CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH

Dated on this the 19th day of February 2002

Coram: Hon'ble Mr.Justice Birendra Dikshit - Vice Chairman
Hon'ble Mr.B.N.Bahadur - Member (A)

(1) O.A.885 of 2001

B.K.Katkar,
Junior Telecom Officer,
O/o Div.Engineer Yerawada,
Pune.
(By Advocate Shri D.V.Gangal with
Shri S.V.Marne)

VERSUS

1. Union of India
through the Secretary,
Ministry of Communications,
Sanchar Bhawan, New Delhi.
2. The Chief General Manager,
Maharastra Telecom Circle,
Mumbai - 411 001.
3. Principal General Manager (East),
Pune Telecom,
Telephone Bhawan, Bajirao Road,
Pune - 411 002.
(By Advocate Shri V.S.Masurkar) - Respondents

(2) O.A.886 of 2001

D.S. Harisangam,
Junior Telecom Officer,
O/o General Manager (East),
Shankersheth Road,
Pune.
(By Advocate Shri D.V.Gangal with
Shri S.V.Marne) - Applicant

VERSUS

1. Union of India
through the Secretary,
Ministry of Communications,
Sanchar Bhawan, New Delhi.
2. The Chief General Manager,
Maharastra Telecom Circle,
Mumbai 411 001.
3. The General Manager,
Pune Telecom,
Kumar Estate Building,
Sankertsheth Road,
Pune.
(By Advocate Shri V.S.Masurkar) - Respondents

(3) O.A.887 of 2001

D.B.Jain,
Junior Telecom Officer (Phone),
O/o Divisional Engineer (Trunks),
Pune Telecom,Pune.
(By Advocate Shri D.V.Gangal with
Shri S.V.Marne) - Applicant

VERSUS

1. Union of India
through the Secretary,
Ministry of Communication,
Sanchar Bhawan, New Delhi.
2. The Chief General Manager,
Maharastra Telecom Circle,
Mumbai.
3. The General Manager,
Pune Telecom District,
Dept.of Telecommunications (BSNL),
Telephone Bhawan, Bajirao Road,
Pune 411 002.
(By Advocate Shri V.S.Masurkar)

(4) O.A.888 of 2001

M.B.Sagar,
Junior Telecom Officer,
O/o General Manager (East),
Shankersheth Road,
Pune.
(By Advocate Shri D.V.Gangal with
Shri S.V.Marne)

VERSUS

1. Union of India
through the Secretary,
Ministry of Communications,
Sanchar Bhawan,New Delhi.
2. The Chief General Manager,
Maharastra Telecom Circle,
Mumbai.
3. The General Manager (East),
Pune Telecom,
Kumar Estate Building,
Shankersheth Road,Pune.
(By Advocate Shri V.S.Masurkar) - Respondents

(5) O.A.888 of 2001

K.P. Patil,
Junior Telecom Officer (Phone),
O/o General Manager (Telecom),
Jalgaon - 425 001.
(By Advocate Shri D.V.Gangal with
Shri S.V.Marne) - Applicant

VERSUS

1. Union of India
through the Secretary,
Ministry of Communications,
Sanchar Bhawan, New Delhi.
2. The Chief General Manager,
Maharastra Telecom Circle,
Mumbai.
3. The General Manager,
Jalgaon Telecom District,
Department of Telecommunications (BSNL),
Telephone Bhawan,Jalgaon.
(By Advocate Shri V.S.Masurkar) - Respondents

(6) OA 890 of 2001

Gunwant Motiram Nagle,
Junior Telecom Officer,
Bharat Sanchar Nigam Ltd.,
Akola. - Applicant
(By Advocate Shri K. R. Yelwe)
VERSUS

1. Union of India
through the Secretary to the
Government of India,
Ministry of Communications,
(Department of Telecommunications)
Sanchar Bhawan,
New Delhi.
2. The Chief General Manager (Telecom),
Maharastra Circle,
Bharat Sanchar Nigam Ltd.,
Mumbai.
3. The General Manager,
Telecom District,
Akola. - Respondents
(By Advocate Shri V. S. Masurkar)

(7) O.A.891 of 2001

Prakash Kanu Bhaske,
Junior Telecom Officer
Bharat Sanchar Nigam Ltd.,
Akola. - Applicant
(By Advocate Shri K. R. Yelwe)
VERSUS

1. Union of India
through the Secretary to the
Government of India,
(Department of Telecommunications)
Sanchar Bhawan,
New Delhi.
2. The Chief General Manager,
Telecom Maharastra Circle,
Bharat Sanchar Nigam Ltd.,
Mumbai.
3. The General Manager,
Telecom District,
Akola.
(By Advocate Shri V.S.Masurkar) - Respondents

(8) **O.A.908 of 2001**

Prakash Hanmantrao Ladnekar,
Junior Telecom Officer,
Bharat Sancnar Nigam Ltd.,
Akola.
(By Advocate D.V.Gangal with
Shri S.V.Marne) - Applicant

VERSUS

1. Union of India
through the Secretary to the
Government of India,
Ministry of Communications,
(Department of Telecommunications)
Sancnar Bhawan,
New Delhi.
2. The Chief General Manager (Telecom),
Maharastra Circle,
Bharat Sancnar Nigam Ltd.,
Mumbai.
(By Advocate Shri V.S.Masurkar) - Respondents

(9) **OA 912 of 2001**

A.R.Patil,
Sub Div.Engineer,
(Survey/Transmission II)
Department of Telecommuication,
Jalgaon.
(By Advocate Shri G.S.Walia) - Applicant

VERSUS

1. Union of India
through the Chief General Manager,
Maharastra Telecom Circle,
Fountain Telecom Building,
Fort, Mumbai 400 001.
2. The General Manager,
Jalgaon Telecom District,
Jalgaon 425 001.
(By Advocate Shri V.S.Masurkar) - Respondents

(10) **O.A.916 of 2001**

Mahesh Vijay Singh Gujar,
Junior Telecom Officer,
O/o General Manager Telecom,
Vasai.
(By Advocate Shri D.V.Gangal with
Shri S.V.Marne) - Applicant

VERSUS

1. Union of India
through the Secretary,
Ministry of Communications,
Sancnar Bhawan,
New Delhi.

2. The Chief General Manager,
Maharastra Telecom Circle,
Mumbai - 411 001.
3. The Assistant General Manager,
Kalyan Telecom, Kalyan 421 301.
(By Advocate Shri V.S.Masurkar) - Respondents

(11) O.A. 10 of 2002

Sarjerao Bhagaji More,
Junior Telecom Officer,
O/o General Manager,
Aurangabad Telecom District,
Aurangabad.
(By Advocate Shri D.V.Gangal with
Shri S.V.Marne) -Applicant

VERSUS

1. Union of India
through the Secretary,
Ministry of Telecommunications,
Sanchar Bhawan, New Delhi.
2. The Chief General Manager,
Maharastra Telecom Circle,
Fountain Telecom Building,
Fort, Mumbai - 400 001.
3. The General Manager,
Aurangabad Telecom District,
C.T.O., Building,Bahadurpura,
Aurangabad.
(By Advocate Shri V.S.Masurkar) - Respondents

: ORDER :

Birendra Dikshit, Vice-Chairman.

These eleven Original Applications moved under section 19 of Administrative Tribunals Act, 1985 have been filed by Junior Telecom Officers posted at different divisions of Maharashtra Circle of Bharat Sanchar Nigam Limited (in short, BSNL) who have been transferred by a common transfer order. The transfer of each of the applicant is from their respective Telecom Division to Goa Telecom Division. The transfer order has been communicated to applicants by Assistant General Manager (SI) at the office of Chief General Manager, Telecom, Maharastra Circle, Mumbai by letter dated 26.11.2000 on a letter head of BSNL wherein it is stated that as per approval of Chief General Manager Maharashtra Circle, Mumbai the said transfers and postings are ordered. As each applicant has challenged the order of transfer by filing separate OA. In these OAs., beside taking common grounds, they have raised pleas on merit applicable to individual cases.

2. The facts giving rise to these OAs are that the applicants are Junior Telecom Officers (for short JTO) GCS Grade 'B' cadre belonging to Maharashtra Circle of BSNL. The cadre of J.T.O's is a circle cadre. A circle is divided into Divisions and applicants are posted in different Divisions of Maharashtra circle. Though eleven J.T.O.'s have approached this Tribunal challenging the impugned order, 20 J.T.O.'s belonging to different divisions have been transferred from their respective Divisions to Goa Division. The initial transfer order was of 21 persons of different divisions but as transfer order of one

officer has been cancelled for which the reason pointed out during argument is that he was wrongly shown as he was S.D.E. and his appointing authority is higher in rank than person who passed order. As all the applicants are dissatisfied by that transfer, they have filed these O.As.

3. The common ground of challenge in all O.As. except one is that applicants have either been charge-sheeted and are facing disciplinary proceeding or are facing criminal prosecution. According to case set up by applicants, each applicant has submitted representation against his transfer soon after, but as nothing has been done by respondent ordering transfer, therefore they have approached this Tribunal.

4. The case of each applicant could be examined separately on merit, but as pleas raised by applicants in all cases are more or less common and same. Arguments advanced by learned counsel for applicants is either applicant could not be transferred due to pendency of disciplinary proceedings or he could not be transferred during pendency of criminal cases. As arguments are common, all the cases can be disposed of by common order.

5. The common argument by learned counsel on the basis of stand taken in these cases is that all the applicants as well as non-applicants, except one, are facing either disciplinary proceedings or criminal prosecution and therefore they have been singled out and transferred in mass to Goa Telecom Division from different Divisions. On that basis the common argument which has been advanced is that the transfer order is in the nature of punishment and is not in the exigencies of service. The applicants claim is also that the order has been issued in colourable exercise of power and is abuse of the power by authority. The argument is that the order is vitiated due to malice in law beside being in violation of Rules 66, 67 and 68 of

departmental instructions as published in Volume - III of Manual of Department of Posts and Telegraph at pages 28 - 29. Each applicant has also highlighted personal difficulty and made grievance against the transfer order as being issued in mid-academic session when their children are studying or because applicant himself is or some of his family member is ill.

6. The stand of applicants has been disputed by Respondents. According to the Respondents, this Tribunal lacks inherent jurisdiction to entertain and try original applications filed by applicants. The ground for challenging the jurisdiction is that BSNL is a government company which has not been notified under section 14 (2) of the Administrative Tribunals Act, 1985 (in short Act) and, therefore, this Tribunal lacks inherent jurisdiction to entertain these cases which are against BSNL. The Respondents have also disputed the claim of applicants on merits. Their stand is that the applicant being JTO or GCS Gr. - B cadre, which happens to be a Circle cadre, the applicants are liable to be transferred in accordance with conditions of service anywhere in the Maharashtra Telecom Circle, which consists of State of Maharashtra and State of Goa. As all the O.As. have been argued simultaneously, as they raised more or less common grounds, they are being disposed of by a common order.

7. The learned counsel for Respondents has argued that ~~the~~ each applicant is working with BSNL and as the order of transfer has been passed by BSNL, which has not been notified under section 14 (2) of the Act, therefore, this Tribunal does not have jurisdiction to entertain the OA and grant relief prayed for by the applicants. He pointed out from documents filed that all the

orders and correspondences under challenge are from BSNL and they are not in exercise of power as an officer of Union of India. The argument is that as BSNL is not notified under Section 14 (2) of the Act, matter does not fall within the jurisdiction conferred on this Tribunal. Shri D.V.Gangal, Advocate appearing on behalf of the applicants opposed the objection raised. His contention is that admittedly applicants belong to GCS Gr. B cadre and as the officers of GCS Gr. B cadre have not been absorbed by BSNL till this date, they continue to be under employment of Central Government and as the transferring officer is an officer of Central Government, he has passed order in exercise of power as an officer of Central Government and not as an officer of BSNL.

8. Undisputedly, employees of Gr. 'C' and 'D', who were working with the Telecommunication Department, opted for being absorbed by BSNL, which has its own identity as a Government Company, and the employees of the said two Groups stand absorbed and are now employees of BSNL. Applicants claimed themselves to be employees of Union of India belonging to Telecommunication Department in Gr. B, who are posted on for managing the work of BSNL. The stand taken by applicants is that they are working as employees of Government of India and are directly getting orders from officers of the Government of India and as transfer order has been passed by an officer of Central Government, the O.As. are maintainable. According to argument of Mr. Gangal unless applicants are absorbed by BSNL, after due formalities, they continue to be employees of Union of India. He has pointed out that the applicants have neither been absorbed by BSNL nor they have been asked to give option for absorption by BSNL.

9. The argument of Learned Counsel for Respondents Mr.V.S.Masurkar has been that applicants are employees of BSNL and Respondents relied upon the decision of Prabir Kanti Choudhry Vs. Union of India & others passed in OA No.2/2001 decided on 3.1.2001 by Calcutta Bench of the Central Administrative Tribunal, that applicant did become employees of BSNL. Various other authorities were also cited by counsel for applicants to support his contention. After hearing counsel for the parties the judgement was reserved by us.

10. We cannot understand as to why BSNL is not coming up with specific plea setting out exact relationship with Group 'A' and Group 'B' officers who are working and managing its affairs. In these OAs the judgment was reserved by us but ~~they had~~ cases had to be heard again on the request of learned counsel for respondents. ~~It~~ They was directed to be listed as learned counsel wanted that a recent judgment of Delhi High Court in the case of Ram Gopal Verma Vs. Union of India, (2001 Lab.IC 3781) be also considered. He cited that judgment to show that the Delhi High Court has held that the Central Administrative Tribunal has no jurisdiction to entertain petition in absence of notification under Section 14 (2) of the Administrative Tribunals Act. Except placing the cases of Prabir Kanti Choudhury (supra) which proceeded on the assumption that "since the Department of Telecommunication has become BSNL w.e.f. 1.10.2001", we are not possessed of any material on record on the basis of which we can conclude that all officers and employees of Department of Telecommunication of Union of India working ~~with~~ in different Circles of BSNL have become BSNL employees and cease to be with the concerned department of Union of India. We are unable to understand that when BSNL was contesting inherent lack

of jurisdiction in this Tribunal on the said ground then why they have not stated in their written statement that applicants stand absorbed with BSNL or they have the status of deputationist to support this factual position. Respondents have not stated that fact in written statement and merely relying on Calcutta Bench judgment of Central Administrative Tribunal contended that Group 'A' and Group 'B' Officers of Telecommunication Department have become Officers of BSNL. Respondents could have even filed affidavit in support of it. Examining the case, we find that the case relates to employees who were on deputation with Mahanagar Telephone Nigam Limited (in short MTNL) and, therefore, for the purpose of suspension, they were directly under administrative control of MTNL. The distinguishing feature of present case is that respondents have failed to inform us in this case as to in what capacity the respondents are with BSNL i.e. are they now employees of Department of Communications or BSNL and if there is any notification order to that effect. As the order was by officers of the Department of Telecommunications, Government of India, we asked learned counsel for respondents to inform us even exercise of power by officer ordering transfer. We have asked specifically that if they exercised power as employees of BSNL or as that of Central Government. The counsel for respondents could not tell us as to in what capacity they passed order. He could not answer query as to whether the relationship between BSNL and applicant or master and servant has come into existence and applicants cease to be in employment of Union of India. Thus, in the case of Ram Gopal Verma (supra), it was an admitted case of parties that employees involved were on deputation, and therefore it was held that Central Administrative Tribunal had no jurisdiction. Here we

find that fact is in dispute. The respondents are withholding the fact that whether officer transferring applicants was an officer on deputation with BSNL or he ordered in discharge of functions as an officer of Government of India as well as if applicant stands ~~involved~~ absorbed. The case is distinguishable.

11. Learned Counsel for Respondents has placed before us the decision of Hukam Chandra Goyal Vs. Union of India, (OA No.56/2001 decided by the Mumbai Bench on 10.4.2001), which was taken up to Bombay High Court in Writ Petition No.2256/2001, wherein the High Court has upheld the order of Tribunal by leaving open the question for determination of jurisdiction. In this case, the objection which has been taken before us has not been the subject matter of consideration.

12. The other decision is of Action Committee Qualified Telecom Technical Assistants for Promotion Posts of Junior Telecom Officers & others Vs. Union of India & others, (OA Nos.246, 278, 205 and 282/2001 decided on 23.7.2001). So far this case is concerned, it is a Division Bench order to which one of us was party. The case related to employees of Group 'C', who were formerly employees of Union of India and therein it was admitted case of parties that the concerned employees stood absorbed by BSNL which is not the case here. It is for the reason that Division Bench after knowing that the employees of that case being absorbed by BSNL and BSNL being not notified under Section 14(2) of the Act, that it held no OA was maintainable before the Tribunal.

13. As the respondents did not disclose the relationship despite query being raised by us, the learned counsel for respondents tried to shift the responsibility on applicants to

prove that the Tribunal has jurisdiction by arguing that the burden of proof to show that Tribunal has jurisdiction on applicants.

14. This takes us to the question as to whether applicants were required to show ouster of jurisdiction of the Tribunal or the respondents. The normal rule is that the person who alleges that a Court or Tribunal does not have jurisdiction has to show that the Court or Tribunal hearing a case does not have jurisdiction. The Learned Counsel for Respondents is not right in contending that it was for applicant to establish that the Court has jurisdiction. The contention cannot be accepted. The reason is that when the Respondents stand is that this Tribunal does not have jurisdiction to entertain and try this OA, it was for Respondents to establish the lack of jurisdiction of this Tribunal. For examining as to which party was required to prove ~~each~~ lack of jurisdiction we would like to point out that here the BSNL is supposed to possess documents which could show the relationship of applicants with BSNL and the status or relationship of officer ordering the said transfer. The fact is within special knowledge of BSNL as to whether Group 'A' Officer of the Department of Telecommunication, who ordered transfer, was exercising power as an officer of BSNL or as an officer of Telecommunication Department of Union of India. As the fact is in the special knowledge of respondents and as no affidavit or document has been filed to show us exact relationship of applicants or officer ordering transfer with BSNL, the preliminary objection of Respondents is liable to be rejected.

15. We would like to point out here that in one of the case, which is not before us, we considered it necessary to have specific stand of respondents on affidavit if applicants or that

case who are of Group 'B' continue to be in the employment of Union of India or they are employees of BSNL. In that case counsel for BSNL orally asked for time to obtain instructions. ~~above stand~~. We granted time and asked to file affidavit or an officer of BSNL on it. On next date, when that case was taken up, we asked the Learned Counsel for Respondents, who happens to be same counsel for BSNL as is in these cases, as to whether affidavit was being filed, the Learned Counsel stated that BSNL was that not going to file any affidavit in that respect. The stand now taken up before us by Respondents is that the onus of proving that the Tribunal has jurisdiction to try the case is on applicant.

16. Be it as it is, as we are of the view that it was for the respondents to bring relevant material for ousting the jurisdiction of this Tribunal and as they have not done it, in absence of any material to establish that the employer of applicants cease to be the Union of India, the objection of the Respondents that this Tribunal does not have jurisdiction fails. This takes us to consider the claim of applicants on merits.

17. The facts of all the cases are more or less similar giving rise to common question of law and therefore, before considering the case on merits, we would like to narrate the facts of each case. As the Learned Counsel for applicants first argued OA No.887/2001, we will be considering it as leading case for considering arguments.

OA NO. 887/2001.

The applicant's case is that he was appointed as Technician on 10.6.1955 and was promoted as Junior Telecom Officer, which is a Group 'B' post on 13.6.1984. By a Memo dt. 28.10.1997/5.11.1997 the D.E. Phones, Rural-I proposed to hold an enquiry against applicant under Rule 14 of the Central Civil Services (Classification, Control & Appeals) Rules, 1965 (in short, CCS Rules). The charges, in substance, were that the applicant failed to follow the formalities while providing six new telephone connections. A reply was submitted by applicant on 28.11.1997 and an enquiry was conducted and Enquiry Report was submitted on 9.6.1998. The enquiry report is against the applicant, but it has not been finalised till the passing of the impugned order when applicant together with 20 other JTOs have been transferred from the office of D.E.(Trunks) Pune Telecom to Goa Telephone District. The objection of the applicant is that under instruction 66 of Post & Telegraphs Manual, Vol. III he could not be transferred pending enquiry. The Learned Counsel for applicant has also contended that the order is punitive in nature as all the 21 persons who were transferred (except A.J. Jawale's (who is at Sl.No.2) transfer order has been cancelled as he was not under clout with either disciplinary or criminal proceedings pending like others). It is further argued by the Learned Counsel for the applicant that his daughter is studying in College, the transfer order is in the mid-academic session is illegal and bad in law.

O.A. NO.885/2001.

The applicant's case is that he was appointed as Telephone Operator on 22.3.1983 and was promoted as Junior Telecom Officer, which is a Group 'B' post on 8.7.1994. On

6.9.2001 a memo was issued to the applicant as to why disciplinary proceedings should not be initiated against him in respect of mis-conduct of certifying bills of contractors with higher measurements. He has submitted his reply on 20.9.2001 denying the alleged mis-conduct. It is then that the General Manager (East) Pune issued a charge sheet under Rule 16 of CCS (CCA) Rules, 1965 alleging that the applicant certified the bills of contractors with higher measurements with mala fide intention and causing loss to the Department. The applicant submitted his reply on 25.10.2001. The Enquiry Officer fixed the enquiry for 20.11.2001 on which date preliminary hearing took place when applicant denied all the charges. The said Disciplinary Proceedings are pending and during the pendency of the said proceedings on 26.11.2001, the applicant has been transferred from the office of the General Manager (East) Pune Telecom District to Goa T.D. He represented on 6.12.2001 which representation is pending. The Learned Counsel for the applicant has argued that the applicant could not be transferred during the pendency of Disciplinary Proceedings. He further argued that the order is punitive in nature as the applicant has been transferred together with 19 other persons who were either facing disciplinary proceedings or criminal prosecution who have been singled out for the purpose of transfer. On the basis of averment in paragraph 4.10 that the applicant's daughter is studying in School and yet the transfer has been ordered in the mid-academic session, which is bad in law.

O.A. No. 886/2001.

The applicant was appointed as Telephone Operator on

1.4.1986 and promoted as J.T.O. on 10.2.1992. On 6.9.2001, the applicant was asked to show cause as to why an enquiry should not be conducted against him for mis-conduct of certifying the bills of higher measurements. The applicant asked for supply of about 80 documents to enable him to explain his position, which is not disputed by Respondents. The applicant submitted his reply on 20.9.2001 denying the alleged mis-conduct. The applicant, who was working at Yerawada Division, Pune was then transferred on 3.10.2001 to the office of the General Manager (East) Shankar Seth Road, Pune. After said transfer, a charge sheet under Rule 16 of CCS (CCA) Rules was issued to applicant for certifying the bills of contractors with higher measurements, with mala fide intention and for causing loss to the department to which also applicant replied. On 31.10.2001, an Enquiry Officer was appointed by the General Manager (East) Pune Telecom District. Now the enquiry has to take place and the Enquiry Officer has to fix the date for hearing. But, before that applicant has been transferred vide impugned order dt. 26.11.2001 to Goa T.D. The applicant's contention on merit is that under Instruction 66 of Posts & Telegraph Manual Vol.III he could neither be transferred during the pendency of disciplinary proceedings nor the exercise of power is bona fide. According to the arguments of the counsel for the applicant, the transfer order is punitive in nature as the persons who are under cloud alone have been transferred and not a single person who was not under cloud have been ordered to be transferred to Goa T.D. by impugned order to the same Goa T.D.

He has further claimed that he has four years old school going son, the transfer order in the mid-academic session is therefore, bad in law. Further, it is argued that his mother who is sick had two heart attacks.

O.A. No.888/2001.

The applicant was appointed as TOA (Clerk) on 22.3.1977 and promoted as J.T.O. on 20.12.1996. On 6.9.2001, the applicant was asked to show cause as to why an enquiry should not be conducted against him for mis-conduct of certifying the bills of higher measurements which charges have been denied in his reply dt. 20.9.2001. The applicant was issued charge-sheet under Rule CCS (CCA) Rules, 1965 on the allegations mentioned in the Memo. The Disciplinary Authority without waiting for reply of the applicant on the charge sheet decided to hold an enquiry and appointed Enquiry Officer, as well as, Presenting Officer on same day i.e. to say 15.10.2001. Applicant subitted his reply to the reply to the charge sheet and has stated that he has not been given inspection of document, as well as, the Enquiry and Presenging Officers could not have been appointed without considering his reply. The Disciplinary Authority appointed fresh Enquiry Officer to conduct the enquiry on 31.10.2001. On 9.11.2001, the preliminary hearing was fixed for 20.11.2001 by Enquiry Officer and during the pendency of enquiry applicant has been transferred from office of General Manager (East) Pune to Goa T.D. The applicant has represented 6.12.2001 and has approached this Tribunal immediately thereafter on 10.12.2001. The main grievance of applicant is that the transfer order is punitive in nature as he together with 19 persons under cloud

alone have been transferred by the single order. It is argued that as per Instruction 66 of Posts and Telegraph Manual Vol. III during the pendency of disciplinary proceedings he could not be transferred. Further, it is argued that his daughters are studying in College and therefore, transfer could not be ordered during mid-academic session. He has also claimed that he is in difficulty because his wife is working at Pune and under the guidelines, he should be posted at a place where his wife is working.

O.A. No.889/2001.

The applicant was appointed as a Technician on 18.4.1984 and promoted as J.T.O. on 1.2.1999. Applicant was transferred from Jamner to Bhusawal in the month of July, 2001. The applicant was issued with a charge sheet on 15.10.2001 alleging that he had certified the bills of contractors at higher measurement. The applicant replied to the charge sheet on 9.11.2001. On 19.11.2001 the Respondents appointed Enquiry Officer and Presenting Officer for conduct of enquiry against applicant. In the meantime, on 19.11.2001, applicant has been transferred along with 19 other persons on the same day. The enquiry officer fixed 29.11.2001 for preliminary hearing. On 6.12.2001 applicant submitted his reply against the order of transfer. The present OA is filed on 10.12.2001. Applicant has stated in para 4.9 that he is being singled out amongst others for transfer though he is facing disciplinary action. Learned Counsel for the applicant has contended that the applicant's transfer pending enquiry is punitive in nature in terms of

Instruction 66 of Posts and Telegraph Manual Vol.III as he has been transferred along with 19 other persons who are either facing disciplinary proceedings or criminal prosecution.

O.A. No.890/2001.

The applicant was appointed as Wireless Operator on 7.5.1975 and promoted as J.T.O. from October, 1992. Subsequently, he was transferred from Mumbai to Akola in the year 1996. It is submitted that the applicant was issued with a charge sheet on 16.7.1997 by the Anti Corruption Branch and the criminal proceedings is in progress. The Respondents have issued a transfer order on 26.11.2001 transferring him from Telecom District Akola to Goa T.D. and that the applicant has made a representation on 4.12.2001 to the effect that the transfer order is in violation of Rule 66 of Post & Telegraphs Manual Vol.III which stipulates that if disciplinary case is pending against the official, then the official should not be transferred out of the jurisdiction of the disciplinary authority. Therefore, it is argued that the order of transfer is punitive in nature and is issued with mala fide intention to punish the applicant.

O.A. No.891/2001.

The applicant was appointed as Phone Inspector on 24.4.1974 and subsequently promoted as J.T.O. (Group ' B ' post) on 25.4.1989 and posted at Nanded. He was further transferred to Akola in the year 1992. It is submitted that he was issued with a charge sheet by the Anti Corruption Branch and a criminal proceedings is in progress. The Respondents have issued an order on 26.11.2001 transferring the applicant from Akola T.D. to Goa

T.D. It is argued the transfer order is in violation of Rule 66 of P & T Manual Vol. III which stipulates that if disciplinary case is pending against an official, then the official should not be transferred out of the jurisdiction of the Disciplinary Authority. Further, it is submitted that he is having two daughters to be married off and an ailing old mother. Finally it is argued that the transfer order is punitive in nature and is issued with mala fide intention to punish the applicant.

O.A. No.908/2001.

The applicant was appointed as J.T.O. (Group 'B' post) w.e.f. 8.7.1991 and was posted at Aurangabad. He was transferred to Latur on 12.6.2001 in public interest. It is submitted that the authorities of Anti Corruption Branch have issued a charge sheet on 24.4.1998 and a criminal proceedings are in progress. The Respondents have issued an order dt. 26.11.2001 transferring the applicant from Latur T.D. to Goa T.D. It is submitted that the transfer order is in violation of Rule 66 of Post and Telegraphs Manual Vol.III which clearly stipulates that if disciplinary case is pending against an official, then the official should not be transferred outside the jurisdiction of the Disciplinary Authority and claims that the transfer order is punitive in nature and is issued with malafide intention to punish the applicant. Further, it is alleged that the applicant is having school-going children and the transfer order is issued in the mid-academic session.

O.A. No. 912/2001.

The applicant was appointed as J.T.O. on 27.4.1995 and

promoted as Sub Divisional Engineer on officiating basis w.e.f. March, 2001. The applicant was issued ~~with~~ a charge-sheet dt. 27.4.1995 and Enquiry Officer was appointed on 12.5.1995. Since there was no progress in the conduct of enquiry, the applicant approached the Tribunal vide O.A.No. 643/99 and the OA was disposed of with a direction to complete the disciplinary proceedings within a period of six months from 14.8.2000. Though the enquiry is complete, no final order is passed. It is, therefore, argued that the applicant was Sub-Divisional Engineer and not J.T.O. and therefore the authority who transferred him was not competent as well as it amounts to his reversion. It has been argued that his case was similar to A.J. Jawale, whose transfer has been cancelled on the ground that he was Sub-Divisional Engineer. It is argued that even as J.T.O., in terms of Instruction 66 of Post and Telegraphs Manual Vol.III if the disciplinary case is pending, then the official could not be transferred out of the jurisdiction of the disciplinary authority. The transfer order is, therefore, punitive in nature and is issued with malafide intention in order to punish the applicant. Further, it is submitted that the applicant is having school-going children and the transfer order is issued in the mid-academic session.

O.A. NO.: 916/2001.

The applicant was appointed as Technician on 10.12.1990 and was promoted as J.T.O. on 23.12.1998. It is submitted that the applicant was issued with a charge-sheet alleging that he had failed to follow formalities while providing new telephone connections. Though the enquiry is complete, no final order is passed and therefore the disciplinary proceedings is still pending. The applicant is transferred alongwith 20 other J.T.Os. are transferred to Goa I.D. from Kalyan I.D. It is argued that in terms of Instruction 66 of Post and Telegraph Manual Vol.III which stipulates that if disciplinary case is pending against an official, then the official should not be transferred out of the

jurisdiction of the disciplinary authority. Further, it is submitted that applicant's brother is studying in college, wife is under medical treatment and he has also submitted disability certificate of applicant's sister to prove that his stay at the present station is very much essential.

O.A. No. 10/2002.

The applicant was appointed as Transmission Assistant on 7.12.1975 and promoted as J.T.O. on 21.6.1999. It is submitted that the applicant inspite of not facing with any departmental or criminal proceedings, he has been transferred to Goa T.D. from Aurangabad T.D. along with others who are facing departmental or criminal proceedings except the applicant. He assails the order on the ground that has been included in the transfer order with the persons who under cloud. It is argued that the applicant is having school-going children and the transfer order is issued in the mid-academic session. It is also submitted that applicant is a patient of Diabetes and hypertension.

18. In all the cases, the objection of counsel for applicant is that the applicants could not be transferred pending disciplinary proceedings/criminal proceedings in view of Instruction 66 of the Post and Telegraph Manual Vol.III. It is well settled that an employee who is appointed on a transferable post is liable to be transferred from one place to another and he cannot raise a grievance against it. Transfer is an ordinary incident of service and in respect of government servants it is a normal feature. No one has any right to remain at one place where an employee is in a cadre which he joins with an open eye that he can be transferred. Instructions under 66 of the Post

and Telegraph Manual Vol. III is only an administrative instruction, which may be of assistance while ordering transfer, but that cannot be enforced in Court of Law and therefore, we are not impressed with the argument that in view of instructions the applicant could not be transferred during the pendency o the disciplinary proceedings. Same principle apply in respect of trial of criminal cases and if somebody is being prosecuted, then he can very well seek leave, which will be a good ground for sanctioning of leave for the employer so that the person attends to Court Proceedings, but even on that ground it cannot be said that the authorities do not have the power to transfer merely because criminal proceedings is pending at the station where he is posted.

19. The argument of Learned Counsel that 20 persons including applicants who have been transferred from different Telecom Districts, all of whom have been transferred to Goa T.D, simultaneously, creates a doubt that a bunch of officers have been singled out except one (applicant in OA No.10/2002) against whom disciplinary or criminal proceedings is not pending and sent to one place. There is no explanation from the side of the Respondents as to how and why, names of officers who are not under cloud is not there in order. Officers who are under cloud alone are there. Had it been a case of one or two or three officers, who would have been transferred simultaneously, then we could have taken it as a co-incidence or chance that some persons stands transferred. But, here we find that more who have been transferred, bunched together, are under cloud. Nothing has been shown to the contrary despite such a plea being raised by

applicants except reliance is being placed on existence power of officers to transfer as well as transfer is an incidence of service. When allegations of malice was being made against respondents, then it was incumbent for respondents to have assigned the reasons as to how this happened. Because of this transfer of similarly situated officers and the absence of reason from the side of respondents in transferring officers, bunched together, against whom disciplinary proceedings are pending or criminal proceedings are going on indicates that the action of the transferring authority is not a bona fide one and he has singled out those who are under cloud. Had this been not there, then there were bound to be officers who are not under cloud. Direct evidence of malice is difficult but it is from circumstances that one has to arrive to conclusion. Here, we find that officers who were under cloud, disciplinary proceedings or criminal prosecution pending in different districts and in different Divisions of Maharashtra Circle, stand to transferred to same division in Goa then considering the number of officers transferred, it is reasonable to conclude that the transferring authority has picked up only those persons who are under cloud. It is the pendency of proceedings mentioned above which appears the basis for picking officials for transfer. The power of transfer conferred appears to be punitive in nature where persons under cloud alone are being sent to Goa Telecom District. However, as we are of the opinion that the transferring officer instead of exercising the power for which it has been conferred to transfer appears to have sent the officers under cloud to Goa Telecom District, is a punitive in nature, it is colourable exercise of power which is bad in law. Thus, we would like to quash the order and direct the respondents that while exercising the power of transfer, if there is necessity of certain JTOs to be sent to Goa T.D. then they have to see that not only those persons who are under cloud should be bunched together, so that but while transferring it is not only that what is being done is bonafidely done but it should also appear that he is exercising power bonafidely. It is their responsibility, equally, to see that none points finger in respect of manner in which power is exercised.

20. Beside, what has been said above, even if the respondents wanted to transfer applicants then in respect of applicants in the eleven OAs before us they were supposed to follow the law enunciated by the Supreme Court in the case of Director General of Education Vs. O. Karuppathevan [(1994) 28 ATC 99] wherein Apex Court has held that :

> Although there is no such rule, we are of the view that in effecting transfer, the fact that the children of an employee are studying should be given due weight, if the exigencies of the service are not urgent .

We find that despite specific stand being taken by the applicants in these eleven OAs except O.A. Nos. 889/2001 and 890/2001 that their children are studying, no reason has been assigned in written statements of the 9 O.As. indicating as to what was so urgent that transfer was necessary in exigencies of service. Even on this ground the transfer of applicants in O.A. Nos.887/2001, 885/2001, 886/2001, 888/2001, 908/2001, 912/2001, 916/2001 and 10/2002, having been made in the mid-academic session cannot be given effect and they could have been transferred at the end of the academic session. They could not be transferred with immediate effect.

21. There is additional ground for which transfer of Applicant A.R.Patil, applicant of O.A.No. 912/2001 is bad in law. A.R. Patil was working as Sub-Divisional Engineer in officiating capacity on the date transfer was ordered. It has been argued that the officer transferring him i.e. Chief General Manager, Telecom Manarashtra Circle was not competent to transfer him, and therefore, his transfer is bad in law. There appears substance in this argument also. The respondents justification for cancelling transfer of A.J. Jawale, one of the 21 persons initially transferred, is that he was Sub-Divisional Engineer at relevant time and therefore he could not be transferred. If A.J. Jawale could not be transferred then now this applicant has been transferred by the same authority. There could not be advanced explanation from respondents' side, specially transferring an officiating Sub-Divisional Engineer as J.T.O. Thus, so far transfer of this officer, namely - A.R. Patel is concerned, it is also bad for that reason.

21. Here, we are required to deal with the case of applicant in OA Nos. 10/2002 separately. We find that in his case neither any criminal prosecution nor any disciplinary proceedings has been initiated. He is only bunched together with those facing criminal prosecution or disciplinary proceedings and thus casting stigma on him. We are not inclined to uphold the order of transfer in other O.As. and therefore so far applicant of this case is concerned there is nothing wrong with the order except that his children are studying and therefore, his order of transfer can be effected after the end of academic session, but when we have recorded finding that while ordering transfer the exercise of power by transferring officer is colourable exercise of power, we would like to quash the impugned order passed against him also.

22. Although we are quashing the transfer order, during arguments it has been pointed out that some officers stand relieved and await the decision on their application for interim relief. We reserved orders in these cases and therefore we would like to direct the respondents that officers who stands relieved and have not joined at Goa Telecom Division, they will grant appropriate leave due to such officer and in case leave is not due to any one then special leave is to be given without break in service.

23. For aforesaid reasons, the O.A. Nos. 885/2001, 886/2001, 887/2001, 888/2001, 889/2001, 890/2001, 891/2001, 908/2001, 912/2001, 916/2001 and 10/2002 are allowed with above directions and the order of transfer dt. 26.11.2001 is set aside against applicants.

(B.N.BAHADUR)
MEMBER(A)

VICE-CHAIRMAN