posting of Shri Saha outside New Delhi in Calcutta has been done correctly or not. I, however, find from the enclosures produced by Mr. Banerjee before me that the Respondents had initiated a policy decision almost at the same time of issuing the appointment letter to Shri Sourik Saha to the effect that the persons who have been staying in Calcutta for a long time should be transferred and for that purpose certain options and also suggestions were called for. I further note that the applicant has been staying in Calcutta for a long time and, therefore, his transfer to New Delhi pursuant to the policy of transfer cannot be termed as 'malicious'. I am also of the

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view that the Govt. is competent to change the posting place of Shri Shourik Saha. As per the Note whether such change has been made under extra-ordinary circumstances is not a subject matter ⁱⁿ to the given application made. It is enough if there has been a decision of the Govt. and I find that the Govt. had taken a decision as per the policy in the sense that since there have been certain vacancies which ^{would} ^{or came up} come up as a result of implementation of the policy and Shri Saha has been posted therein. Considering the timing of adoption of the policy decision, I find it difficult to hold that said Shri Shourik Saha was posted in Calcutta with ulterior motive or that the applicant has been transferred out of Calcutta with such ulterior motive. This being the position, I am clearly led to the conclusion that the impugned transfer order has not constituted any 'Malice in Law' and to that extent the submission of the ld. Counsel for the applicant must fail.

14. The Hon'ble Apex Court ^{has} laid down the law regarding transfer in a number of decisions. In ~~Six~~ Shilpi Bose (Mrs.)'s case the Hon'ble Apex Court has held as below :-

"...the Courts should not interfere with a transfer Order which is 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 Govt. 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...."

In the case of - Rajendra Roy Vs. Union of India (reported in AIR 1993 SC 1236) the Hon'ble Apex Court held that -

"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 in violation of rules of service and guidelines for transfer without

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any jurisdiction 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".

In the case of - N.K. Singh V. Union of India (reported in 1994 (5) SLR 153) Their Lordships further held that -

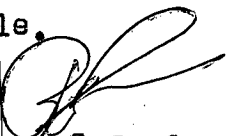
"Courts to interfere only if the order is vitiated by malafides or there was infraction of any professed norm or principle governing the transfer. In other cases the matter must be left to the departmental heads in the public interest!"

15. On the basis of the law laid down by the Hon'ble Apex Court as discussed hereinabove, I have no hesitation to hold that there is no justifiable ground to interfere with the impugned transfer order and, this being the position, the application is liable to be dismissed.

16. For the reasons given above, I do not find any merit in the application. It is, therefore, dismissed. No Order is passed as regards costs.

Copies of the documents which have been produced by Mr. Banerjee during hearing today, may be kept in file as a part of record.

17. Mrs. Sanyal submits that since ~~Bangalore~~ Durga Puja Festival is going to be celebrated in the last part of October, the applicant may be permitted to stay in Calcutta ^{til} such celebrations are over. I have considered the submission of Mr. Sanyal and Order that although the application is dismissed ~~and~~ consequently leading to the vacation of the Interim Order passed, I direct the respondents to allow the applicant to function in Calcutta till 31st October, 1996 after which the applicant should join in New Delhi after ^{avail} ~~following~~ joining time as per rule.


(B.C. Sarma)
Member (A)