

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

Original Application No. 126 of 2008

Monday, this the 30th day of June, 2008

C O R A M :

HON'BLE DR. K B S RAJAN, JUDICIAL MEMBER

M. Divakaran,
S/o. Late Madhavan,
Post Graduate Teacher (English),
Kendriya Vidyalaya No: 2,
Kozhikkode, Residing at
Mannath House, Thikkodi Post,
Calicut District.

... **Applicant.**

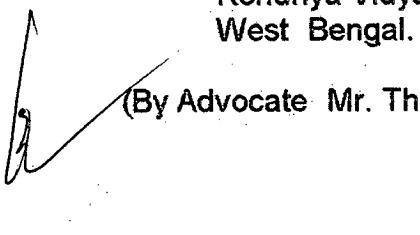
(By Advocate Mr. T.C. Govindaswamy)

v e r s u s

1. The Commissioner,
Kendriya Vidyalaya Sangathan,
18, Institutional Area,
Sahid Jeet Singh Marg, New Delhi : 110 016
2. The Education Officer,
Kendriya Vidyalaya Sangathan,
18, Institutional Area,
Sahid Jeet Singh Marg,
New Delhi : 110 016
3. The Assistant Commissioner,
Kendriya Vidyalaya Sangathan,
Regional Office, I.I.T. Campus,
Chennai : 600 006
4. The Principal,
Kendriya Vidyalaya No. 2, Calicut.
5. Smt. A.N. Mahita,
Post Graduate Teacher (English),
Kendriya Vidyalaya, Alipurduar,
West Bengal.

... **Respondents.**

(By Advocate Mr. Thomas Mathew Nellimoottil)



The Original Application having been finally heard on 30.06.08, this Tribunal on the same day delivered the following :

ORDER
HON'BLE DR. K B S RAJAN, JUDICIAL MEMBER

A brief description of the case of the applicant is given as hereunder.

2. The applicant is presently working as a Post Graduate Teacher (English) in KV at Calicut. According to the applicant, earlier, when respondent No. 5 was serving at Alipurduar, her request for transfer was registered as a priority item vide Annexure A-5. First, she was to be accommodated by dislodging one Shri K. Gopalan, who had filed OA No. 95/2008 challenging his transfer as he was to retire within three years and he comes under the category of LTR and hence, cannot be subjected to any such transfer. This has led the authorities to consider some other individual and as the applicant is the longest stayee at Calicut, this information, through Annexure A-2 was communicated by the Chennai Region to the Headquarters and the applicant now has been transferred to Alipurduar, vide Annexure A-1 order. Fifth Respondent has been transferred to Calicut, vide Annexure A-3.

3. The applicant had earlier challenged the transfer order vide OA No. 105/2008 and this Tribunal passed the following order on 22-02-2008: -

'In the above facts and circumstances of the case, I am of the considered opinion that the O.A. can be disposed of at the

admission stage itself by directing the applicant to make a detailed representation to the 1st respondent within a period of one week from the date of receipt of a copy of this order and the 1st respondent in turn shall consider the same before taking a final decision on the impugned Annexure A-1 letter dated 19-02-2008. I accordingly do so. Till such time, the proposal to transfer the applicant to KV, Alipurduar should not be given effect to. With these directions, the O.A. is disposed of."

4. The applicant did send a representation dated 25-02-2008 vide Annexure A10, which was forwarded to higher authorities vide Annexure A-11 letter dated 26-02-2008. However, vide Annexure A-1 order dated 27/28-02-2008, the applicant stood transferred to K.V. Alipurduar, in public interest, invoking the provisions of Para 17.4 of the guidelines (Annexure A4), which reads as under: -

"17.4 Commissioner will be competent to make such departure from the transfer guidelines as he may consider necessary with the approval of the Chairman, KVS."

5. As the above transfer order at Annexure A-1 was not after considering the representation of the applicant, whereas the direction of this Tribunal, vide Annexure A-10 is that the proposal to transfer the applicant to KV Alipurduar should not be given effect to, on filing of this OA the Tribunal had passed the following order on 04-03-2008: -

"The order of this Tribunal clearly specifies that the 1st respondent in turn shall consider the same (representation) before taking a final decision. As such, order dated 27/28-02-2-2008 vide A-1 whereby the applicant stands transferred, cannot be said to be in compliance of the directions given in para 2 of this Tribunal's order dated 22.02.2008. As such, this order has to be necessarily stayed. We order accordingly. By any chance, the applicant has already been relieved, he shall be reinstated in the same position. Two weeks' time is granted to the respondents to file a short reply....."

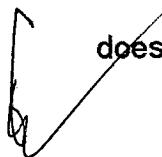


6. In their reply, the respondents have stated, "The A-1 transfer order was passed in respect of the applicant without taking into consideration of Annexure A-10.....This Hon'ble Tribunal disposed of the said OA with a direction that the proposal to transfer the applicant to KV Alipurduar should not be given effect to. It was also directed that the first respondent should consider the representation of the applicant before taking a final decision on the order dated 19-02-2008. It is respectfully submitted that the said representation of the applicant is being examined and disposed of by the first respondent in KVS HQrs. The decision of the Commissioner, KVS is still awaited." The respondents have further stated, "it is reiterated that the Commissioner, KVS will be competent to make a departure from the transfer guidelines to order any transfer, even if the teacher had not completed the required stay in a particular station."

7. The applicant has filed his rejoinder stating that the fifth respondent has not come within the priority category and hence, transfer of the applicant with a view to accommodating the fifth respondent is thoroughly illegal.

8. In the additional reply, the respondents have reiterated the provisions of Para 17.4 of the Guidelines.

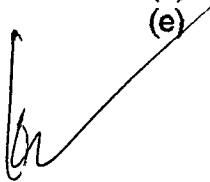
9. Counsel for the applicant argued that transfer of the applicant has been caused to accommodate respondent No. 5. The said Respondent No. 5 in fact does not come under the DCA category. If so, the necessity to transfer the said



Respondent No. 5, by dislodging the applicant is not known. Again, when such transfer takes place, the past stations served by the individuals too should be considered. The applicant had spent as many as 5-1/2 years at North Eastern Region and it was thereafter that he has been posted to Calicut. Here again, the applicant has been serving only for a period of less than 3 years. As such, dislodging the applicant for the purpose of accommodating another is illegal.

10. The counsel for the applicant also argued that there is no reason given as to how the case of fifth respondent deserves to be considered by invoking the extraordinary provision of para 17.4 of the guidelines. The respondents ought to have first exhausted the possibility of accommodating the Fifth respondent at her first place of choice. If Shri Gopalan was not available, the next immediate senior most in that school ought to have been displaced. It is not exactly clear whether the respondents have considered all these aspects. Again, in the instant case, when there has been a specific direction to consider the representation of the applicant, without complying with the same, the respondents have acted illegally by passing the order of transfer. The following are the decisions cited by the counsel for the applicant:-

- (a) K.P. Prasad vs Union of India & ors 2004(3) ATJ 97:
- (b) Harpal Singh Kashyap Vs Govt. of NCT Delhi & Ors 2005(2) ATJ 125.
- (c) Dr. Mukesh Kalra vs Government of NCT Delhi & Ors 2006(1) SLJ (CAT) PB 46.
- (d) Preeti Katyar vs K.V.S. & Ors 2007(1) SLJ (CAT) Luck 58.
- (e) M.A. Quareshi vs K.V.S. & Ors 2007(3) SLJ (CAT) Jodh 85.



11. Counsel for the respondents argued that transfer being an incidence of service and the employer having full discretion to decide as to who shall be transferred where, judicial intervention is very much limited. He has cited the following case laws in support of his arguments:-

- (a) K.V.S. vs Damodar Prasad Pandey & Ors (2007) 2 SCC L&S 597.
- (b) Union of India vs Janardhanan Debnath 2004(4) SCC 245.
- (c) National Hydro Electric Power Corp'n vs Shri Bhagwan (2001) 8 SCC 574.
- (d) Abani Kanta Ray vs State of Orissa & Ors 1995 (Supp)4 SCC 169.
- (e) Union of India vs S.L. Abbas.

12. Arguments were heard and documents perused. The contention of the applicant is three-fold –

- (a) The case of Respondent No. 5 does not fall within what is called the PCGR Category and hence, issue of Annexure A-3 order, transferring the respondent to the place of the applicant is arbitrary and abuse of provisions of para 17.4 of the guidelines. In a way, provisions of para 17.4 giving absolute power to the Commissioner for effecting transfer in variation of the guidelines are in the nature of encouraging arbitrariness.
- (b) Assuming without accepting that the case of Respondent No. 5 falls within that category, there is no justification of shifting the applicant who has spent 5 years plus in North East and has been at this part of this peninsula only since August, 2005 and who has other grounds as stated in his representation, vide Annexure A-10.
- (c) In any event, when this Tribunal has directed that the applicant shall not be transferred till the disposal of the case, there is no question of Annexure A-1, which has been issued without compliance of the order of this Tribunal, to be held as valid.

13. In so far as the decisions cited by the counsel for the applicants, in the first two decisions, the Tribunal has held that where there is an element of administrative exigency in issuing a transfer order, it is incumbent upon the employer to spell out the exact exigency or administrative reason, and in

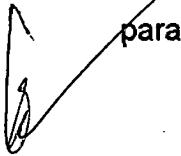
particular, when the issue is before the Court. In the case of Dr. Mukesh Gupta, the Tribunal has held that when the transfer order is with a view to getting one specifically, the transfer is accentuated by Malafide. But this is not inflexible, for, where provision exists to accommodate any one as in the instant case vide the guidelines, the transfer does not get vitiated. Of course, the decision to post one by dislodging another should be on a judicious consideration and not arbitrary. In the case of Preeti Katyar, the Lucknow Bench had struck as unconstitutional para 18 of the erstwhile guidelines. Part of it resembles para 17(4) of the present guidelines. In the case of Quareshi, the Tribunal has held that misplaced sympathy cannot justify wrong action.

14. Para 17.4 no doubt, provides wide powers to the Commissioner. Can the same be held to be arbitrary. Answer to this question is perhaps in negative, for, a look at the provisions would go to show that the power vested with the Commissioner is not that absolute under this para, for, *Commissioner will be competent to make such departure from the transfer guidelines as he may consider necessary with the approval of the Chairman, KVS*. Thus, para 17.4 ipso fact does not give absolute power to the Commissioner. When there is a check provided by conferment of the discretionary authority not to one individual but to a body of men, requiring final action to be taken, the absoluteness of the discretion suffers a dent. In this connection, it is worth referring to a decision by the Apex Court, which, while discussing about administrative action with reference to absolute authority, in the case of *Supreme Court Advocates-on-Record Assn. v. Union of India, (1993) 4 SCC 441*, held as under:-

"427. A further check in that limited sphere is provided by the conferment of the discretionary authority not to one individual but to a body of men, requiring the final decision to be taken after full interaction and effective consultation between themselves, to ensure projection of all likely points of view and procuring the element of plurality in the final decision with the benefit of the collective wisdom of all those involved in the process. The conferment of this discretionary authority in the highest functionaries is a further check in the same direction. The constitutional scheme excludes the scope of absolute power in any one individual. Such a construction of the provisions also, therefore, matches the constitutional scheme and the constitutional purpose for which these provisions were enacted."

15. To reiterate, Chairman of KVS is the highest authority and the Commissioner, the next highest. If the latter, in respect of any case, wants to deviate from the guidelines of transfer, he has no independent authority, as he has to have the approval of the Chairman. The concentration of absolute power and consequent discretion of the Commissioner, by virtue of the above condition of approval by the Chairman, here gets thoroughly diluted. Thus, any decision taken would be as a result of collective wisdom. Thus, the powers under para 17.4 cannot be branded as an absolute power vested in the Commissioner, in its strict sense.

16. Now, one question arises. Can the Commissioner, with the approval of the Chairman of KVS while invoking the provisions of para 17.4 of the guidelines be unmindful of existence of all the other provisions of the Guidelines. On a glimpse of the provisions of para 17.4, it may appear so, but when read between the lines, such an absolute discretion is not available. For, the very provision of para 17.4 is under "special circumstances" as is evident from the very heading



of para 17. Thus, there may be deviation in respect of dates prescribed in the guidelines or the like but complete eclipsing of the provisions of guidelines is not contemplated even in 17.4. This power under para 17.4 of the guidelines, to deviate from various prescriptions of the guidelines is provided for only as a safety valve, to be utilized sparingly and not as a steering to be used frequently. Thus, when dealing with an individual case, if the power under para 17.4 has to be invoked, then certain other provisions are normally to be followed. There must be a proper ground for invoking the provisions of this para, as for example, it has to embrace a situation of any case coming within the PCGR category for transfer from one place to another and the time limit for application has expired. On being satisfied with the existence of proper grounds for the same, the Commissioner may take a decision. An inevitable consequence of that decision to accommodate a PCGR Category person may entail dislocation of another who otherwise may not be likely to be subjected to a transfer at this juncture. Now, this individual being subjected to a transfer in order to accommodate a PCGR Category, has certain concessions, as contained in para 15.1 which reads as under:-

“ Where transfer is sought by a teacher coming under PCGR and no vacancy is available at the station of his choice, required vacancy will be created by displacing a teacher of the same category (Post/subject) with longest stay at the said Station and not belonging to CDA. However, nobody shall be displaced in this manner, as far as possible, before completing a tenure of three years. If no non-CDA category employee with more than 3 years tenure is not available at the station of first choice of a PCGR category employee, the exercise will be done for locating such a person at stations of his second, third and lower choices, in that order. If no non-CDA employee with more than 3 years tenure is available at any of the station of choice, the non-CDA

employee with longest tenure out of all the preferred stations taken together will be displaced. The displaced teacher will be accommodated against available nearby vacancy as far as possible within the region. The resultant vacancies arising out of transfer orders as per first priority list, will be used to accommodate non-PCGR category requests, who could not be accommodated in the first priority list, to the extent possible."

17. In the instant case, the above provision has been certainly looked into when the respondents have considered the transfer of Respondent No. 5 to Calicut. That's why, in the instant case, the longest stayee, Shri Gopalan, was initially to be disturbed, but, on finding that he comes under LTR category, the next longest stayee has been then ascertained vide Annexure A-2. The applicant happens to be the next longest stayee (presumably, within the choice stations of Respondent No. 5). To this extent, there is no arbitrariness.

18. When 15.1 is invoked, that is a sort of a little respite to the 'displace' in that though his transfer may be inevitable, he has a choice station to prescribe. Perhaps, he may ventilate his own circumstances while responding to the advice of the authorities in regard to the choice stations and the grounds may be good that he too may fall within any of the excepted category or the like. In that case, the authority competent to take decision is the Commissioner and no other authority lower than that. In the instant case, it was for that reason, that this Tribunal, while disposing of earlier OA No. 105/2008 specifically directed the Commissioner, KVS to consider the representation of the applicant and till then, the proposal to transfer the applicant to Alipurduar was not to be given effect to.

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19. The Commissioner will have to consider the choice stations if any offered by the displacee (the applicant herein) and if no such choice station is given, but the individual submits the grounds for his retention in the same place due to various hardships that he would be facing in the event of his transfer, then the Commissioner may have to contrast the hardship that is faced by respondent No. 5 in not being transferred from the place of her posting and that caused to the applicant in being shifted from his place of posting to accommodate respondent No. 5 and take a judicious decision. This part of the job is admittedly incomplete in this case. Annexure A-1 and A-3 orders being without considering the representation of the applicant, the same has to be kept in abeyance till the representation (Annexure A-10) has been 'duly' considered by the Commissioner, KVS, i.e. the first respondent.

20. In so far as the citations referred to by the counsel for the respondents, the same no doubt have relevance in so far as transfer in general is concerned. However, herein, the question involved is not merely transfer in general, but as to the legal validity of the decision taken by the respondents without complying with the directions of this Tribunal. Hence, the decisions do not apply directly and in respect of the above issue.

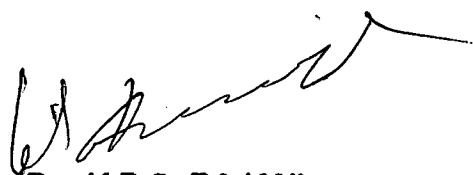
21. In view of the above, the OA is disposed of with a direction to the respondent No. 1 to consider the representation dated 25-02-2008 of the applicant, vide Annexure A-10 and take a judicious decision in this regard. If the submissions in the representation are accepted, the Respondent No. 1 may pass

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suitable orders canceling Annexure A-1 order of transfer. Instead, if the respondent No.1 still feels that Annexure A-1 and A-3 shall remain intact, then, each and every point raised vide para 1 to 6 of the representation dated 25.02.2008 has to be adverted to and answered and sufficient time should be granted to the applicant before he is being relieved. Till then, Annexure A-1 order of transfer of the applicant shall be kept in abeyance.

22. No costs.

(Dated, the 30th June, 2008)



Dr. K B S RAJAN
JUDICIAL MEMBER

CVR.