

**CENTRAL ADMINISTRATIVE TRIBUNAL,
LUCKNOW BENCH,
LUCKNOW.**

Original Application No. 472 of 2010

This the 9th day of April, 2011

Hon'ble Mr. Justice Alok K Singh, Member-J
Hon'ble Mr. S.P. Singh, Member-A

Smt. Bhawana Singh, W/o Sri B.K. Singh, R/o 7 Kasturba Road, Cantt., Lucknow

.....Applicant

By Advocate : Sri Keshari Nath Tripathi Senior Advocate assisted by Sri A. Moin and Sri Amit Verma

Versus.

1. Union of India through Secretary, Ministry of Defence, Department of Defence Estates, Raksha Sampada Bhawan, Delhi Cantt.
2. Director General Defence Estate, Raksha Sampada Bhawan, Ulaanbaatar Road, Delhi Cantt.
3. Additional Director General (Administration), Defence Estate, Raksha Sampada Bhawan, Ulaanbaatar Road, Delhi Cantt.
4. Principal Director, Defence Estate, Central Command, Lucknow.
5. Sri G.S. Rajeswaran, Defence Estates officer, Jallandhar.

.....Respondents.

By Advocate : Sri Kapil Dev Senior Advocate assisted by Sri R.C. Singh, I.H. Farooqui, Assistant Solicitor General and Sri R.C. Singh for R-5

By Hon'ble Mr. Justice Alok Kumar Singh, Member (J)

O R D E R

This O.A. has been filed for quashing the transfer order dated 11.11.2010 as contained in Annexure no.1 to the O.A. and order dated 12.11.2010 passed by respondent no.2 as contained in Annexure no.A-1(a) to the O.A. by means of which the representation made by the applicant against the transfer order has been rejected.

2. The case of the applicant is that she belongs to Indian Defence Estates Service (1993 Batch). She joined as Joint Cantonment Executive Officer, Delhi Cantt. Board in 1994 and subsequently she was transferred to various places. Meanwhile, she was promoted to the post of Cantonment Executive Officer (hereinafter referred as CEO for short)

and was posted at Allahabad. She was transferred from Allahabad to Lucknow vide order dated 5.10.2010 (Annexure-2). She joined at Lucknow in compliance of transfer order. Her husband is also in the Army and at present he is holding the post of Colonial. She has two minor children aged about 07 and 09 years respectively. The Government of India, Ministry of Defence has issued Government order dated 5.9.1983 fixing tenure of the officers of Defence Estates Service. There are two types of posting i.e. in the Directorate and in the field office. The term of posting as CEO is 2.5-3 years (Annexure-3). After joining at Lucknow, she has completed only five weeks and therefore, in view of the aforesaid G.O., she ought to have been retained on the said post for at least 2.5-3 years. But in utter violation of the aforesaid G.O., she has been transferred from the post of CEO to the post of Joint Director, Defence Estates vide impugned order dated 11.11.2010. The impugned order purports to have been passed on administrative grounds. But in fact it has been passed with malafide intention to harass the applicant. The then Director General, Department of Defence Estates Sri Bal Sharan Singh retired from service after completing his superannuation on 31.10.2010. The applicant was posted as CEO, Lucknow by the then DGDE Sri Bal Sharan Singh. After his retirement, the officiating charge of his post was taken over by one Sri Ashok Harnal, whose post is Principal Director, Defence Estates, Southern Command, Pune. Sri Harnal was earlier superior officer of Smt. Rachel Koshy in the capacity of being Principal Director, Defence Estates, Southern Command, where she was working as CEO, Pune. By means of order dated 5.10.2010 passed by Sri Bal Sharan Singh, the then DGDE, Smt. Rachel Koshy was transferred as Joint Director, Defence Estate, Southern Command, Pune and in her place Sri B.A. Dhayalan was transferred and posted from Lucknow as CEO, Pune. Vide an order dated 8.11.2010 issued by Ministry of Defence, the transfer orders passed by the outgoing DGDE Sri Bal Saran Singh during the last two months of his retirement were directed to be reviewed in the wake of allegations of corruption in the transfer/posting of officers. On the pretext of this order, the impugned order is said to have been passed. The said order talks about only review of transfer/posting orders and for submitting of a report. The said order did not give any license or an authority to pass a fresh transfer order or cancel/modify the earlier transfer orders. But instead of submitting a report to Raksha Mantralaya as was directed in the said order dated 8.11.2010, the officiating DGDE vide his impugned order dated 12.11.2010 has modified the previous order dated 5.10.2010 passed by his predecessor which was beyond the scope of the authority given to

him by order dated 8.11.2010. The Opposite parties have failed to demonstrate as to whether the allegations of corruption against outgoing DGDE were found to be true or not. It is further said that no cognizance can be taken of the bald allegations of corruption in transfer and posting without any enquiry having been carried out. Further, no action whatsoever has been taken against outgoing DGDE Sri Bal Sharan Singh till date in respect of alleged serious allegations of corruption made against him in respect of transfer/ posting within the last two months of his retirement. So far as the question of the applicant being transferred from the post of CEO to that of Joint Director is concerned, according to the applicant the post of CEO is a statutory post prescribed under Cantonment Act, 2006 and it has got clear duties assigned under Sections 25 and 26 of the Act. Whereas the post of Joint Director, Defence Estates service has got basic desk job without any statutory powers attached to it. In the case of Smt. Rachel Koshy, impugned order dated 11.11.2010 is sought to be justified by the respondents on the ground that Smt. Koshy had not completed her tenure of 2.5-3 years as CEO and, therefore, she was sought back by means of impugned order. On this analogy, the applicant having been posted as CEO, Lucknow only for about five weeks by virtue of same order dated 5.10.2010 could not have been transferred prior to completion of her tenure. Otherwise also, the respondent no.2 in the capacity of having got only officiating charge of DGDE had no power to transfer the applicant. The unceremonious removal/transfer of the applicant from the post of CEO after a short period of five weeks, patently, amounts to causing aspersion on her working and tarnishing her image in the eyes of public. The applicant has always been commended for her excellent work as would be evident from the perusal of various commendation certificates contained in Annexure no.8. The applicant moved representation on 11.11.2010 as soon as she received the transfer order, but the same has been rejected on the very next day.

3. The case of opposite Parties No.1 to 4 as contained in the Counter Affidavit is that the order dated 5.10.2010 was issued when there was less than one month left for superannuation of outgoing DGDE, which became highly controversial and, therefore, with the approval of the Hon'ble Defence Minister all transfer/posting order which were made within last two months, were directed to be reviewed. Consequently, having regard to the posting profile and past performance of the applicant, she was transferred and posted as Joint Director, Defence Estate, Central Command, Lucknow vide impugned order on

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administrative ground and in public interest. The order will neither change the station i.e. Lucknow nor the status of the applicant nor her pay and allowances. While posted as CEO, Allahabad Cantt. the applicant was not able to conduct the Board's meeting as per provisions of Cantonment Act. She also did not send the budget estimate in time resulting in delay even in payment of arrears etc of 6th Pay Commission. Therefore, Army authorities in Central Command had asked for immediate transfer of the applicant from the station. In the Supplementary Counter Affidavit filed by Sri N.V. Satyanarayana, CEO Cantt., Kanpur filed against the affidavit of the applicant in support of some amendments which were sought in this case, it has been averred that the President of India has been pleased to authorize Sri Ashok Harnal to discharge the duties and responsibilities of DGDE w.e.f. 1.11.2010 and by subsequent order dated 24.11.2010 Sri Harnal has also been placed in the pay scale of regular DGDE i.e. Rs. 80,000/- (fixed). As per records, only one transfer/posting orders of the officers of Indian Defence Estate Service (hereinafter referred to as IDES for short) was issued during the month of September-October, 2010 vide impugned order dated 5.10.2010 involving four officers namely Sri B.A. Dhayalan, Smt. Rachel Koshy, Smt. Bhavana Singh and Sri Puspendra Singh. After receiving the directions for review of transfers, the posting profile of the officers and tenure at their stations of posting etc. were analyzed. Besides, the past performance of the officer and vigilance background were also taken into consideration. Thereafter, revised order was issued partially modifying the transfer order made by outgoing DGDE.

4. A short Counter Affidavit on behalf of respondent no.5 Sri G.S. Rajeswaran has also been filed. He is presently posted as Defence Estates Officer, Jalandher Cantt., and has been now posted vice the applicant. According to him no prejudice has been caused to the applicant because she has been transferred to another post in the same station.

5. In response to the Counter Affidavit filed on behalf of the respondent nos. 1 to 4, a Rejoinder Affidavit dated 21.1.2011 has been filed on behalf of the applicant on 10.2.2011 mostly reiterating the original pleadings. In respect of her alleged controversial tenure at Allahabad, it has been said that one Sri Jai Prakash Sharma, elected Vice President of Cantonment Board, Allahabad was patently peeved with the sincere and honest working of the applicant and he tried to browbeat by filing various Writ petitions and Contempt petitions before Hon'ble High Court at Allahabad. In fact all the orders issued by the Hon'ble High Court were complied with. Ultimately, seeing the nefarious designs of Sri

Sharma, the Hon'ble High Court by means of judgment and order dated 28.5.2010 passed in Writ petition no. 31600 of 2010 dismissed the petition with exemplary cost of Rs. 10,000/-. Sri Sharma however, preferred an SLP before the Hon'ble Supreme Court, which stayed the order of Hon'ble High Court imposing the cost upon Sri Sharma. During the course of arguments, however, it was pointed out that this SLP has now been disposed of. The imposition of cost has been set-aside and the matter has been referred back to Hon'ble High Court to decide the aforesaid Writ petition. An electrostat copy of order dated 14.2.2011 passed in SLP has also been placed on record for perusal. Coming back to the averments made in the Rejoinder Affidavit, it has been further said that as far as contention that the Army authorities had asked for thorough probe and transfer of the applicant from Allahabad, she already stands transferred from Allahabad. However, after probe in the matter, nothing adverse was found against the applicant. But the main reason for passing the impugned order was for bringing back Smt. Rachel Koshy as CEO, Pune. Though an order of transfer can be modified even after its implementation, but the same can only be done in a judicious manner and not in an arbitrary or whimsical manner as has been done in the instant case. On one hand, the post of Joint Director is being described as a post of higher responsibilities but on the other hand, the said post remained vacant on many occasions since last several years.

6. Rejoinder Affidavit has been filed by the applicant also against Short Counter Affidavit filed on behalf of respondent no.5 saying that purport of order dated 24.11.2010 is that Sri Harnal has been given officiating charge of the post of DGDE till regular incumbent joins or six months or either fresh order, which ever is earlier. As such, he has to carry out only routine administrative work and therefore, impugned transfer order has been issued without any authority. That under Rule 9 of Defence Estates Service (Group -A) Rules, 1985 (hereinafter referred to as 1985 Rules for short) provides that all appointments to the service shall be made by the President and postings & transfers of the members of the service shall be made by DGDE. Therefore, it could not have been made by an officiating DGDE particularly when his basic post continues to be that of Principal Director.

7. A supplementary Affidavit dated 22.3.2011 has also been filed by the applicant on 24.3.2011. In this Affidavit, it has been said that alongwith Supplementary Counter Affidavit filed by respondents, a note-sheet dated 11.11.2010 has been annexed as Annexure CA-3 upon

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which much emphasis has been laid. In this note-sheet it is mentioned that there were spate of complaints against the applicant during her tenure as CEO at Bareilly and some of which are under consideration of CVC. It is further mentioned in the note-sheet that GOC-in-C, Central Command, Lucknow vide letter dated 2.9.2010 also recommended for attachment of the applicant with Directorate office at Lucknow pending further enquiry. It has been averred in this supplementary Affidavit that all these allegations are patently false. In respect of CVC complaints, the applicant has reliably come to know that the said matter has been closed by CVC as nothing was found against her. On similar grounds, in the second matter also arose and DGDE himself as well as Ministry of Defence have recommended for its closure. On the other hand, the applicant has been given commendation on 15.8.2005 by the Chief of the Army Staff and even by the Defence Minister while she was at Bareilly (Annexure SCA-1 & 2). In respect of Allahabad incident, it has been averred, that nothing was found against the applicant (Annexure SCA-3). In respect of letter dated 13.4.2010, it has been said that DGDE had written to the GOC-in-C a letter dated 25.5.2010 saying that all allegations against the CEO, Allahabad were found to be false after due investigation. Further, GOC-in-C was requested to advice Brig. i.e. President Cantonment Board to function properly (Annexure SCA-4). In respect of spate of litigation started by Sri J.P. Sharma, it has been averred that its roots in the deals which were indicated by the applicant by means of a confidential letter dated 4.8.2009 and 16.11.2009 (SCA 6 and 7) giving out the details of illegalities and irregularities which the applicant was being asked to perpetuate under the coercion and threats of Sri J.P. Sharma duly supported by the President, Cantonment Board Brig. R.K. Bhutani, which were sent to Principal Director, Defence Estates, Central Command, Lucknow who also forwarded the same to the DGDE. In respect of letter of GOC-in-C, Central Command, dated 2.9.2010, it has been averred that firstly the GOC-in-C, Central Command has no role and authority to write such letter, therefore, it has been adversely commented by the DGDE vide his letter dated 25.5.2010 in response to an earlier letter sent by GOC-in-C, Central Command dated 13.4.2010. Otherwise also, the said letter dated 2.9.2010 has been acted upon and the applicant has been transferred from Allahabad. Therefore, if that letter has any 'sting' the said 'sting' had lost its force with the transfer of the applicant from Allahabad to Lucknow. Therefore, that letter could not be acted upon and relied upon again and again.

8. Against the aforesaid Supplementary Affidavit, a supplementary Counter Affidavit/Reply has been filed by Sri N.V. Satyanarayana, who is

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said to have been doing pairvi on behalf of the respondents. It has been averred in this affidavit that the applicant cannot derive any benefit of the note-sheet placed on record as there is no element of punishment and impugned order was passed in public interest. In respect of vigilance matter pending at Bareilly, it has been said that the matter is still under consideration before CVC. Lastly, it has been said that under the provisions of Sections 58 and 59 of Cantonment Act, 2006, the General Officer Commanding has over all responsibility to see and ensure that the Cantonment Boards in his command functions properly and efficiently.

9. We have heard the learned counsel for parties at length and perused the material on record including the written arguments submitted by both the sides.

10. It has been submitted on behalf of the applicant that the impugned order has been passed by an incompetent authority in as much as it has been passed by not a regular DGDE but by an officiating person. In this regard, reference was made to Rule 9 of the IDES (Group 'A') Rules, 1985 which says that "all appointments to the service shall be made by the President and the postings and the transfers of the members of the Service shall be made by Director General Defence Estates." It has been further said that the opposite parties have also not produced any order delegating the power of transfer to the officiating DGDE. In support of this submissions, reliance was placed on the following five case laws:-

i) **1994(2) SCC page 416- Dr. Ramesh Chandra Tyagi Vs. Union**

of India and others (para 5) which is as under:-

"5. Two basic questions arise, one whether the basic transfer order passed against the appellant was valid and in accordance with law and the other if the dismissal order suffers from any infirmity. Taking up the transfer order it is undisputed that the competent authority to transfer the appellant was the Secretary of the Department whereas the order was passed by the Director General. It was attempted to be defended by claiming that the power of transfer was delegated. But despite grant of time no order delegating the authority could be produced. The learned counsel appearing for Union of India had to concede that no order of delegation was on record. We are not prepared to infer

delegation because there were orders on the record which indicated that subsequently the Secretary had delegated the powers. It is not delegation earlier or later which is material but whether any delegation existed on the date when the transfer order was passed. Further, it is necessary to mention that the respondents having taken definite stand in the written statement that the transfer order was approved but did not produce the record in the trial court nor could they substantiate it even in this court, there is no option but to hold that the order was not passed by the person who alone was competent to do so. The transfer order issued by the Director General, thus, being contrary to rules was non-est in the eye of law."

ii) **1979 (1) SLR page 44- *Presh Chandra Dutta Vs. Collector of Calcutta and others*** (particularly paras 3 and 7 were referred). The relevant portions are extracted hereinbelow:-

"3. Mr. Kashi Kanta Maitra, Learned Advocate for the petitioner contended that the charge sheet was bad inasmuch as the same was not issued by the disciplinary authority. It was issued by the respondent No.2 who was at the time discharging the functions of the respondent No.1 as a stop-gap arrangement.....Mr. Maitra contended that the subsequent notification giving retrospective effect could not validate an act, particularly which affected the rights of the petitioner, which act was done and performed at a time when he had no authority in that behalf."

"7. In my opinion, the charge sheet was not issued by authority who was entitled to or empowered to issue the charge sheet on the date when the same was issued and therefore, the same was bad and cannot be sustained."

iii) **1978 L.I.C. 41 - *T.R. Pandey Vs. The Chief Commissioner, Andaman and Nicobar Islands and others***. (paras 4 and 8)

“4. The first ground urged in support of this appeal is that Mr. Narayana who issued the punishment order was not the Education Officer at the relevant time, and therefore, he was not entitled to exercise the statutory power under the Central Civil Services (Classification Control and Appeal) Rules. It was contended that these rules have framed under Article 309 and CI (v) of Article 148 of the Constitution and as such these were statutory rules.”

“8. The next question to be considered is whether the order of the appellate authority can be upheld on the ground that the defect in the order of the punishing authority in inflicting the punishment of stoppage of increment with cumulative effect without following the proper procedure, was cured by the appellate authority, inasmuch as the appellate authority modified the order of punishment to stoppage of two increments only. It has been noticed earlier that the order of the punishing authority was vitiated on the ground that it gave no reason for the order and had not recorded any finding on the imputation of charges leveled against the appellant. The order of punishment was without any jurisdiction on the ground that the punishing authority was not competent to exercise the statutory powers. If the order is without jurisdiction it is void altogether . Such a void order cannot be converted into a valid order by ratification by the appellate authority.”

iv) **Lt. Col. Des Raj Shamal Vs. Union of India and others.** This is an unreported case. The judgment was delivered by a Division Bench consisting of Hon'ble Mr. Justice S.B. Sinha and Hon'ble Mr. Justice A. Sikri. (Paragraphs 4 and 17). The operative portion of these paragraphs are as under:-

“4. At the time of Indo-Pak war, the petitioner was a Lieutenant Colonel. The petitioner while assailing the aforementioned

judgment of conviction and sentence has raised the following questions:-

a) The GOC of 16th Infantry Division being biased allegedly hatched up a conspiracy against him. He had also mala fide transferred him twice to Jalandhar.

b) The GCM was improperly constituted inasmuch as it was convened by an officer holding the rank of Lieutenant Colonel and has signed as Officiating General Officer Commanding 16th Infantry Division, which is in contravention of the provisions of Section 109 of the Army Act, 1950. The same was also constituted in violation of Rule 37 of the Army Rules, 1954."

"17. The submission of the learned counsel for the respondents to the effect that having regard to the provisions of Section 133 of the Army Act, the petitioner may not be permitted to raise the question of lack of jurisdiction on the part of the concerned authority, in our opinion, is also not correct. In the event it is found that the GCM has been illegally convened, the same would go to the root of the matter and, thus, any order passed by it would be coram non judice. It is now well known that the order passed by an authority, who lacks inherent jurisdiction in respect thereof, the order would be a nullity and, thus, non-existent in the eyes of law."

v) **(2003) 1 Supreme Court Cases 364 P. Tulsi Das and others Vs. Govt. of A.P. and others.** (paragraph 15). Relevant portion of this paragraph is extracted herein below:-

"15. It is well settled that a person holding a lesser grade of post can be made to be in charge of a higher post and be paid also the scales of pay permissible for the higher grade or category of post but that will not make the said person entitled to claim to be a regular member or incumbent of the post, to claim consequential benefits for any advanced career or promotion as if

he is a regular incumbent to the said post. Even any one of the appellants or the class of persons similarly situated when assert a claim for the benefits of the said Scheme they will have to strictly comply with the requirement of the conditions stipulated therefore, in the scheme and cannot by virtue of the services rendered in a post pursuant to the concession shown to appoint them in the higher category of posts with a limited purpose and object as the aim automatically becomes entitled to count such service for claiming the benefits under the special Scheme."

11. Secondly, it has been submitted that there has been patent haste in issuing the impugned order inasmuch as the officiating charge was given to the Principal Director of Southern Command on 1.11.2010. The Defence Ministry issued an order dated 8.11.2010 for reviewing all the transfer orders on the ground of alleged corruption against the ex-DGDE. On 11.11.2010, the impugned transfer order was passed by officiating DGDE. It was further said that no grounds or reasons have been assigned by the opposite parties as to why they could not wait for a regular DGDE to join. In this regard, reliance has been placed on the following two case laws:-

i) **2004 (2) SCC page 65 - Bahadur Singh Lakhubhai Gohil Vs. Jagdishbhai M. Kamalia and others** (paras 2,3,4,5,24 and 25). The relevant portions of para 25 are as under:-

"25. **In S.P. Kapoor (Dr.) Vs. State of H.P.**, this Court held that when a thing is done in a post-haste manner, mala fide would be presumed , stating (SCC p. 739 para 33).

"33....The post-haste manner in which these things have been done on 3.11.1979 suggests that some higher-up was interested in pushing through the matter hastily when the Regular Secretary, Health and Family Welfare was on leave."

ii) **1981 (4) SCC page 716- Dr. S.P. Kapoor Vs. State of Himachal Pradesh and others.** (para 33). The relevant portion is extracted below:-

"33. The process of selection and appointment were obviously mala fide and that they were appointed on the date on which Mr. Yadav , the regular Secretary, Health and Family Welfare Department , was on leave and that this haste suggests that he would not have agreed to carry out the political wish of the then Chief Minister in making the appointments in the post haste manner. Though it is not possible to accept the belated contention that there was any mala fide on the part of the then Chief Minister in the matter of constitution of the Departmental Promotion Committee with his Principal Secretary as one of its members in the place of the regular Secretary, Health and Family Welfare, we are of the opinion that there is room for suspecting the reason why the whole thing was completed in haste on November, 3, 1979 after the preparation of the final seniority list on November, 2, 1979, in the light of the admitted position that the Deputy Directors and Director of Health Services, Himachal Pradesh were holding adhoc appointments from 1973. The matter was not such as could not have been put off by a few days . Such rush is not usual in any State Government. The post haste manner in which these things have been done on November, 3, 1979 suggests that some higher up was interested in pushing through the matter hastily when the regular Secretary, Health and Family Welfare was on leave. Therefore, we are of the opinion that the matter requires to be considered afresh."

12. Thirdly, it has been submitted that the impugned transfer order has not been passed for any administrative exigency or public interest as claimed but to accommodate one Smt. Rachel Koshy as CEO, Pune. Smt. Rachel Koshy working as CEO, Defence Estates, Pune was

transferred as Joint Director, Defence Estates at Pune itself and Sri Dayalan , who was working as CEO, Defence Estates, Lucknow, was transferred and posted as CEO, Defence Estates, Pune. Similarly , the applicant working as CEO, Defence Estates, Allahabad, was transferred and posted as CEO with additional charge of DEO, Lucknow circle. These orders were passed on 5.10.2010 by out-going DGDE. By means of impugned order dated 11.11.2010, Smt. Koshy was transferred back to the post of CEO, Pune while Sri Dayalan was transferred from CEO, Pune to that of Joint Director, Defence Estates, Pune and similarly the applicant was transferred from CEO, Lucknow to that of Joint Director, Defence Estates, Lucknow. Thus, the only beneficiary of the entire exercise is Smt. Koshy while Sri Dayalan as well as the applicant both were disturbed. At this stage, the attention of the Tribunal also was drawn towards the transfer policy of 5.9.83 (Annexure -3) which provides the tenure of the CEO to be 2-1/2 to 3 years. The reasons for cancellation of transfer of Smt. Koshy is said to be that she had not completed her tenure as CEO, Pune. But in respect of the applicant, this analogy was not adhered although, she had also not completed her tenure at Lucknow on the post of CEO. Therefore, it was emphasized that the impugned transfer order has been passed simply to accommodate Smt. Koshy , CEO, Pune. This according to the learned counsel for the applicant amounts to discrimination reflecting patent arbitrariness and malice in law on the part of the respondents. He has further submitted that the Govt. order dated 5.9.83 regarding the tenure of the officers has been applied in a discriminatory manner which is violative of Article 14 and 16 of Constitution of India, and it amounts to treating equals as unequals.

13. Fourthly, it has been submitted that the order of Defence Ministry dated 8.11.2010, was for reviewing all transfers, postings ordered by former DGDE during last two months in the wake of alleged corruptions in transfers/postings . Therefore, the condition

precedent for reviewing the orders of transfer was that the allegation of corruption should in fact have been proved but no corruption has been indicated in the note sheet dated 11.11.2010 which is said to be the basis of impugned record.

14. Fifthly, it has been submitted that according to the respondents, the posting profiles and the tenure at their stations of posting have been analysed and four points were taken into consideration while carrying out the review; namely

- a) the posting profiles of the officers concerned;
- b) tenure at their stations of postings;
- c) past performance of the officers; and
- d) vigilance background of the officers.

It was emphasized that the respondents have conveniently omitted the direction contained in the Defence Ministry's letter dated 8.11.2010 by which review of transfer was directed on the ground of alleged corruption against ex-DGDE. It was further argued that moreover, even the aforesaid four factors were not taken into consideration in respect of all the concerned officers, whose transfer were reviewed. This has been demonstrated in a tabular form in the written arguments of page 9 and 10 as under:-

Officer	Factors actually taken into consideration
Sri Dayalan	a) Posting Profile (b) Tenure (c) Past performance (d) Vigilance Background
Smt. Koshy	b) Tenure
Sri Pushpendra Singh	(b) Tenure
Smt. Bhawna Singh , the applicant	(c) Past performance (d) Vigilance background

15. In view of the above, it was submitted that the respondents have failed to maintain and follow their own allegation of corruption and apparently they were looking for ways, means and reasons to somehow or the other try and justify the impugned order.

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16. Sixthly, it has been submitted that the letter dated 8.11.2010 issued by the Ministry of Defence only directed for review of the transfer orders and not for passing an order transferring the persons. But, in this case, the impugned order of transfer has been passed with information to the Ministry of Defence without indicating as to what corruption was noticed in the earlier transfer order dated 5.10.2010. in this connection, it was also pointed out that if the impugned order was a bonafide order passed in pursuance to the aforesaid letter dated 8.11.2010, then it ought to have been confined to the four officers only mentioned in the earlier order dated 5.10.2010 i.e. Sri Dayalan, Smt. Koshi, Sri Pushpendra Singh and Smt. Bhawna Singh, the applicant. But the impugned order tries to bring in a new officer to replace the applicant at Lucknow, namely, Sri G.S. Rajeswaran who has been transferred from Jalandhar as CEO, Lucknow. This was out side the ambit of review. Moreover, on the same analogy, a new officer should have been brought in to replace Smt. Koshy at Pune but this was not done which patently indicates the gross arbitrariness, malice in law and discrimination as well as favoritism adopted to favour just one officer on the pretext of alleged review, which ultimately turns out to be Smt. Koshy.

17. Lastly, reliance has also been placed on the following two case laws:-

i) **Vice Chancellor , L.N. Mithila University Vs. Dayanand Jha (1986) 3 Supreme Court Cases, 7** (Specific reference was made to para 8, which is as under:-

“8. The prerequisite of the power of the Vice Chancellor under Section 10(14) of the Act to transfer any teacher occupying a post in any department or college maintained by the University to any equivalent post in another department or college maintained by it is that they must broadly, bear the same characteristics. The mere circumstances that the two posts are carried on the same

scale of pay is not enough. That is because in the original text of the Amendment Act the words used in Section 10(14) as well as in the expression 'other equivalent post' as defined in Section 2 (ka, chh) are samakaksh pad. Learned counsel for the respondent is therefore right in contending that equivalence of the pay scale is not the only factor in judging whether the post of Principal and that of Reader are equivalent to adopt is whether they could be regarded of equal status and responsibility. The term 'teacher' is defined in Section 2 (ka, chh) to include Principal, University Professor, College Professor, Reader, Lecturer etc. Professors of the university like head of the department college Professors, Readers, Lectures belong to different grades and discharge different duties and responsibilities. The power of the Vice-Chancellor to transfer any teacher under Section 10(14) is controlled by the use of the word samakaksh and he cannot transfer any teacher from one post to another in a department of the university or a college unless they belong to the same class. In that view, there can be no doubt that the two posts of Principal and Reader cannot be regarded as of equal status and responsibility. The true criterion for equivalence is the status posts. Although the two posts of Principal and Reader are carried on the same scale of pay, the post of Principal undoubtedly has higher duties and responsibilities. Apart from the fact that there are certain privileges and allowances attached to it, the Principal being the Head of the college has many statutory rights, such as : (i) He is the ex-officio member of the Senate. (ii) He has the right to be nominated as the member of the Syndicate. (iii) As head of the institution, he has administrative control over the college Professors, Readers, Lecturers and other teaching and non-teaching staff. (iv) The Principal of a constituent college is also

the ex-officio member of the Academic Council of the university. And (v) He has the right to act as Centre Superintendent in the university examinations. It is thus evident that the High Court was right in holding that the post of Reader could not be regarded as an equivalent post as that of Principal in the legal sense. May be, when the affairs of a college maintained by the university are mismanaged, the Vice Chancellor may, for administrative reasons, transfer a Professor or Reader of any department or college maintained by it to the post of the Principal of such college, but the converse may not be true. While the Professor and Readers by reason of their learning and erudition may enjoy much greater respect in society than the Dean or Principal of a college, it does not follow that the post of Principal must be treated as equivalent to that of a Reader for purposes of Section 10 (14) of the Bihar State Universities Act, 1976, as amended.

ii) **2009 (2) SCC page 592, Somesh Tewari Vs. Union of India and others** (Emphasis was laid on para 16 which is as under:-

"16. Indisputably, an order of transfer is an administrative order. There cannot be any doubt whatsoever that transfer, which is ordinarily an incident of service should not be interfered with save in cases where *inter alia mala fide* on the part of the authority is proved. *Mala fide* is of two kinds- one malaice in fact and the second malice in law. The order in question would attract the principle of malice in law as it was not based on any factor germane for passing an order of transfer and based on an irrelevant ground i.e. on the allegations made against the appellant in the anonymous complaint. It is one thing to say that the employer is entitled to pass an order of transfer in administrative exigencies but it is another thing to say that the order of transfer is passed by way of or in lieu of punishment.

When an order of transfer is passed in lieu of punishment, the same is liable to be set aside being wholly illegal."

18. From the other side, it has been submitted that the Rules of 1985 has been framed under proviso to Article 309 of the Constitution of India, which itself is subject to the Act passed by Parliament. The definition of 'Director General' is given in Section 2(p) of Cantonment Act, 2006. As no definition has been given in the Rules of 1985, the aforesaid definition given u/s 2(p) of the Act of 2006 will apply. This definition is as under:-

"Director General" means an officer of the Indian Defence Estates Service (IEDS) appointed by the Central Government to perform the duties of the Director General, Defence Estates for the purpose of this Act and includes Senior Additional Director General and Additional Director General."

19. In respect of case of Tulsi Das and others (Supra), relied upon from the other side, it has been submitted that the ratio of the decision in this case, therefore, does not apply in the present case. Similar submission has been made in respect of the case of Dr. Ramesh Chandra Tyagi (supra). Like-wise, in respect of cases of Bahadur Singh Lakhubhai Gohil, Dr. S.P.Kapoor (Supra) cited on behalf of the applicant as mentioned hereinabove, it has been submitted that those cases will also not be applicable in the present case. Similar submissions have been made in respect of cases of Vice Chancellor Mithila University and Somesh Tiwari (Supra).

20. As against the case laws of Paresh Chandra Dutta and T.R. Pandey (Supra), the reliance has been placed on an un-reported judgment of Allahabad High Court in W.P. No.64396 of 2006 **Om Prakash Asati Vs. State of U.P. and others**. It was a case pertaining to Uttrar Pradesh Jal Nigam and the petitioner was working as an Executive Engineer, who was compulsorily retired by respondent No.1 vide an order which was passed by Managing Director, U.P. Jal

Nigam. Emphasis has been laid down on paragraphs 15 and 16, which are as under:-

“15. Before commenting upon this commentary, it can be noted that no case law has been cited in support of this contention. As regards the view of the author contained in the book noted above, we entirely disagree with what the author has said. The simple reason for our view is that there are numerous occasions when the authority concerned is not available for a long time for the reason or the other, and urgent situations arise for the exercise of authority. It would be a great problem and even chaos if the commentator’s proposition is to be accepted. Right from the time of British Administration, it has been the tradition and the procedure that officiating Authority exercises all the powers and authority of the post on which it was functioning and that tradition has continued even now.”

“16. What is an Officiating Officer? For all practical purposes, he steps in the shoes of the officer he is officiating otherwise the very purpose of his being officiating officer will be nullified. It is wholly illusory to draw a line that an officiating officer can do this, and cannot do that. The proposition propounded by the commentator is, therefore, wholly unpalatable.”

21. It has been further submitted that as far as alleged violation of guidelines/ norms in respect of transfer is concerned, the same do not confer any enforceable right to any Govt. Servant. In this regard, reliance was placed on the case of Union of India Vs. S.L. Abbas (AIR 1993 SC 2444), which has been followed by Hon’ble High Court in the case of **Vinod Kumar Pandey Vs. State of U.P. and others reported in 2010 (28) LCD 232**. It has been further submitted that while reviewing the order dated 5.10.2010, the competent authority passed the impugned order after taking into consideration the following four factors:-

- a) the posting profiles of the officers concerned;
- b) tenure at their stations of postings;
- c) past performance of the officers; and
- d) vigilance background of the officers.

22. Further, it has been submitted that ratio of decision of Om Prakash Singh (supra), is not applicable in the present case. The transfer order is not based on extraneous material or non-existent material. Replying to the arguments from the side of applicant, in respect of Smt. Rachel Koshy, it has been said that Sri Dayalan feeling aggrieved by the said order filed an O.A.No. 777 of 2010 which has been dismissed by CAT, Mumbai. Moreover, the transfer of the applicant is actually an adjustment in the same station. There has been neither any reduction in status or emoluments. In this respect, reliance was placed of the case of ***Lal Bahadur Gupta Vs. State of U.P. and others***

2008 (26)LCD 1605 (para 5 to 7) Relevant portions are as under:-

“7. Transfer of the petitioner has not been effected at the behest of a Minister or upon intervention of a political person. Request made by wife of an employee has been considered and that too taking in account the difficulties expressed by her in her representation. By transferring the petitioner from Lucknow region to Headquarters at Lucknow neither the status of the petitioner is being altered in any manner nor his emoluments. Interference can only be made if the same is tainted with malice against the provisions of some statutory rules or has been passed by an incompetent authority.

23. Lastly, it has been submitted that initially, the applicant has also criticized the transfer order on the ground that once the order dated 5.10.2010 was already implemented, it could not have been modified. According to the respondents, it is totally a misplaced and misconceived submission. In this regard, reliance has been placed on the case of ***Director, Rajkiya Krishi Utpadan Mandi Parishad Vs. Natthi***

Lal 1995 (2) UPLBEC 1128. It is a full bench judgment of this Hon'ble High Court where it has been laid down that there is no bar in exercise of power for cancellation, revocation or modification after implementation.

24. On behalf of the respondents 1 to 4, reliance has also been placed on the following case laws:-

i) **(2009) 11 SCC 678, Tushar D. Bhatt Vs. State of Gujarat and others** (paras 16 and 17). The relevant portions of paragraphs 16 and 17 are as under:-

“16. The legal position has been crystallized in a number of judgments that transfer is an incidence of service and transfers are made according to administrative exigencies.”

“17. In the instant case, in the entire tenure of more than 18 years, the appellant was only transferred twice. The appellant's transfer order cannot be termed as mala fide. The appellant was not justified in defying the transfer order and to level allegations against his superiors and remaining unauthorisedly absent from official duties from 11.10.1999 to 27.4.2000 i.e. more than six months. In the interest of discipline of any institution or organization such an approach and attitude of the employees cannot be countenanced.”

ii) **(2004) 11 SCC 402, State of U.P. and others Vs. Gobardhan Lal** (paras 7 and 8). The relevant portion of paragraphs 7 and 8 of the case are as under:-

“7. It is too late in the day for any government servant to contend that once appointed or posted in a particular place or position, he should continue in such place or position as long as he desires. Transfer of an employee is not only an incident inherent in the terms of appointment but also implicit as an

essential condition of service in the absence of any specific indication to the contra, in the law governing or conditions of service. Unless the order of transfer is shown to be an out come of a mala fide exercise of power or not violative of any statutory provision (an Act or rule) or passed by an authority not competent to do so, an order of transfer cannot lightly be interfered with as a matter of course or routine for any or every type of grievance sought to be made. Even administrative guidelines for regulating transfers or containing transfer policies at best may afford an opportunity to the officer or servant concerned to approach their higher authorities for redress but cannot have the consequence of depriving or denying the competent authority to transfer a particular officer/ servant to any place in public interest and as is found necessitated by exigencies of service as long as the official status is not affected adversely and there is no infraction of any career prospects such as seniority, scale of pay and secured emoluments. This Court has often reiterated that the order of transfer made even in transgression of administrative guidelines cannot also be interfered with, as they do not confer any legally enforceable rights, unless , as noticed supra , shown to be vitiated by mala fides or is made in violation of any statutory provisions."

"8. A challenge to an order of transfer should normally be eschewed and should not be countenanced by the courts or tribunals as though they are Appellate Authorities over such orders, which could assess the niceties of the administrative needs and requirements of the situation concerned. This is for the reason that courts or tribunals substitute their own decisions in the matter of transfer for that of competent authorities of the State and even allegations of mala fides when made must be such as to inspire confidence in the court or are

based on concrete materials and ought not to be entertained on the mere making of it or on consideration borne out of conjectures or surmises and except for strong and convincing reasons, no interference could ordinarily be made with an order of transfer."

iii) **2003 (21) LCD 311, Sanjay Bhatia and Anr. Vs. State of U.P.**

and others. The relevant paragraph 13 of case of Sanjay Bhatia and another (Supra) is as under:-

"13. We also find ourselves unable to accept the arguments of Sri Singh, learned Senior Advocate that the present is a case of 'malice of law'. Sri Singh has sought to distinguish between 'malice of fact' and 'malice of law'. In this behalf, paragraph 28 of the writ petition is relevant wherein it has been alleged by the petitioners that the Minister was won over and, therefore, the Minister with a mala fide intention and for extraneous consideration, favoured the respondent No.7 with the impugned letter dated 27.8.2000. Use of words 'won over' 'mala fide intention' and 'extraneous consideration' can only mean malice in fact and not 'malice in law'. It is precisely because of this reason that Mr. Lalji Tandon has been impleaded as a respondent in the writ petition. Had it been a case of 'malice of law.', there was absolutely no need to implead Mr. Tandon in the instant case."

iv) **(2004) 12 SCC 299, Kendriya Vidyalaya Sangathan and others Vs. Damodar Prasad Pandey and others.** In the case of Kendriya Vidyalaya Sangathan (supra), para 4 has been relied upon, which is as under:-

"4. Transfer which is an incidence of service is not to be interfered with by courts unless it is shown to be clearly arbitrary or visited by mala fide or infraction of any prescribed norms of principles governing the transfer (see Abani Kanta Ray

Vs. State of Orissa). Unless the order of transfer is visited by mala fide or is made in violation of operation guidelines, the court cannot interfere with it (see Union of India Vs. S.L. Abbas). Who should be transferred and posted where is a matter for the administrative authority to decide. Unless the order of transfer is vitiated by mala fides or is made in violation of any operative guidelines or rules the court should not ordinarily interfere with it.

v) **(2009) 8 SCC 337, Airport Authority of India Vs. Rajeev Ratan Pandey and others.** In this case, the relevant portion of paragraphs 5,7,10 and 11 are as under:-

“10. In the writ petition, the transfer order has been assailed by the present Respondent 1 on the sole ground that it was violative of transfer policy framed by the appellant. The High Court, did not even find any contravention of transfer policy in transferring Respondent 1 from Lucknow to Calicut. In a matter of transfer of a government employee, scope of judicial review is limited and the High Court would not interfere with an order of transfer lightly, be it at interim stage or final hearing. This is so because the courts do not substitute their own decision in the matter of transfer.”

“11. In the present case, the High Court fell into a grave error in staying the transfer order which, if allowed to stand, may cause prejudice to the administrative functioning of the appellant. “

vi) **AIR 1991 SC 532, Mrs. Shilpi Bose and others Vs. State of Bihar and others.** In this case reliance has been placed of para 3 and 4. The relevant paragraph 4 is as under:-

“4. In our opinion the courts should not interfere with a transfer order which are made in public interest and for administrative reasons unless the transfer orders are made in

vi) 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. Transfer orders issued by the competent authority do not violate any of his legal rights. Even if a transfer order is passed in violation of executive instructions or orders, the Courts ordinarily should not interfere with the order instead affected party should approach the higher authorities in the Department. If the Courts continue to interfere with day-to-day transfer orders issued by the Govt. an its subordinate authorities, there will be complete chaos in the Administration which would not be conducive to public interest. The High Court over looked these aspects in interfering with the transfer orders."

vii) **(2008) 9 SCC 345, Government of Andhra Pradesh Vs. G. Venkata Ratnam.** In this case, the relevant paragraph which have been relied upon are 8 and 11. The relevant paragraph 11 is as under:-

"11. We are surprised to see the High Court castigating the respondent's transfer order as lacking in bona fides on such flimsy and fanciful pleas advanced by the respondents. We are more than satisfied that the High Court's finding regarding lack of bona fides in the matter on the part of the State Govt. is completely unfounded and untenable. The legal position regarding interference by courts in the matter of transfer is too well established to be replaced here. The respondent's transfer neither suffers from violation of any statutory rules nor can it be described as mala fide by any stretch of imagination. We are, accordingly, unable to sustain the High Court's order. In the result, this appeal is allowed, the order coming under challenge

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is set aside and the writ petition filed by the respondent in the High Court is dismissed."

viii) **(2009) 15 SCC 178 Rajendra Singh and others Vs. State of U.P. and others** .In this case, the paragraphs which have been relied upon are 2,3,12 to 15. The relevant paras are as under:-

"3. The transfer order dated 31.7.2007 came to be challenged by the writ petitioner before the High Court of Allahabad , Lucknow Bench. While challenging the legality of the transfer order, the writ petitioner set up the grounds that he joined as Sub-Registrar, Ghaziabad ,Sadar IV only a month back, that the transfer order has been issued on the complaint of one Radhey Lal, Sanyojak, Dalit Morcha Sangharsh Samiti, Lucknow and that the order of transfer was arbitrary, stigmatic and suffers from non-application of mind."

"15. The only question required to be seen was whether transfer of respondent 5 was actuated with mala fides or otherwise in violation of statutory rules. The transfer of Respondent 5 was not found to suffer from any of these vices. The High Court went into the competence and suitability of respondent 5 for such posting. It is here that the High Court fell into a grave error. As a matter of fact, the impugned order of the High Court casts stigma on the service of respondent 5 which may also act prejudicial to his interest in the pending appeal against the adverse remarks."

ix) **2004 (22) LCD 95, Smt. Kiran Tripathi Vs. U.p. Rajkiya Nirman Nigam and others**. In this case, paragraph 5 has been relied upon, which is as under:-

"5. It is well settled that this court can interfere with an order of transfer under Article 226 of the Constitution of India on very limited ground namely that the transfer order has been passed contrary to any statutory provisions or has been passed by a

person who is not competent to do so or is malafide (see Mrs. Shilpi Bose Vs. State of Bihar AIR 1991 SC 532 and Union of India Vs. S.L. Abbas AIR 1992 SC 2444). No such ground exists in the present case."

x) **2004 (22) LCD 365, Kaushal Kishore Bajpai Vs. D.P.R.O.**

Unnao and others. In this case reliance has been placed of paragraph 3, which is as under:-

"3. It is well settled that this courts can interfere with an order of transfer under Article 226 of the Constitution on very limited grounds namely that the transfer order has been passed contrary to any statutory provisions or has been passed by a person who has no authority to do so or is malafide (see Mrs. Shilpi Bose Vs. State of Bihar AIR 1991 SC 532 and Union of India Vs. S.L. Abbas AIR 1993 SC 2444). In the facts and circumstances of the present case, no such ground has been made out which may warrant interference by this Court.."

25. On behalf of the private respondent No.5, a separate compilation of case laws has been submitted. In all six case laws have been cited, out of which 3 have already been mentioned hereinabove i.e. Om Prakash Asati's case, Lal Bahadur Gupta's case and Vinod Kumar Pandey's case. Besides, following 03 case laws have also been relied upon:-

i) **AIR 1993 S.C. 1605, Union of India Vs. N.P.Thomas**

(paragraphs 8 and 10, which are as under:-

"8. In the present case, it cannot be said that the transfer order of the respondent transferring him out of Kerla circle is violative of any statutory rule or that the transfer order suffers on the ground of mala fide. The submissions of the respondent that some of his juniors are retained by Kerala Circle and that his transfer is against the policy of the Govt. posting the

husband and wife in the same station as far as possible cannot be countenanced since the respondent holding a transferable post has no vested right to remain in the Kerala Circle itself and cannot claim, as a matter of right, the posting in that circle even on promotion."

"10. For all the aforementioned reasons, we hold that the Tribunal was not justified in quashing the order of transfer of the respondent and accordingly we set aside the order of the Tribunal."

- ii) **2011 AIR SCW page 518, R.S. Sujatha Vs. State of Karnataka and others** (paragraphs 8 to 11, 15, 16 and 19)
- iii) **2004 (22) LCD 1583, Prem Prakash Vs. State of U.P. and others** (Paragraph 7 to 10).

These cases pertain to contempt proceedings and the proceedings under Section 340 Cr.PC which shall be dealt with separately in the Misc. case which has been directed to be registered separately.

26. The law is settled on the point that power of judicial review in cases of transfer is limited. A transfer order can be interfered with only when it is against statutory provision or passed by an incompetent authority or it suffers from malice.

27. The first point for consideration in this case, is as to whether the impugned transfer order dated 11.11.2010 passed against the applicant was against the statutory provisions and without any authority. The detail submissions in this regard and the case laws on the point relied upon on behalf of the applicant already find mention in para 10 of this order. The relevant Rule 9 of the IDES (Group A) Rules, 1985 says that "all appointments to the service shall be made by the President and the postings and the transfers of the members of the Service shall be made by Director General Defence Estates." But in the

present case the transfer order has not been passed by DGDE. Instead it has been passed by an officiating person namely Sri Ashok Kumar Harnal, Principal Director, Southern Command, Pune, who was given additional charge of DGDE w.e.f. 1.11.2010 as an officiating arrangement pending receipt of the approval of ACC, consequent upon superannuation of Sri Balsharan Singh, DGDE on 31st October, 2010 (Annexure CA-1 of Supplementary Affidavit dated 14.12.2010). Under Rule 9 of the IDES Rules, 1985, the power of posting and transfer vests in DGDE only. This Rule does not make any mention about officiating DGDE. According to the applicant, therefore, in view of the ratio laid down by the Hon'ble Apex Court in the cases mentioned hereinbefore in para 10 of this order, the transfer order is void and nonest in the eyes of law. From the side of respondents, the order has been tried to be defended mainly on two grounds- firstly it has been said that definition of Director General is given in Section 2 (p) of the Cantonment Act, 2006 which is as under:-

"Director General" means an officer of the Indian Defence Estates Service (IDES) appointed by the Central Government to perform the duties of the Director General, Defence Estates for the purpose of this Act and includes Senior Additional Director General and Additional Director General."

28. But the above definition does not help the respondents simply because it deals with the performance of duties by the DGDE for the purpose of the Cantonment Act, 2006 only i.e. u/s 52,54 and 55 whereas the impugned transfer order has been passed in view of the above Rule 9 of the IDES Rules, 1985 which empowers only DGDE to make postings and transfers. Moreover, the aforesaid definition merely says that Director General includes Senior Additional Director General and Additional Director General. Nowhere it says that DGDE also includes officiating DGDE. In the present case, it was the Principal

Director, Southern Command Pune, who was given additional charge of DGDE as an officiating arrangement, who has approved/ passed the impugned order. The Principal Director has been defined separately under Section 2 (ZN). "Principal Director" means the Officer appointed by the Central Government to perform the duties of the Principal Director, Defence Estates, the Command for the purpose of this Act and the rules made thereunder. It is note worthy that while in the definition of Director General u/s 2(p), words " for the purpose of this Act" have been used as mentioned above, whereas, in the aforesaid definition of Principal Director, words used are " for the purpose of this Act and rules made thereunder". It is not on account of any inadvertence. It has been done consciously while enacting the Act. Secondly, it has been defended on the ground that besides entrusting additional charge of the post of DGDE upon Sri Harnal, the Principal Director ,Defence Estates, Pune, he was also given the pay scale of Rs. 80,000/- (fixed) with retrospective with effect from 1.11.2010 for a period of six months or till regular incumbent joins or until further orders which even is earliest. The copy of this order dated 24.11.2010 (CA-2 to Supplementary C.A. dated 14.12.2010) reads as under:-

No. 15(7)/2010 D(QUC)
Government of India
Ministry of Defence,
Sena Bhawan
New Delhi dated the 24th November, 2010

ORDER

The President is pleased to entrust additional charge of the post of Director General , Defence Estates upon Sh.Ashok Kumar Harnal, Principal Director, Defence Estates, Pune in the pay scale of Rs. 80,000/- (fixed) with effect from 01.11.2010 upto six months or till the regular incumbent joins the post or until further orders, whichever is the earliest.

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(A.K.Singh)
Director(L&C)

1. Sr. Ashok Kumar Harnal, Principal Director Defence Estates
2. Department of Personnel and Training, Shri Chetan Prakash Jain, Director (ACC), North Block, New Delhi w.r.to their O.M.No. 12/61/20910-EO (SM-II) dated 19.11.2010.
3. Smt. Deepa Bajwa, Additional Director General, DGDE, New Delhi.
4. D (Appointment), Ministry of Defence, Sena Bhawan, new Delhi.

Copy to:-

1. PS to RM
2. PS to RRM
3. SO to Defence Secretary
4. AS (A)
5. AS(M)
6. JS(C&W)".

29. Concededly as on 11.11.2010, when the impugned order was passed, he was merely an officiating DGDE. As far as above order dated 24.11.2010 is concerned, a careful perusal of the above order dated 24.11.2010 reveals that firstly, it speaks only about entrustment of additional charge. He was probably not made even full fledged DGDE. Merely granting of scale of pay will also not make him a regular DGDE as has been held in the case of P.Tulsi Das (Supra). Similarly, subsequent notification giving retrospective effect would not help the respondents. The point of such retrospective effect came before the Hon'ble Apex Court in the case of Parsh Chand Dutta (Supra) and in para 3, a reference has also been made to the decision of the Central Govt. on CCS (Classification, Control and Appeal) Rules, 1965 which is very significant. It is as under:-

(O.M. No. 7/14/Estt (A) dated 24.1.1963)

"Officers performing current duties of a post cannot exercise statutory powers under the Rules- An officer appointed to perform the current duties of an appointment can exercise administrative or financial powers vested in the full-fledged incumbent of the post but he cannot exercise statutory powers whether those powers are derived direct from an Act of Parliament (e.g. Income

Tax Act) or Rules Regulations and Bye-laws made under various Articles of Constitution (e.g. Fundamental Rules, Classification, Control and Appeal Rules, Civil Services Regulations, Delegation of Financial Powers Rules etc.)".

In reference to the context of Fundamental Rule 49, as per advice rendered by the Law Ministry contained in the aforesaid O.M. dated 24.1.1963, an officiating person could have definitely exercised administrative or financial power vested in the full-fledged incumbent of the post but he could not have exercised statutory powers contained in Rule 9 of the IDES (Group 'A') Rules, 1985, which specifically provides that the transfers of the members of the service shall be made by Director General Defence Estates. The subsequent notification giving retrospective effect would also not help the respondents as discussed before.

30. From the side of respondents reliance was laid on an unreported Judgment of Allahabad High Court in the case of Om Prakash Asati (Supra). In this regard the Hon'ble High Court has said that for all purposes, an officiating officer steps in the shoes of the officer he is officiating. But while making the above observation, in para 15 of the judgment, it has been mentioned that no case law has been cited in support of the contention that an officiating person can not discharge the statutory duties. But in the present matter, several case laws have been cited from the side of the applicant on this point. Moreover, in the present case, as mentioned above, the power of transfer has to be exercised by DGDE only as has been specifically provided in Rule 9 of the IDES (Group A) Rules, 1985. These specific rules were not in question before Hon'ble High Court in the above case. In the aforesaid case of Om Prakash Asati (Supra), it was an employee of Jal Nigam of State Govt. of Uttar Pradesh wherein a commentary (book) was cited from the other side. But in the absence

of any case law cited in support of commentary , the Hon'ble Court did not agree with the views of the author of the commentary. But in the present case as said above, several case laws have been cited. Further, in that case, specific powers of transfer vested in DGDE as provided under Rule 9 of Rule 1985 were not in question. Therefore, the respondents can not derive any benefit from this case law.

31. In view of the above, we come to the conclusion that the impugned transfer order dated 11.11.2010 so far it relates to the applicant was against the statutory provisions and it was not passed by a competent authority.

32. The second point for consideration is as to whether there has been patent haste in issuing the impugned order. This point has been raised in para 11 of this order. The officiating charge was given to the Principal Director, Southern Command on 1.11.2010. After 7 days, i.e. on 8.11.2010, the Defence Ministry issued the order for reviewing the transfers on the ground of alleged corruption against ex-DGDE. Within 3 days, i.e. on 11.11.2010, the impugned order was passed by the officiating DGDE. No satisfactory grounds or reasons could be assigned by the opposite parties as to why they could not wait for a regular DGDE to join. Similarly, the order dated 24.11.2010 was probably also issued in haste giving retrospective effect to cover up the issue in question which had already been brought before the court of law i.e. this Tribunal on 12.11.2010 by the applicant. Further, probably on account of this haste, the proper orders could not be issued in accordance with Fundamental Rule 49. Further, as the perusal of the order dated 24.11.2010 shows, it is also debatable as to whether it was issued clearly indicating proper approval and authentication in accordance with the Govt. of India (Transaction of Business) Rules, 1961 and the

Govt. of India (Allocation of Business) Rules, 1961 framed under Article 77 of the Constitution of India.

33. Therefore, as suggested on behalf of the applicant, a possibility cannot be ruled out that some higher up was interested in pushing through the matter hastily as was held in the case of S.P. Kapoor (Supra).

34. The next point for consideration is whether the impugned order has not been passed for any administrative exigency or public interest as claimed, but to accommodate one Smt. Rachel Koshi, as CEO, Pune as already mentioned in para 12 of this order. Vide order dated 5.10.2010 by the then DGDE, Smt. Koshi working as CEO, Defence Estates, Pune was transferred and one Sri Dayalan working as CEO, Defence Estates, Lucknow was transferred and posted as CEO, Defence Estate, Pune. Similarly, the applicant who was working as CEO, Defence Estates, Allahabad was transferred and posted as CEO, Lucknow with additional charge of DEO, Lucknow Circle. By means of impugned order dated 11.11.2010, Smt. Koshi was transferred back to the post of CEO, Pune while Sri Dayalan was transferred from CEO, Pune to the post of Joint Director, Defence Estates Pune. The applicant was transferred from CEO, Lucknow to the post of Joint Director Defence Estates, Lucknow. The attention of the Tribunal was also drawn towards the transfer policy dated 5.9.83 (Annexure to O.A.) which provides the tenure of CEO to be 2-1/2 years to 3 years. The reason for cancellation of transfer of Smt. Koshi is said to be that she had not completed her tenure at CEO, Pune. But in respect of the applicant, this analogy was not followed although she has also not completed her tenure at Lucknow on the post of CEO. This amounts to discrimination reflecting patent arbitrariness and malice in law on the part of the respondents, in so far as, the transfer policy dated

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5.9.83 regarding the tenure of the officers has been applied in a discriminatory manner which is violative of Article 14 and 16 of Constitution of India and that amounts to treating equals as un-equals. The only explanation which has been offered from the other side in this regard is that, there were certain complaints against the applicant. But, the direction issued by the Ministry of Defence vide order dated 8.11.2010 was for reviewing the transfers in the wake of alleged corruptions in transfers/postings made by outgoing DGDE. The scope of review was therefore, specifically defined. Then where was the occasion to consider alleged complaints if any against the applicant for reviewing her transfer. We shall take up the point of alleged old complaints against the applicant herein below. Coming back to the aforesaid order of the Defence Ministry dated 8.11.2010, the condition precedent for reviewing was the alleged element of corruption against outgoing DGDE. Therefore, there ought to have been at least a *prima facie* finding regarding corruption against outgoing DGDE, but no such corruption has been indicated in the entire note sheet dated 11.11.2010 which has been brought on record as Annexure CA-3 to Supple. C.A. dated 14.12.2010 and in furtherance whereof the impugned order is said to have been passed. Instead, it has been submitted on behalf of the respondents that 4 points were taken into consideration while carrying out the review, namely:-

- a) the posting profiles of the officers concerned;
- b) tenure at their stations of postings;
- c) past performance of the officers; and
- d) vigilance background of the officers.

35. But when there was specific direction for reviewing transfers/postings in the wake of corruption, then what was the occasion and justification for taking the aforesaid 4 points into consideration. It appears that the respondents have conveniently

omitted the aforesaid specific direction mentioned in Defence Ministry's letter dated 8.11.2010 for the reasons best known to them. Further, even the aforesaid 4 factors do not appear to have been taken into consideration in respect of all the concerned officers whose transfers were reviewed. This has been demonstrated in a tabular form in the written arguments submitted on behalf of the applicant on pages 9 to 10 as under:-

Officer	Factors actually taken into consideration
Sri Dayalan	a) Posting Profile (b) Tenure (c) Past performance (d) Vigilance Background
Smt. Koshy	b) Tenure
Sri Pushpendra Singh	(b) Tenure
Smt. Bhawna Singh, the applicant	(c) Past performance (d) Vigilance background

36. Now, we come to some complaints mentioned in the note sheet dated 11.11.2010 (Annexure CA-3 to the Supple. CA dated 14.12.2010) against the applicant, the relevant para 6 of this note sheet is as under:-

“6.(i) Smt. Bhavna Singh, had been posted in Allahabad w.e.f. 7.7.2008 and had almost completed her tenure. However, both offices of CEO and DEO Allahabad Circle had been unable to function effectively due to serious differences between her and the President Cantonment Board duly supported by the Vice President of the Board. Several Court cases between then had aggravated the situation.

(ii) While the further continuance of Smt. Singh at Allahabad appears to have become untenable due to this impasse, the GEO-in-C, Central Command, Lucknow vide letter dated 02.09.2010 also made a strong complaint against the officer's functioning in specific matters, and recommended for her attachment with the Directorate office at Lucknow pending further inquiry.

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(iii) Smt. Bhavana Singh has also immediately preceding her Allahabad posting, been posted as DEO, Lucknow from 13.06.2005 to 17.06.2008. Now, the officer is again posted with additional charge of DEO, Lucknow. In view of the background necessitating her move from Allahabad and a spate of complaint during her tenure as CEO, Bareilly, some of which are under consideration of CVC, her posting at this stage as CEO, Lucknow with additional duties of DEO, Lucknow, does not seem to be appropriate.

(iv) As the officer is in Lucknow and has not done any staff posting she may be considered to be posted in the Directorate Central Command as Jt. Director against an existing vacancy."

37. As far as complaints and litigations against the applicant while she was posted at Allahabad is concerned, the same have been explained by the applicant in an Affidavit as mentioned in detail in para 7 of this order. After probe in the matter, nothing was found against her. There is also no order as on today against her by Hon'ble High Court. According to applicant all the allegations regarding her tenure as CEO, Bareilly are patently false. Similarly in respect of CVC complaints, it has been averred in her affidavit that the matter has been closed by the CVC as nothing was found against her. On similar grounds, the second matter also arose and DGDE himself as well as Ministry of Defence have recommended for its closure. On the other hand, the applicant has been given commendation on 15.8.2005 by the Chief of Army Staff and even by the Defence Minister while she was at Bareilly (Annexure SCA-1 and 2). These averments have not been controverted by the respondents specifically. Therefore, we have no reason to disbelieve the averments made on behalf of the applicant. In respect of CVC complaint, it has been merely averred from the other side that it is pending with the CVC. From this vague averment, it can be safely

inferred that while posted at Bareilly, the applicant had a good tenure which was even commended by the Defence Minister, Chief of Army Staff. It is not a secret that sometimes the dashing and upright officers have to face some impediments generally created by persons having vested interests. Be that as it may. But from the averments made by the rival parties it can be safely inferred that in respect of CVC complaint, nothing was found against her and even DGDE as well as Ministry of Defence have recommended for its closure. Now, the final decision has to be taken by the CVC. It may be a formal decision but unless such a decision is taken for closure of complaint, it will be construed to be still pending and that is why from the side of respondents it has been merely said that the complaint is still pending with the CVC. In respect of letter of GOC-in C, Central Command, dated 2.9.2010 as mentioned in the aforesaid para 6 (ii), it has been already explained in Supple. Affidavit dated 22.3.2011 that GOC-in C had no role or authority to write such letter, therefore, it has been adversely commented by DGDE vide letter dated 25.5.2010 in respect of earlier letter of GOC-in-C, Central Command dated 13.4.2010. Otherwise also, the said letter dated 2.9.2010 has already been acted upon and the applicant has been transferred from Allahabad. Therefore, if that letter has any 'sting' such sting has lost its force on her transfer from Allahabad to Lucknow. Therefore, that letter should not be acted upon and relied upon again and again. Moreover, if the impugned transfer order is punitive in nature, then it is a settled preposition of law that when an order of transfer is passed in lieu of punishment, the same is liable to be set aside being wholly illegal as was laid down in the case of Somesh Tiwari (supra). In this case, it was also laid down that if the order in question was not passed on any factor germane for passing an order of transfer and based on an irrelevant ground it would attract the principle of 'malice in law'. Moreover in the second impugned order dated 12.11.2010, by means of which the representation of the applicant

against transfer has been rejected, it has been mentioned that the applicant has been transferred as Joint Director in the Directorate, which is a post carrying serious responsibilities and functions involving the entire command. On the converse, in the aforesaid note sheet, there is a mention of pending spate of complaints including the complaint before CVC. Why then she was given a responsible charge of Jt. Director. The respondents cannot be permitted to blow hot and cold simultaneously. Their contention in this regard appears to be contrary.

38. From the above, it appears that the impugned order has not been passed for any alleged administrative exigency or public interest as claimed. Rather, it was based on non-existent and extraneous material and is vitiated on account of malice in law. From the other side, it was submitted that in her representation against the transfer, the applicant did not mention about these points. But merely on this ground, the applicant cannot be estopped from raising such substantial and legal pleas. From the side of the applicant, it has been explained and rightly so that if the applicant would have mentioned about the malice and lack of authority in her representation, same would have been construed to be misconduct entailing some departmental action. A representation by a responsible officer has to be polite. But obviously, there is no such constrain in the judicial proceedings which are conducted before the court of law by legal experts. We find substance in these contentions. Finally, therefore, we decide the aforesaid points also in favour of the applicant.

39. The next submission on behalf of the applicant was that letter dated 8.11.2010 issued by Ministry of Defence was only for review of the transfer orders. But in the present case, instead of submitting a report after making a review, even transfers have been made under

intimation to Ministry of Defence without indicating as to what corruption was noticed in the earlier transfer order dated 5.10.2010 passed by the outgoing DGDE.

40. Further, it has been submitted that if the impugned order was bonafide and passed in pursuance of aforesaid order dated 8.10.2010, then it ought to have been confined to 4 officers only mentioned in the order dated 5.10.2010 i.e. Sri Dayalan, Smt. Koshy, Sri Pushpendra Singh and Smt. Bhavana Singh but the impugned transfer order tries to bring in new person to replace the applicant at Lucknow, namely Sri G.S. Rajeshwaran, who has been transferred from Jalandhar to Lucknow. Therefore, according to the applicant's counsel, this was outside the ambit of review. On the same analogy, a new officer should have been brought in to replace Smt. Koshy at Pune, but this was not done which again indicates gross arbitrariness and malice in law and discrimination as well as favoritism on the pretext of alleged review.

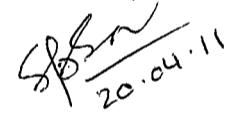
41. From the side of the respondents, it was submitted that though malice has been contended but the relevant persons have not been impleaded by name. In reply, the learned counsel for applicant placed reliance on the case of Division Bench case of **Om Prakash Singh Singh Vs. State of U.P. reported in 2008 (2) UPLBEC , 1140** wherein it has been laid down that "once it is found that allegations constitute 'malice in law' no impleadment is necessary".

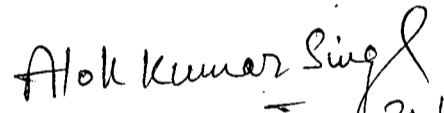
42. From the side of the respondents, it has been further submitted that the same impugned transfer order dated 11.11.2010 so far it relate to Sri Dayalan has already been upheld by Hon'ble Mumbai Bench of CAT in O.A. No. 777 of 2010 filed by Sri Dayalan.. Suffice is to mention that the said judgment has been rendered by the Hon'ble Single Member, while this matter is being adjudicated upon by the Division

Bench of this Tribunal. However, we have gone through this judgment, a copy whereof has been brought on record. Most of the grounds mentioned herein-above were not canvassed before the Hon'ble Mumbai Bench, therefore, that judgment is distinguishable on its own facts.

43. In view of the discussion made herein above, we decide the aforesaid points also in favour of the applicant.

44. Finally, therefore, this O.A. deserves to be allowed and accordingly, it is so ordered. The impugned transfer order dated 11.11.2010 (Annexure -1) which has been passed in partial modification of the earlier order dated 5.10.2010 is hereby quashed so for it relates to the applicant. The impugned order dated 12.11.2010 passed by respondent No.2 (Annexure A-1(a), rejecting the representation of the applicant against the aforesaid transfer order is also quashed. No order as to costs.


(S.P.Singh)
Member (A)


Alok Kumar Singh
(Justice Alok Kumar Singh)
Member (J)
20.11.11

HLS/-