

Central Administrative Tribunal Lucknow Bench Lucknow

O.A. NO. 306/2007

Lucknow this, the 23rd day of October, 2008

HON'BLE SHRI JUSTICE M. RAMACHANDRAN, VICE CHAIRMAN

Bishun Dayal aged about 45 years son of Sri Thakuri resident of Village Kundra Khurd, Post Office- Malihabad, District- Lucknow presently posted as Principal, Kendriya Vidyalaya , Faizabad Cantt.

Applicant.

By Advocate: Sri R.C. Singh

Versus

1. Kendriya Vidyalaya Sangathan, 18, Institutional Area, Shaheed Jeet Singh Marg, New Delhi, through the Joint Commissioner (Administration), and Ex- Officio Secretary of the Sangathan.
2. Commissioner, Kendriya Vidyalaya Sangathan, 18, Institutional Area, Shaheed Jeet Singh Marg, New Delhi.
3. Deputy Commissioner (Personnel), Kendriya Vidyalaya Sangathan (Vigilance Section), New Delhi.
4. Assistant Commissioner, Kendriya Vidyalaya Sangathan, Lucknow Region, Lucknow.

Respondents.

By Advocate: Sri Surendran P.

ORDER

BY Hon'ble Shri Justice M. Ramachandran, Vice Chairman

The applicant is working as Principal of Kendriya Vidyalaya Sangathan (KVS) and during the relevant times, has been attached to Higher Secondary School at Faizabad Cantt. By an order of Dy. Commissioner (Pers.), he had been put on transfer to K.V.S. Jyotipuram. The office order spoke of transfer of 8 persons who were working as Principals. The applicant felt that the transfer was not justified/warranted and since his representation did not yield result, had filed O.A. No. 269/2007 before the Central Administrative Tribunal, Lucknow Bench . There was an order of interim stay of transfer. After hearing the parties, on 28.6.2007, a single bench of the Tribunal had disposed of the O.A. finally with a direction that the Commissioner was to pass order on the representation of the applicant dated 24.6.2007. The transfer order was not to be given effect to till such time the

representation is decided. It had been further observed that the Commissioner should keep in mind the spirit of Government of India's order dated 21.8.1989 while looking into the matter.

2. In view of the directions as above, the Commissioner had issued a Memorandum dated 16.7.2007, a copy of which is produced as Annexure A-2 here, whereby he held that it was not possible to modify or cancel the transfer of the applicant. Both the orders passed by the K.V.S. as referred to above are under challenge.

3. By virtue of an order passed on 6.2.2008, the OA. came to be listed before the Division Bench and had been thereupon finally heard. According to the Administrative Member there was no sufficient justification to interfere with the order and it had been so held by an order dated 26.5.2008. But, however, the Vice Chairman of the Tribunal, by a note dated 24.6.2008 had requested the Member (A) to reconsider the matter, since by order prepared by him, he had inter-alia thought it fit to set aside the impugned orders with a further direction that the matter should be considered afresh by the K.V.S. However, it has come out that there was no consensus between the two members and ultimately on 28.7.2008, two orders were pronounced, the Vice Chairman allowing the application and the Member (A) opting to dismiss the application.

4. The Hon'ble Vice Chairman had thereafter directed the registry to place the matter before the Hon'ble Chairman of the Tribunal as envisaged under Section 26 of the AT Act. The Chairman had thereupon nominated me as third member for hearing the Original Application. Notices had been issued to the parties concerned and on

19th and 20th October, 2008, I got opportunity to hear Mr. R.C. Singh, appearing on behalf of the applicant and Sri Surendran P, appearing for the respondents.

5. It may be relevant to notice that Justice Khem Karan, Vice Chairman had demitted the office within couple of days of passing the orders. Perhaps for the above reasons, there was no attempt made to specifically refer to the points of disagreement as such. Therefore, it may not be possible for me to confine myself to any specific points of disagreement but a perusal of the order would indicate that on both the points that were possibly highlighted by the parties, there was disagreement. I would therefore adopt a course to go to the matter in its entirety since counsel had addressed ~~since on being consensus~~ ^{her} on all the disputes and issues, and the legal position as found by them relevant.

6. The applicant had been selected for appointment as a Trained Graduate Teacher by K.V.S. during 1990 and he had been given posting at Darjeeling. He had worked there from 23.3.2990 to 6.2.1995. He is seen to have been transferred from Bagdogra in February, 1995 and consequently was in the new station till 18.12.2000. A later transfer brought him near to his home town at Unnao and attached to the K.V.S., Unnao from 20.12.2000 to 25.6.2002. In the mean while, he had been considered for appointment to the post of Principal. On being selected, he was appointed as Principal of K.V.S., Kishtwar in Jammu and Kashmir.

7. During the period, from 28.6.2002 to 27.5.2005, applicant had ^{been} functioned as Principal of the School. On transfer, he had come down

to Faizabad and actually had taken charge on 30.5.2005. At last, he was given a posting which was convenient to him, stated the counsel.

8. But the complacence was not to last long. According to him, as soon as he had completed two years of service, he has been ordered to be transferred to Jyotipuram in J&K by order dated 18.6.2007. Mr. R.C. Singh, his counsel submits that the applicant had an excellent track record all through out and there was no possible reason for the respondents to take a decision that he deserves a transfer to a disturbed area. It is submitted that this was a strange and an uncommon step, to issue an order of transfer to a person who had undergone a full tenure in a hard station. The respondents should have taken note of his position and a blind transfer was not to be ordered. His family circumstances required that he be continued to be permitted to work in his home State. His two daughters were attending the college and his full attention was necessary to be bestowed on them. He had an ailing father and as a matter of fact, these circumstances were highlighted in a representation lodged at the time he was served with a transfer order. Since there was no response forthcoming, there is no other option than to prefer an Original Application. According to the counsel, in all probability, it could be assumed that the applicant has been served with this transfer order to harass him since he was a member of Scheduled Caste. Secondary treatment was given all through out his career as could be evident in almost all his postings. Counsel submits that perhaps that was the reason why his initial posting was to Darjeeling. On his promotion, he had been shunted out to a hard station without a precedence. The present transfer also is ordered, which defies any explanation and the reason can be that he is seen as a second class citizen, and he had

been denied protection of order of the Government on the subject. The norms applicable as laid down by the Education Code stands violated and the resultant position is that the discriminatory treatment violates his fundamental rights envisaged under Part III of the Constitution of India.

9. Mr. Singh submits that even if, there was no reason necessary to be recorded in a case of a routine transfer, when the matter was brought to the attention of this Tribunal and when there was specific order to look into the matter by the highest functionary, it should have been ensured by the Commissioner that all matters were duly considered. A reading of Annexure II would show that the Tribunal's order have been given only a scant respect, notwithstanding the directions issued. The Commissioner thereby held out that no body will be permitted to sit in judgment over the assessment and primacy of KVS. In the earlier proceedings, the applicant had placed strong reliance on two orders passed by the Central Govt. which were seen as violated. Therefore, by the order dated 28.6.2007, the Tribunal had specifically referred to the order dated 21.8.1989 and had required the decision makers to specifically attend to the grievances as highlighted. But the Commissioner had practically side-lined the issue evading the real contents of two O.Ms. and this was an abuse of the powers to the detriment of the applicant.

10. Counsel also submits that the additional reasons given by the subsequent order A-2 also was not capable to get across scrutiny. It had been referred to in Annexure A-2 that the inefficient functioning of the applicant had prompted the respondents for coming to a decision that he was liable to be transferred out of the State. But the

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same was factually unacceptable for two reasons. The first was that the deficiency pointed out admittedly was not there. Even if it was taken that there was lower percentage of result in respect of results pertaining to class 12, there were hundreds of other schools which were below the standards of Faizabad but principals attached to such schools had not been subjected to any penal treatment. It was also highlighted that story weaved as above could not have been possible to be digested. As could be seen from a communication issued by the Assistant Commissioner dated 20.8.07 addressed to one of his colleagues, Mr. Nand Lal it could be seen that there was no decision to transfer away the principals on the sole criteria of board results. Annexure S-1 produced along with the Additional statement so relied on also showed that there was no recommendation for effecting a transfer on such basis. It is submitted that although the Tribunal has only circumscribed jurisdiction in interfering with a transfer, when in the case of transfer, special facts and circumstances showed that the impugned order was malafide and motivated, it deserves to be set aside and the applicant should be permitted to continue in the post.

11. Mr. Surendran P appearing on behalf of the respondents submits that the O.A. is not maintainable. It is well settled that in the matter of transfer, unless there is proved malafides or only when there was circumstances to hold that it was a case of total non- application of mind, then alone the decision of the administrative body are to be set aside. The Tribunal is not expected to sit in appeal over the decision in the matters of transfers and postings. He submits that after the matter was directed to be reconsidered, the Commissioner had examined the case and have come to the conclusion that the order was not liable

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to be recalled. The applicant had attempted to coin a story of discrimination so as to prejudice the mind of the Tribunal and none of them have any factual basis. He submits that the applicant in no way discriminated by the Sangathan. Nor was there any secondary treatment for the reason the applicant belonged to a S.C. category both in the matter of his transfers and postings. The order dated 28.6.2007 dealt with all aspects and particularly with reference to the O.M. dated 21.8.1989. Both O.M. namely A-8 and A-9 dated 24.6.1985 and 21.8.1989 had been duly looked into as such general guidelines were always applicable to the K.V.S. His claim and case that he had been subjected to prejudice for being a member of S.C. category was found as incorrect and baseless.

12. Mr. Surendran submits that Annexure A-8 and A-9 was issued in earlier years when it was found that some times S.C. officers were transferred to far of places and in the case of some officers, they were not accepted in their place of posting. It had been directed that on complaints, the Ministry was to look into the matter and come up with prompt action against the responsible persons for such lapses. He points out that there was no such lapse and the applicant also had not brought to the attention of Government of India any grievance for initiating action on any such discriminatory treatment.

13. Inviting our attention to Annexure A-2, Mr. Surendran points out that as desired by the Tribunal, the issue had been specifically addressed to by the Commissioner. In Paragraph 4 of the order, he had concluded that there was no harassment of the applicant being a S.C. employee as mentioned in his representation. Counsel submits that the results of class 12 were below the average of Lucknow region

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and this was also one of the ground which had resulted in transfer. This could not have been seen in a lighter perspective as chosen to by the applicant. Of course, counsel submits that by Annexure S-2, a communication have been issued to Sri Nand Lal but it could not been conclusive as the officer concerned might not have been possessing full information. It would not therefore be conclusive or ipso-facto sufficient to doubt the stand taken by the impugned order. The basic right of the KVS could not have been whittled out, in any case.

14. I may examine the contentions as above after advertizing to the orders passed by the Vice Chairman and the Administrative Member, in brief.

15. The Vice Chairman has scanned through the entire facts and had noticed the law on the subject as could be seen in paragraph 8 of the order. He was of the opinion that "transfer being an incidence of service need not be interfered with by the courts or Tribunal unless the same is in breach of any statutory rules or is penal in nature or is actuated by malice or is arbitrary. However, according to the Vice Chairman, the case in hand is quite different to the cases that come before the courts or Tribunals against transfers of employees. This is because the employee concerned is a member of S.C. and was being sent to a far flung station in J&K. He had served in a hard station. Principals of other schools having longer stay were either being not touched or if touched, were being accommodated at convenient places. The peculiar nature of allegations prompted the Tribunal to examine whether the Commissioner had considered the matter objectively in compliance of the Tribunal's order dated

26.8.2007. In paragraph 10 of the order, adverting to order A-8 and A-9., Vice Chairman held as follows:-

"Today if the Govt. or for that K.V.S. issues any instructions that employees belonging to scheduled castes or scheduled Tribes can be transferred at any time, while others can be transferred only on completion of five years or six years, the same are found to be stuck down by courts or law, being violative of Article 14 and 16(1) of the Constitution of India. But if there is nothing like that in the written instructions and in practice, the same is done by those who are trusted to be fair an equal to all, it goes either unnoticed or the victim meekly accepts the same, thinking that there is no use in raising the grievance as none is going to entertain or hear it."

Observing that there can be subtle discrimination, the Hon'ble Vice Chairman had relied on observation made by the Hon'ble Supreme Court in State of Andhra Pradesh Vs. Nalla Raza Reddy AIR 1967 SC page 1548. He further observed that hope had been expressed when the Commissioner was asked to look into the matter but he felt sorry that Commissioner had not applied his mind.

16. In conclusion, it has been held that as the Commissioner had not examined the grievance of the applicant in an objective manner, keeping in view the spirit of O.M. A-8 and A-9. Therefore, the order required to be quashed with further direction to reexamine the matter.

17. The Administrative Member also had practically relied on the same judicial pronouncement as guidelines as referred to by the Vice

Chairman. The order discloses that he had come to notice that when the transfer has been made in public interest after having considered all aspects and in administrative exigencies, it was not proper for the Tribunal to interfere in the matter. The courts were not to substitute themselves for the administrative authorities and interfere in the matter of transfer unless there are clear cut malafides or violation of statutory rules. With reference to the O.M., it has been observed that the officer concerned was posted on promotion to J&K and thereafter, given a posting to his home town on his own request. His case was not covered by the cases contemplated by the circular. Further his second transfer to Jyotipuram is neither a hard station nor a very hard station. The member was of opinion that there is no provision that SC and ST employees were not liable to be posted to hard places along with others. Resultantly, according to him there was no discrimination or violation of Article 14 and 16 and therefore, the contention on such basis is not tenable. Consequently, the application was dismissed.

18. After the benefit of going through the orders as above, and on hearing the counsel of both sides, I am of the stand that the view expressed by Member (A) is the one acceptable and in fact that is the only position possible to be adopted. I may give my reasons which prompted me to arrive at the said conclusion, as below:-

19. In the matter of transfers, the jurisdiction of the Tribunal or courts are substantially well defined. Generally in the cases where the order of transfer is found as come out of an exercise which is patently malafides, courts has power to interfere. Also in cases where statutory stipulations are violated, the Tribunal could assume jurisdiction to

attend to rectification work. The Hon'ble Supreme Court had observed in Union of India and others Vs. Janardhan Debanath and another (2004 Supreme Court Cases (L&S) 631) that the courts or the tribunals should not interfere with the transfer orders as a matter of routine as if they were appellate authorities enjoying powers for substituting their own discretion. The position had been explained by the Court in an earlier decision (Union of India and others Vs. S.L. Abbas reported in 1994 Supreme Court Cases (L&S) 230) and we could accept it as a guideline. Paragraph 6 thereof is reproduced below:-

"An order of transfer is an incident of Govt service. Fundamental Rule 11 says that "the whole time of a Government servant is at the disposal of the Government which pays him and he maybe employed in any manner required by proper authority." Fundamental Rule 15 says that " the President may transfer a Government servant from one post to another." That the respondent is liable to transfer any where in India is not in dispute. It is not the case of the respondents that the order of his transfer is vitiated by mala fides on the part of the authority making order,- though the Tribunal does say so merely because certain guidelines issued by the Central Government are not followed, with which findings we shall deal later. The respondent attributed 'mischief' to his immediate superior who had nothing to do with his transfer. All he says is that he should not be transferred because his wife is working at Shillong, his children are studying there and also because his health had suffered a setback some time ago . He relies upon certain executive instructions issued by the Government in that behalf. Those instructions are in the nature of guidelines. They do not have statutory force."

20. Mr. Surendran P. had invited my attention to a number of other cases as well but the principle is well settled that advertance to all of them might be superfluous.

21. Evidently the applicant could be credited with full perception of the legal position as is existing. So much so, his trump card was that he being a Member of the Scheduled Caste, for that reason alone, such an order of transfer has been issued. This accounted for malafides. He was not aware of any other reason to be existing as far



as his knowledge went. The discrimination was there in his posting, it continued at the time of promotion, and the secondary treatment is being adopted even later in his case. Mr. Singh however, submits that it may not be possible to highlight any specific instance to show the malafide approach. The circumstances spoke for themselves.

22. It would be relevant to note that before the present order of transfer, the applicant had no case or grievance that any of the previous orders were issued with malafide or bias. Judicial notice could be taken that the KVS might have had occasion to issue thousands of appointment orders and transfer orders and a vast number of persons among them may belong to the SC and ST categories. The appointees might be occupying different rungs of the hierarchy. It is not therefore, conceivable that a biased official had dealings with his files in 1990, 1995, 2002 and again in 2007. Unless a person has a definite case which could be substantiated at least *prima facie*, it will not be in good taste to claim that an order which results in inconvenience is a direct result of harassment for being a SC member. The proposition is too shallow. Also the scenario of 1984 and 1989 definitely are not there now.

23. It has to be noticed that applicant had been selected and posted to Darjeeling. He had willingly accepted the posting and even during all the time, his work was appreciated even according to him. He had come to his native place on his own request and there is no suggestion that there was any objection about granting his request for coming over to Bagdogra. The posting to Unnao also disclosed that he was treated well and without slighting him in any manner. In a selection, competing with his colleagues, he rose in

his career. About posting at Kishtwar there is nothing to suggest that he was unwilling and was posted overlooking his objections. After about three years, he had been transferred to Faizabad on request. All these go to indicate that there was no secondary treatment and the applicant has come with a case of possible bias only when there is a transfer to Jyotipuram, J&K. Circumstance that some of his colleagues had obtained postings in not far away places cannot be sufficient enough for the Tribunal to assume that he has been picked up for the arbitrariness. With respect, I may observe that even without recording a finding as about discrimination, the V.C. had opted to hold that there was non application of mind. But fact appears to be that the plea was empty and unsubstantiated and therefore, deserved to be rejected.

24. It is elementary that a person who makes allegations of discrimination has the duty to bring materials prima facie to evince a doubt that there was extraneous factors sufficient enough for arriving at an imperfect decision. The only circumstances that the transfer is to Jyotipuram, by itself cannot lead to a conclusion that there was any illegality in the action sufficient enough to decry the transfer. According to the Administrative Member, all these aspects had been examined by the highest authority and he had found that the assertion had no merit. I have no hesitation to hold that this was the right conclusion in the background of the facts presented.

25. Mr. Singh had adverted to a decision of the Allahabad High Court; the case of Dr. Avneesh Kumar Vs. Director, Indian Veterinary Research Institute 1999 (17) LCD 419, to the effect that when a statutory functionary makes an order based on certain grounds, its

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validity must be judged by the reasons so mentioned and it cannot be supplemented by fresh reasons in the shape of additional affidavits. High Court relied on the Mohinder Singh Gill and another Vs. The Chief Election Commissioner and others , AIR 1978 SC 851. But I do not think the decision as such has application here. Being a general transfer order (Annexure A-1) non recording of reasons in respect of every individual could not have been considered objectionable. The direction of Mohinder Singh Gill did not lay down any such principle . There is no necessity for recording reasons in respect of general transfer orders although the relevant records preceding to orders and minutes of deliberations should disclose the general yard stick employed and the departure if any made for not following accepted guidelines. When the matter was remitted for reconsideration at the instance of the Tribunal the issue highlighted appears to be about possibility of suspicion that could have been drawn from Annexure A-9 and A10. The contention has been dealt with and as referred to earlier, the applicant had failed to discharge his initial burden to show that malice had a role in the impugned order. It is not possible to concur with the argument of the learned counsel for the applicant that the transfer to distant place and a transfer immediately after completion of two years of service, after completing the minimum tenure in a hard station would by itself disclose that there was bias. Perhaps the applicant was suggesting that instead of him, some other principal who had longer tenure or who was more comfortably placed should have been asked to go and serve at Jyotipuram. Preciously, possible tendency of a Tribunal is to be curbed because of the caution suggested to be exercised by Supreme Court of India. The rule is that interference in a transfer case is an exception . Only when there is reliable material to assume that administrative decisions were in

colorable exercise of power, Tribunal is expected to interfere. The decision making authority is the best judge in the matter of transfer and postings and interference therefore, cannot be possible to be made, on the facts presented.

26. Of course, applicant submits that the Tribunal is not to be carried away by the observation that the transfer is in public interest. The said expression is supremely important and the court will be free to examine whether the order is issued in an attempt to mislead one and all. It is therefore, submitted that when the complaint about deficiency of the applicant is debatable, and when it appears that the opportunity to come up with full facts, although offered, had been turned down, the court has to presume that the transfer is not in public interest. But it is begging the question, as such a jurisdiction does not normally vest with us, of course for restraints prescribed by ourselves. Jyotipuram is also not a hard station, and as a public servant, the applicant could not have avoided a transfer as any specific guidelines had not been violated by the K.V.S.

27. Mr. R.C. Singh had, also, submitted that Mr. Hassan who was beneficiary of the orders and who was on promotion ought to have been directed to go to Jyotipuram and the favour shown by the administration of positioning him attached to the Assistant Commissioner and later a transfer to nearby station, was perhaps evidence of favoritism. However, there is no pleadings to indicate that any special favour has been given to Mr. Hassan. In the course of submission, Mr. Singh has also submitted that Mr. Hassan is no more. In the circumstances, we do not think such matters come within the purview of the present application, when we are examining the issue of

justifiability of transfer of the applicant. Certainly the O.A is found to be without merit. It is, therefore, dismissed.

28. In view of the circumstance that I have opted to agree with the decision rendered by the Administrative Member, the net result would be that the application stands rejected. It is so ordered. I may also record that Mr. R.C. Singh made a submission that his client has been at Faizabad because of interim order all through out, and when it is the position that it may not be necessary to accommodate any other individual at Faizabad, as of now having superior claims, the K.V.S. may be directed to examine as to whether there is necessity to enforce the order. Notwithstanding, the circumstances that the O.A. stands dismissed. I feel it is eminently a request not to be abjectly rejected. I direct that in their discretion, K.V.S. is to look into the matter and advise the applicant of their decision in three weeks time from today. No costs.



(M. RAMACHANDRAN)
VICE CHAIRMAN

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