

CENTRAL ADMINISTRATIVE TRIBUNAL
CALCUTTA BENCH

M.A. No.106 of 1998
O.A. No.1223 of 1997

Present: Hon'ble Mr. D. Purkayastha, Judicial Member

Rajendra Behari Lal Aggarwal,
son of Late Shyam Behari Lal Aggarwal,
Income Tax Guest House, 16B, Rowland Row,
Calcutta-700 020

... Applicant
VS

1. Union of India, service through
The Secretary, Department of Revenue,
Ministry of Finance, Govt. of India,
North Block, Central Secretariat,
New Delhi-110 001

2. Under Secretary, Govt. of India,
Ministry of Finance, Department of
Revenue, New Delhi-110 001

3. The Chairman, Central Board of Direct
Taxes, North Block, Central Secretariat,
New Delhi-110 001, service through the
Chief Commissioner of Income Tax, West
Bengal, Calcutta-700 069

4. Director to the Govt. of India,
Ministry of Finance, Department of
Revenue, New Delhi-110 001

5. Joint Secretary to the Govt. of India,
Ministry of Finance, Department of Revenue,
New Delhi-110 001

6. The Chief Commissioner of Income Tax,
West Bengal, Calcutta-700 069.

... Respondents

For the Applicant : Mr. Milan Chandra Bhattacharjee, counsel
Mr. Samir Kr. Banerjee, counsel
Mr. Ujjwal Kumar Das, counsel

For the Respondents: Mrs. K. Banerjee, counsel

Heard on 3.4.98, 6.4.98 & 7.4.98 : : Date of order : 7.4.1998

O_R_D_E_R

Being aggrieved by and dissatisfied with the order of appointment to the post of OSD (Planning) with headquarters at Calcutta vide letter No.141 of 1997 dated 20.10.1997 (Annexure/D), the applicant, Shri Aggarwal who is holding the post of Chief Commissioner of Income Tax, Calcutta has filed this application before this Tribunal alleging that the impugned order

of transfer dated 20.10.97, Annexure/D to the application has been issued with collateral purpose and malafide intention or with ulterior motive in order to accommodate Shri P.K. Sharma, CCIT, Calcutta. It is also stated that the said impugned order of transfer was not issued in public interest. According to the applicant, he was promoted and appointed to the grade of of Chief Commissioner of Income Tax by the President of India, as he was posted as CCIT, Calcutta by the President, the appointing authority of the applicant by an order dated 13.9.97, Annexure/C to the application and accordingly he joined to the said post of Chief Commissioner of Income Tax, Calcutta on 19.9.97. But it is a surprise to him that he has been transferred by the Under Secretary to the Govt. of India by issuing order of appointment to the post of OSD(Planning) with headquarters at Calcutta by the impugned order dated 20.10.97, Annexure/D to the application. It is categorically averred in the application that the President of India has not created any post of OSD(Planning) by any Gazette Notification. And it is stated by the applicant that he has been transferred by way of appointment from functional post to non functional post, which was not in existence on the date of issue of transfer order on 20.10.97(Annexure/D). According to the applicant, the instant application is arbitrary and violative of Arts. 14 and 16 of the Constitution and without jurisdiction and thereby the impugned order of transfer(Annexure/D) is liable to be quashed.

2. The respondents contested the application by filing a written reply, stating inter-alia that there is no malafide involved in the order of transfer and that transfer order was issued for administrative exigencies and in public interest. It is also stated that in the reply that the transfer of a Govt. servant, appointed to a cadre of transferable post, from one post to another post, is an incident of service and it is nothing but a table transfer within the same office. The respondents

categorically admitted in their reply that the post of Chief Commissioner of Income Tax and the post of OSD(Planning) are at the same level and that transfer to the post of OSD (Planning) was issued after approval of the Competent Authority. According to the respondents, the post of OSD (Planning) was not created by the President by notification in the official Gazette but it was created by the Competent Authority i.e., the Finance Minister, Govt. of India. In view of the judgment of the Hon'ble Supreme Court reported in 1991 Suppl.(2) SCC 659 (Shilpi Bose and others v. State of Bihar), there is no reason to interfere with order of transfer issued by the Competent Authority in the administrative exigency. So, order dated 20.10.97 was issued for administrative reason and in public interest. So, the application is devoid of merit and is liable to be dismissed.

3. Mr. Bhattacherjee, learned advocate appearing on behalf of the applicant submits that it is not a routine transfer, as stated by the respondents in their reply, but on a perusal of the impugned order dated 20.10.97, Annexure/D it is clear that he has been appointed as OSD(Planning) with headquarters at Calcutta, which is a nonfunctional post and was non-existent on the date of issuing the order, Annexure/D to the application. He further submits that the applicant has been appointed as Chief Commissioner of Income Tax, Calcutta on promotion by the President of India who is the appointing authority by a letter dated 13.9.97, but the Under Secretary, Govt. of India, Ministry of Finance, Department of Revenue shifted him from the post of Chief Commissioner of Income Tax, Calcutta to the post of OSD (Planning) within one month from the date of joining at Calcutta and that indicates that action has been taken by the respondents in order to accommodate Shri P.K. Sarma, CCIT, Calcutta, who is junior to the applicant. Learned advocate for the applicant further submits from the record that there is a smack of malafide apparent because of the fact that it is within the knowledge of

the respondents that the applicant would retire from the said post of Chief Commissioner of Income Tax in the month of October, 1998, but he has been appointed as OSD (Planning) with headquarters at Calcutta for one year for completion of the job from the date he would assume the charge of the post of OSD (Planning). Referring to this order dated 20.10.97 (Annexure/D) Mr. Bhattacharjee, ld. advocate further submits that the letter itself indicates non-application of mind for such transfer issued by respondent No.2, Under Secretary to the Govt. of India, who issued the impugned order of appointment of the applicant as OSD (Planning) having no authority to do so, without approval of the President of India and since the post was not in existence on the date of issuing the transfer order dated 20.10.97, the respondent No.2, Under Secretary to the Govt. of India had no jurisdiction to appointment the applicant to such post and thereby the entire action of the respondent No.2 is wholly malafide, arbitrary and without jurisdiction. Mr. Bhattacharjee, ld. advocate further has drawn my attention to the notification regarding the method of procedure for creation of the post under non-plan scheme and plan scheme which was notified by the Govt. of India, Ministry of Finance No. 7(2)-E(Con)/95 dated 30.5.95 published at page 89 of the Swamy's Complete Manual on Establishment and Administration, corrected upto September, 1996 (6th Edition), 1997. Referring to the aforesaid notification regarding creation of the post, learned advocate for the applicant submits that the post of OSD(Planning) which is equivalent to the post of Chief Commissioner of Income Tax, as admitted by the respondents, requires approval of the Cabinet before creation of the post, but in the instant case no Cabinet approval has been obtained by the respondents for the purpose of creation of the post of OSD (Planning) which is under challenge in this case. So the order of subsequent creation of the post by the letter dated 7.11.97 (Annexure/R1 to the reply) with retrospective effect does not

help the respondents to support the case of the transfer in public interest and thereby the impugned order of transfer is liable to be quashed.

4. Ms. Banerjee, learned advocate appearing on behalf of the respondents strenuously argued before me that the order of transfer does not suffer from any infirmity in view of the instruction issued by the Government of India under notification Finance Memo No.F 12(11)E.11(59) dated 4.4.59 regarding creation of the post of officers of special duty. Referring to the said notification dated 4.4.59 on the subject Ms. Banerjee submits that the Government is competent to create a post of Officer on Special Duty in the administrative exigency and that decision of creation of post was taken by the Government with the approval of the Finance Minister on 3.10.97 and no notification was ~~4~~ necessary for creation of that post of OSD (Planning) as submitted by the applicant in this case and thereby the applicant cannot have any grievance for the purpose of transferring him from the post of Chief Commissioner of Income Tax, Calcutta to the post of OSD (Planning) created by the Central Government in the administrative exigency. Ms. Banerjee further submits that the applicant has no locus standi to challenge the order of transfer issued by the competent authority in the administrative exigency and the applicant has totally failed to prove that there was a malafide on the part of the respondents for the purpose of transferring the applicant from the post of Chief Commissioner of Income Tax to the post of OSD (Planning) with headquarters at Calcutta. Ms. Banerjee also relied upon the decisions reported in AIR 1995 SC 1056 (State of Madhya Pradesh and another v. S.S. Kourav), AIR 1993 SC 2476 (State of Punjab and others v. Joginder Singh Dhatt) and AIR 1974 SC 555 (E.P. Royappa v. State of Tamil Nadu and another). Ms. Banerjee further submits that the power of transfer has been delegated to the Head of the Department by provision of the Rule 6 of the F.R. and under such

delegation of the power, Chairman of the Central Board of Direct Taxes is the Head of the Department and he initiated the proposal of transfer of the applicant in public interest and accordingly he was transferred from the post of CCIT to the newly created post of OSD (Planning) though no notification was issued by the Department as per the decision taken by the Chairman of the Board. It is also the submission of Ms. Banerjee that Chairman took the decision on 3.10.97 with approval of the members of the Board. So no question of malafide arises, as alleged but for the purpose of allegation of malafide, no name of a particular officer has been mentioned in the application and thereby the allegation of malafide cannot be accepted unless a particular officer is pointed out stating that he exercised his power for extraneous consideration and with malafide intention and ultimately she submits that the application is devoid of merit and is liable to be dismissed.

5. I have considered the submissions of the learned advocate of both the parties and perused the records of the case. The respondents have also produced the relevant file regarding the impugned order of transfer issued by the Under Secretary to the Government of India. It is found that the impugned order of transfer was issued under signature of the respondent No.2, i.e., Under Secretary, Govt. of India, Ministry of Finance on 20.10.97 and the applicant moves this application before this Tribunal on 27.10.97 with specific allegation that the President of India has not created any post of OSD (Planning) at Calcutta by way of any declaration or order by authority, but he was appointed as OSD (Planning) from the post of CCIT, Calcutta. So there is no dispute, on admission of the respondents, that no notification regarding creation of the post of OSD (Planning) at Calcutta has been published in any Gazette of Govt. of India before order of transfer contained in a letter dated 20.10.97, Annexure/D to the application. Under Secretary to the Government of India had

issued the impugned order of transfer, as it has been decided by some authority, the letter does not indicate whether the President had considered to appoint Shri Aggarwal as OSD (Planning) headquarters on 20.10.97. But the letter dated 13.9.97(Annexure/C) issued by the Director to the Govt. of India relating to the transfer and posting of some CCIT on promotion, clearly indicates that the President has been pleased to transfer and post him as CCIT, Calcutta from the post of CC, Bhopal with effect from the date of assuming the charge until further orders. Accordingly, the applicant joined Calcutta as CCIT on 19.9.97 and the applicant has been transferred and posted against the post of CCIT at Calcutta vice Shri A. Chatterjee. But it is found from ~~the letter dated 20.10.97~~ para 15 of the reply of the respondents ^{~~dated 20.10.97~~} ~~stated~~ that the applicant has been appointed to the post as OSD(Planning) headquarters with approval of the Finance Minister of Govt.of India not by the President of India, though the said order also does not indicate who had decided to appoint the applicant as OSD (Planning) at Calcutta from the post of CCIT at Calcutta.

6. It is found that the applicant moved an application before this Tribunal on 27.10.97 and obtained the stay order against the impugned order of transfer dated 20.10.97, Annexure/D. After getting the stay order from the Tribunal, the respondents woke up from the sleep and realised that a Gazette notification was required to be issued for the purpose of justifying the order of transfer and accordingly by a letter dated 7.11.97, Under Secretary to the Govt. of India had communicated sanction of the President of one post of OSD (Planning) in the scale of Rs.7300-7600/- with headquarters at Calcutta for implementing the long term perspective plan for the functioning of the Department of Revenue, CBDT, which will integrate the manpower development and the infrastructure requirement in the perspective of computerised functioning. A

sanction order further indicates that this post will carry the same pay of CCIT. The post was sanctioned with effect from 3.10.97 for a period of one year. It was derived from the said letter dated 7.11.97 that one post of CCIT, Calcutta will be kept vacant in lieu thereof, during the period the said post will be operative or until further orders whichever is earlier. That sanction order dated 7.11.97, Annexure/R to the reply further supports the case of the applicant that on the date of issue of the impugned order of appointment of the applicant as OSD (Planning), no Gazette notification regarding creation of the post of OSD (Planning) has been issued though decision was taken in the note dated 3.10.97 by the Department on 3.10.97 that the said post of OSD (Planning) would be assigned to the applicant. In support of this action the respondents produced the relevant file where Chairman, CBDT passed the following order on 3.10.97:

"Shri R.B.L. Agarwal stands posted as CC-II, Calcutta, vide order dated 13.9.97. He joined there on 19th Sept. 1997.

2. The Board has, for some time, been feeling the need for a senior officer to evolve a long-term perspective plan for the functioning of the Deptt. which will integrate the manpower development and the infrastructure requirements in the perspective of computerized functioning. Ideally, the officer should have had a long field experience to be able to do this job well.

3. It is felt that Shri R.B.L. Agarwal should be given this assignment. He can be designated as OSD (Planning). He can continue functioning from Calcutta, so that the need for a transfer is avoided. He can be given a year's time to complete the job.

4. The charge of CC-II Calcutta can be held as an additional charge by CC-II, Calcutta during this period.

5. This proposal has the concurrence of other Members in the CBDT."

It is found that this note was approved by the Finance Minister, thereafter, it was sent to the Dept. for necessary action. From this note dated 3.10.97, it is also found that the Chairman, proposed that Shri Agarwal be given the assignment off the scheme. But the Under Secretary without publishing any notification, had issued the appointment of the applicant as OSD

(Planning) at Calcutta on the basis of the said decision dated 3.10.97.

7. A careful scrutiny of the order contained in the note dated 3.10.97 issued by the Chairman, CBOI indicates that the Chairman felt that the charge of OSD (Planning), should be assigned to Shri Agarwal (applicant) and the charge of CCIR, Calcutta can be held as additional charge by CCI, during this period. It further shows that Shri Agarwal can be given a year's time for the same, though it was not known to the Dept. that Shri Agarwal would retire in the month of 31st October, 1998. But the said note does not clearly indicate any proposal for creation of any new post of OSD as was made by the Government by notification dated 7.11.97 vide Annexure/ R1 to the reply with retrospective effect from 3.10.97 for a period of one year with the approval of the Finance Department. According to Ms. Banerjee no Gazette notification for creating of post is required for the purpose of appointment as OSD; mere official letter of appointment is sufficient for the purpose of assignment of duty of post in view of the instruction contained in memo No.F.12(1)-E1A/59 dated 4.4.59. If it is so, why respondents issued notification on 7.11.97 regarding creation of post. Whatever might be the case but the fact remains that no post of OSD (Planning) has been sanctioned by the President till 7.11.97 for which the Under Secretary, had to issue order and sanctioned by the President on 7.11.97. But If I look into the latest circular regarding creation of the post under plan and non-plan as referred to above it is found that for creation of post in the rank of Secretary and Special Secretary to the Govt. of India approval of the Cabinet and Administrative Ministry is required. Similarly for creation of the non-plan post of Secretary, Special Secretary, Addl. Secretary, Jt. Secretary or equivalent post, approval of the Cabinet and the Administrative Ministry is required. On a comparison of the two notification dated 13.5.95

as relied upon by the learned advocate for the applicant and the notification dated 4.4.59 as relied upon by the learned advocate Ms. Banerjee, it is found that the creation of posts of Officer on Special Duty upto the rank of Dy. Secretary to the Govt. of India can be sanctioned by the Department. The said notification dated 4.4.59 further indicates that the Department is not permitted to create another post of Officer of Special Duty in the level of CCIT. Besides, from the letter of sanction of creation of post subsequently issued by the Under Secretary of Finance Department vide letter dated 7.11.97, Annexure/R1 to the reply it is seen that one post of CCIT sanctioned for Calcutta region in the scale of Rs.7300-7600/- has been converted as OSD(Planning) with headquarters at Calcutta. According to the respondents, there are three posts of CCIT at Calcutta region and three posts are occupied by three officers including the applicant. So on the basis of the letter of creation dated 7.11.97, the applicant, Shri Aggarwal has been appointed against the post of OSD (Planning) with headquarters at Calcutta for implementing the scheme in question. But it is not clear as to why Shri Agarwal could not be assigned with the duty of OSD (Planning) in addition to his normal posting as CCIT, Calcutta without keeping one post of CCIT, Calcutta vacant in lieu of OSD (Planning) in Calcutta region for a further period of one year. However, the power of judicial review of the order of transfer by the Court or Tribunal is circumscribed by the catena of decisions of the Hon'ble Apex Court. Normally order of transfer of Govt. servant should not be interfered with by way of judicial review unless an order of transfer is malafide or passed under colourable exercise of power. In other words, order of transfer can be set aside or quashed by the Tribunal or Court, if the Tribunal is satisfied that the order suffers from malafide, arbitrariness or non-application of mind to the relevant facts. The learned advocates of both the parties cited various decisions

of the Hon'ble Apex Court in this regard. But I do not like to burden the judgment with all the aforesaid decisions when the law is now settled in this regard. But I like to refer the decision of N.K. Singh v. Union of India & others, reported in AIR 1995 SC 423 wherein the Hon'ble Apex Court held as below:

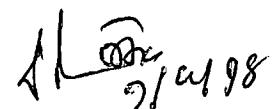
"Transfer of a Government servant in a transferable service is a necessary incident of the service career. Assessment of the quality of men is to be made by the superiors taking into account several factors including suitability of the person for a particular post and exigencies of administration. Several imponderables requiring formation of a subjective opinion in that sphere may be involved, at times. The only realistic approach is to leave it to the wisdom of the hierarchical superiors to make that decision. Unless the decision is vitiated by mala fides or infraction of any professed norm or principle governing the transfer, which alone can be scrutinised judicially, there are no judicially manageable standards for scrutinising all transfers and the courts lack the necessary expertise for personnel management of all government departments. This must be left, in public interest, to the departmental heads subject to the limited judicial scrutiny indicated."

In view of the aforesaid decision I am satisfied that the respondents were not justified to issue a subsequent notification regarding creation of the post when they received the notice from this Tribunal that the matter has been stayed on the ground that the applicant has been appointed to a post which is non-existent on the date of transfer. When Ms. Banerjee specifically argued before me that creation of the post need not be notified in the gazette notification. In this connection I would like to refer the decision taken in the case of Anil Kumar Chowdhury v. State of Assam and others, reported in (1975) 4 SCC 7 where a similar question was raised whether declaration of equivalence with 'cadre post' is to be made by the State Government with approval of the Central Government and whether such declaration can be made ex post facto. In para 11 of the said judgment the Hon'ble Apex Court held that there can be no declaration without a formal notification. Governments speak and act formally and in solemn writing, not informally. In the present case no formal declaration is found on the date of transfer. I find similar

things happened in this case. No notification for creation of the post was made or issued by the authority on the date of issuing the transfer order dated 20.3.97 when Under Secretary to the Govt. of India appointed the applicant as OSD (Planning) from the post of CCIT, Calcutta. In para 8 of the said judgment it has been observed that the bone of contention is that these posts were not formally declared equivalent to 'cadre posts' with the Union Government's approval and service therein was insufficient to back the right set-up and the Hon'ble Apex Court answered this question stating that a miss is as good as a mile and continuity means continuity. The short hiatus destroys the credential for seniority accumulated by long officiation. In view of the aforesaid circumstances, however, I find that after receipt of the letter of appointment on 20.10.97 the applicant had rushed to this Tribunal challenging the validity order dated 20.10.97 on the ground of malafide without disclosing the name of the respondent who acted with malice in this case. It is very difficult to prove ^{✓ the matter} on the part of the applicant. But admittedly the Tribunal granted stay of the impugned order dated 20.10.97 and that stay still is in force. The learned advocate, Mr. Bhattacharjee appearing on behalf of the applicant submits that since the application has been admitted for hearing, thereby the question of filing representation to the authority has become redundant because the court can decide the case on merit. I do not dispute with this fact, as submitted by Mr. Bhattacharjee on that score, but the matter of transfer is to be decided by the competent authority in the exigency of the service and that power should not be taken away by the Tribunal or court by way of judicial review.

6. In view of the aforesaid circumstances I think that it is a fit case to direct the applicant to make a representation to the competent authority ~~stating~~ ^{as} the grounds stated in the application afresh and the respondents shall consider the

~~representation~~
~~application~~ in the light of the allegations made by the applicant as well as made before this Tribunal, as mentioned in the judgment with a reasoned and speaking order within two months from the date of submission of the representation by the applicant and accordingly the applicant is directed to make the representation before the authorities within seven days from the receipt of the certified copy of this order and the respondents shall dispose of the representation within one month from the date of receipt of the representation and communicate the same to the applicant with a reasoned and speaking order in the light of the discussion made in the judgment. And with this observation I dispose of the application awarding no costs, but it is directed that till the disposal of the representation the applicant should not be disturbed.


(D. Purkayastha)

MEMBER (J)

7.4.1998