

BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL

MUMBAI BENCH, MUMBAI

OA.NOs. 714/2000 & 725/2000

Dated this the 12th day of March 2001.

CORAM : Hon'ble Shri S.L.Jain, Member (J)

1. Naresh Kumar Pandey,
Inspector of Central Excise
(Audit) (Group C),
R/o Flat No. K L-6/7/8,
Sector 3-E, Kalamboli,
Navi Mumbai.
2. S.M.Birajdar,
Inspector of Central Excise
(Legal Cell) (Group C),
R/o C-5, 34/1-3, Sector 18,
New Panvel, Dist. Raigad.

...Applicants

By Advocate Shri S.N.Pillai

V/S.

1. Union of India through
The Commissioner of
Central Excise, Mumbai-VII
Commissionerate, 1st Floor,
CGO Complex, CBD, Navi Mumbai.
2. Addl. Commissioner (P & V),
Central Excise,
Mumbai-VII Commissionerate,
1st Floor, CGO Complex,
CBD, Navi Mumbai.

...Respondents

By Advocate Shri M.I.Sethna

O R D E R

{Per : Shri S.L.Jain, Member (J)}

These are the applications under Section 19 of the Administrative Tribunals Act, 1985 seeking the relief to quash and set aside the order dated 21.9.2000 issued by the Respondent No. 1 transferring and posting the applicants from Central Excise to Marine & Preventive Wing of Mumbai Customs Preventive Commissionerate.

2. The applicants are initially appointed as Inspector of Central Excise under Bombay III Collectorate/Commissionerate at Thane in the year 1985. New Collectorate/Commissionerate were formed in the year 1997. The applicants were posted at Bombay VIII Collectorate/Commissionerate at Belapur, Navi Mumbai. The area now coming under the Bombay VII Commissionerate was part of Old Bombay III Commissionerate. The applicants were transferred and posted in the Audit Wing of Central Excise VII Commissionerate vide order dated 27.8.1999. The Respondent No. 2 issued the impugned transfer and posting order dated 21.9.2000 whereby the applicants have been transferred and posted to Marine Preventive Wing of Mumbai Customs Preventive Commissionerate.

3. The applicants have challenged the said transfer and posting order on the ground that the respondents have no authority to transfer them from Central Excise to Customs Department without their request or willingness, such transfer

can only be effected by way of transfer on deputation for which the respondents should obtain willingness of the employees which they did not obtain, the said transfer and posting order is against the guidelines issued by the Chief Commissioner of Central Excise vide letter dated 27.11.1997 (Exhibit-'B'). The second ground is that being a Group 'C' employee, he is not liable to be transferred to any where outside the Commissionerate as per his appointment order (Para 5 of Exhibit-'C'). The third ground is that in Audit Wing, he gets a Special Pay of Rs.220/- p.m., as per the Central Excise Manual, the tenure is 3 years, which is to be strictly followed in view of Board's circular dated 5.7.1999 (Exhibit-'F'). The Inspector of Central Excise and Inspector of Customs are different cadres, the seniority units are different, cadre Controlling Authorities are different. The Chief Commissioner of Central Excise, under whom Seven Commissionerates are working is different from the Chief Commissionerate of Customs. The officers belonging to Group 'A' service only are liable to be transferred from Central Excise to Customs and vice versa. Hence, these OAs.

4. The claim of the applicants is resisted by the respondents stating that the application is misconceived, not maintainable and can be termed as abuse of process of law. The alleged transfer is within City of Bombay. The applicants joined the Audit Wing on 25.5.1998. The applicants have been selected in the Marine and Preventive Wing of Mumbai Customs Preventive Commissionerate on the basis of Ministry's letter

F.No.A-11019/151/85/Ad IV dated 16.6.1986 (Exhibit-I). On the basis of the representation made by the Bombay Central Excise Non Gazetted Officers Union in 1986, the Government has considered that vacancies in the Marine & Preventive Wing of Customs Preventive Collectorate will be filled in equal number from the then existing three Collectorates of Mumbai - I, II & III. On the basis of the said Ministry's letter and guidelines issued by the Chief Commissioner dated 27.11.1997 and from time to time officers are roated in the Marine and Preventive Wing of Customs Preventive Commissionerate, purely on diversion basis for a fixed tenure of two years. As the Inspectors of Mumbai VII Commissionerate posted in Marine & Preventive Wing have completed two years of tenure in September, 2000, a Screening Committee was held on 20.9.2000. The applicants were found suitable to be roated in Marine and Preventive Wing and accordingly, they have been selected. It is further stated that the Thane Collectorate has been renamed as Mumbai III Commissionerate and these three Commissionerates were again trifurcated vide Govt. order dated 9.7.1997. The Mumbai-VII Commissionerate started functioning w.e.f. 13.8.1997 vide trade notice No.1/97-97 dated 13.8.1997. It is further alleged that such posting continuing from 1986. After the bomb explosion in 1992, few officers opt for Marine & Preventive Wing posting, each Commissionerate has to provide the required numbers of officers on rotation basis, no willingness for posting in Marine & Preventive Wing is obtained. The reasons for non obtaining the willingness has been explained in the Minutes of Screening Committee Meeting. The Chief Commissioner's

further direction in respect of posting in Marine and Preventive Wing is Exhibit-5. The representation dated 21.9.2000 & 27.9.2000 were rejected after due consideration by Respondent No.

1. The officers can be shifted from Special Pay posting even before completing the normal tenure on such posts due to administrative reasons. Hence prayed for dismissal of OAs. along with costs.

5. The learned counsel for the applicants relied on (1999) 4 SCC 659, Umapati Choudhary Vs. State of Bihar & Anr. and argued that what 'deputation' is :-

" Deputation can be aptly described as an assignment of an employee (commonly referred to as the deputationist) of one department or cadre or even an organisation (commonly referred to as the parent department or lending authority) to another department or cadre or organisation (commonly referred to as the borrowing authority). The necessity for sending on deputation arises in public interest to meet the exigencies of public service. The concept of deputation is consensual and involves a voluntary decision of the employer to lend the services of his employee and a corresponding acceptance of such services by the borrowing employer. It also involves the consent of the employee to go on deputation."

On perusal of the above proposition, three essential conditions for deputation emerges which are as under :-

- (i) Voluntary decision of the employer to lend the services of his employee,

(ii) A corresponding acceptance of such services by the borrowing employer and

(iii) The consent of the employee to go on deputation.

6. The learned counsel for the applicant further relied on (1997) 8 SCC 372, State of Punjab & Ors. vs. Inder Singh & Ors. to support the contention that what is meant by deputation and the effect of missing of one of the conditions i.e. consent - on deputation :-

" Concept of "deputation" is well understood in service law and has a recognised meaning. "Deputation" has a different connotation in service law. The dictionary meaning of the word "deputation" is of no help. In simple words, "deputation" means service outside the cadre or outside the parent department. Deputation is deputing or transferring an employee to a post outside his cadre, that is to say, to another department on a temporary basis. After the expiry period of deputation, the employee has to come back to his parent department to occupy the same position unless in the meanwhile he has earned promotion in his parent department as per the recruitment rules. Whether the transfer is outside the normal field of deployment or not is decided by the authority which controls the service or post from which the employee is transferred. There can be no deputation without the consent of the person so deputed and he would, therefore, know his rights and privileges in the deputation post."

7. He further relied on 1984 Lab.I.C 739 decided by the Hon'ble High Court of Bombay Prakash R. Borkar vs. Union of India & Ors. which lays down the proposition that transfer of temporary Government employee from one cadre to another consent of the employee is necessary, as it amounts to deputation.

8. He further relied on an order passed by this bench in OA.NOs.930/94 & 941/94 decided on 30.8.1996 Shri Bhagavan Sirumal Lalchandani vs. Union of India & Ors. following the proposition laid down by the Hon'ble High Court of Bombay referred above.

9. Keeping in view, I have to arrive to a conclusion that whether the transfer and posting vide Annexure-'A' is a deputation.

10. The applicants have placed on record the General guidelines for transfer and postings (Exhibit-'B') dated 27.11.1997. The para relating to Deputation to other Departments and M & P is worth mentioning which is as under :-

• "(D) Deputation to other Departments and M & P :

1. The deputation vacancies are generally circulated. The officer willing to avail such opportunity should send his willingness through the controlling officer with an advance copy to the Commissioner where time available is very short.

2. All such cases need be scrutinised with reference to existing instructions and names of only select few need be sent. All such cases would be rotated through the Chief Commissioner. While forwarding such names, the existence of vigilance and non-vigilance case need be specifically mentioned.

3. The deputation to M & P should be based on selection consisting of D.C. (M&P) & D.C.(P&V) of the concerned Commissionerate and a representative of scheduled caste and scheduled tribe in the rank of Asstt. Commissioner/Dy. Commissioner. The selection should be made by the aforesaid panel after obtaining willingness from the Inspectors and Supdts. desirous of such posting to M&P. The panel for posting drawn by the aforesaid

committee should take into consideration the number of persons likely to be reverted on completion of tenure within a period of 1 and 1/2 years. In other words, the panel drawn should be valid for 1 and 1/2 years and should be automatically operated upon, immediately an officer returned back from deputation reports for duty in the Commissionerate headquarters. As, is in other cases, the tenure should be for a period of 2 years only. An officer posted to M & P Wing on completion of his tenure, should be relieved by local adjustment immediately."

The perusal of the portion underlined by me in para (D) 3 makes it clear that posting of an official from Central Excise to Customs Preventive Wing is a deputation for which consent of the official is essential one.

11. The respondents have relied on Exhibit-1. The narration of part of para 2 which is as under :-

"After carefully considering the matter, it has been decided to make the following changes :-

(a) The posts of Supdt. Grade 'B' and Inspector in the M & P and Gold Control Wings of the Bombay Preventive Collectorate will hereafter be filled in equal number from all the three Central Excise Collectorates at Bombay instead of only from Bombay-II Collectorate."

12. It is true that the said order is passed by the Ministry on 16.7.1986 on a move made by Inspectors and others of Central Excise to the Ministry. It was a group agitation seeking representation on deputation and not an individual representation

without seeking consent on deputation. The said order nowhere takes away the right of the applicant regarding consent for deputation as the principle of estoppel applies to the person concerned- individually and by the said letter privilege is provided to a group of employees on their representation. It nowhere states that consent of the employee is waived. As there is no estoppel against law, Hence all the officials including the applicants are not prevented to agitate the matter in accordance with law. It makes it further clear that the Collector of Central Excise and Collector of Customs (Preventive) are different cadre Controlling Authorities.

13. Minutes of meeting of the Screening Committee, no doubt states that since none of the Inspectors expressed willingness to be posted in M & P Wing, the Committee decided to consider the Inspectors for posting in M & P Wing strictly on the basis of their seniority by adopting the criterias. As the applicants have not challenged the transfer and posting order on ground of malice, hence solely on the ground that non-availability of the officers, right to consider by the Screening Committee do not come in existence or the employees right of consent is not taken away.

If at the highest level Customs and Central Excise was/is one and the same department does not mean that the cadre of Inspectors/Cadre Controlling Authority is the same. The reluctance of the Inspectors for such post is regrettable but the solution and method by which it is sought is not legal one.

14. The learned counsel for the respondents relied on an order passed by this bench in OA.NO.724/2000 Satish M.Talnikar vs. Union of India decided on 30.1.2001, particularly on para 10,11 & 14. I agree with the finding that there is no malice attributed and no reason to discern any malice in law either. As it is not the case of the applicant that respondents' action is malafide one - either on facts or in law, hence in the present cases, the said question does not arise for consideration.

15. In para 15, 16 of the order, it is observed :-

"Unfortunately, from this basic document, it is not possible to ascertain whether the service of the applicant cannot be utilised in the Customs Department as, a legal position. This peculiar feature arises in this Department because after a certain level, postings are freely interchangeable between Excise and Customs and basically the Department is one.

~~Had the assignment been a change from the Excise Department to a permanent shift to the Customs Department, the matter would have come in doubt on the question of its legality at this level. However, the present posting whether a transfer as such, or as the Applicant alleges, a deputation, is for a stipulated tenure, and will have to be looked at in the background of historical facts, in the absence as stated above, of any clear document (regarding service conditions) being provided by the applicant. While we have seen the general guidelines referred to, these are indeed guidelines, and will have to be viewed as such, within the well known principles settled by the Apex Court with regard to guidelines vis-a-vis transfers."~~

I do not agree with the reasoning of para 17, 18 of the order in view of the principle laid down by the Apex Court, Hon'ble High Court of Bombay and followed by this Bench in

OA.NOs.930/94 & 941/94 decided on 30.8.1996. In view of the fact that this Bench has laid down the principle regarding considerations of 'Deputation' since 30.8.1996, I am proceeding to decide the matter on the principles laid down by the Apex Court, it appears that the said decisions of the Apex Court, High Court and our Bench are not placed before the learned Member, hence, it is not necessary for me to refer the matter to a larger Bench.

16. The learned counsel for the applicant did not agitate the other points raised in pleadings during the course of arguments and stated that the case be decided only on this issue. Hence, I do not proceed to decide the same.

17. In the result, the OA^s ^{are} allowed. The order passed by Respondent No. 2 dated 21.9.2000 transferring and posting the applicants from Central Excise to Marine Preventive Wing of Mumbai Customs Preventive Commissionerate is quashed and set aside. No order as to costs.

(S.L.JAIN)

MEMBER (J)

mrj.