

CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH

Original Application No: 182/94

Transfer Application No: --

DATE OF DECISION: 5-8-94

S.A. Engineer

Petitioner

Mr.C.U.Singh with Mr.G.S.Walia

Advocate for the Petitioners

Versus

Govt. of Maharashtra & Ors.

Respondent

Ms.P.D.Anklesaria with Mr.V.S.Masurkar for Respondent No.1

Mr. Arun Tripathi for R.No.2 Advocate for the Respondent(s)

CORAM :

The Hon'ble Shri M.R.Kolhatkar, Member(A)

The Hon'ble Shri --

1. To be referred to the Reporter or not ?
2. Whether it needs to be circulated to other Benches of the Tribunal ?

M.R.Kolhatkar

(M.R.KOLHATKAR)
Member(A)

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BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY

O.A.182/94

S.A.Engineer,
Chief Administrator
(New Towns)
CIDCO Ltd.,
New Aurangabad.

.. Applicant

v/s.

1. Government of Maharashtra
through

The Chief Secretary,
Government of Maharashtra,
General Administration,
Mantralaya,
Bombay - 400 032.

2. The City and Industrial
Development Corpn.,
Through the Managing Director,
Nirmal,
Nariman Point,
Bombay - 400 021.

3. Union of India
through
The Secretary,
Dept. of Personnel and
Administration,
Training & Public Grievances,
Ministry of Home Affairs,
North Block,
New Delhi - 110 001.

.. Respondents

Dated
3/8/1994

Coram: Hon'ble Shri M.R.Kolhatkar,
Member(A)

Appearances:

1. Mr.C.U.Singh
with Mr.G.S.Walia
for the Applicant.

2. Ms.P.D.Anklesaria with Mr.V.S.Masurkar
Counsel for
Respondent No.1

3. Mr. A.Tripathi
Counsel for
Respondent No.2

JUDGMENT

0 Per M.R.Kolhatkar, Member(A))

Date: 5-8-94

...2/-

This is an O.A. impugning State Government's order dated 4-2-94 in respect of an I.A.S. Officer transferring him from the post of Chief Administrator (New Towns) CIDCO Ltd. New Aurangabad, which is a post under a public sector undertaking of the Govt. of Maharashtra, to the post of Deputy Secretary, Co-operative and Textile Department, Mantralaya, Bombay. Respondent No.1 is the Govt. of Maharashtra, Respondent No.2 is the CIDCO, and respondent No.3 is the Union of India. The applicant had represented against this transfer by his representation dated 9-2-94 and when this case came up for the first time before the Tribunal, the Tribunal while directing maintenance of status-quo had also given liberty to the respondent No.1 to consider the representation which has already been made by the applicant to cancel the re-transfer to Bombay and to accommodate him anywhere in Aurangabad itself. On 22-2-94 the Tribunal heard the respondent No.1 and while staying the operation of the impugned order of transfer had directed the respondent to allow the applicant to resume the post from which he was transferred. The officer therefore continues to be in the post of Chief Admini-

nistrator (New Towns) CIDCO, New Aurangabad, Respondent/ No.1

and 2 have filed written statements and applicant has filed separate rejoinders with reference to written statements of respondents No.1 and 2. Respondents No. 1 and 2 have also filed notes of written argument.

2. The main contention of the applicant is that the impugned transfer order suffers from the twin vices viz. abuse of power and non-application of mind and it is arbitrary, improper, discriminatory, malafide and violative of Articles 14 and 16 of the Constitution of India. It is also contended that the impugned transfer order is punitive in nature inasmuch as ^{the} immediate occasion for the impugned transfer order was a representation dt. 31-1-94 made by the applicant on the subject of "Monthly House Rent deduction of 20% of salary drawn" It appears that from 1989 till the applicant joined the post in July, 1993 the incumbents of the post who used to be IAS Officers, as in the case of the present officer, enjoyed the concession of rent free accommodation. However, it appears that in the meanwhile CIDCO had constructed residential accommodation at New Aurangabad and while according administrative approval for procurement of furniture amounting to Rs.5.36 lakhs for the newly constructed residence one of the conditions imposed by the M.D. ^{was} that:

"A deduction of 10% of the salary drawn should be made from the salary of the present CA(NT) in

addition to the usual house rent deduction."

In this representation the applicant has made out that according to standard terms and conditions laid down for the officers on deputation to CIDCO it is stated that if the rules of foreign employer permit rent free accommodation to the deputationist he may be permitted to avail the concession. The predecessors of the applicant availed of this concession. However, the M.D. under the guise of according administrative approval imposed an onerous condition on the applicant ~~of~~ deduction of usual house rent ~~deduction~~ which, as is well known, means deduction of 10% of the salary. In addition ~~deduction of 10%~~ was to be made from the salary of the presumably present CA(NT) as and by way of rental for the new furniture. According to the applicant, therefore, he was subjected to double discrimination and moreover charging 10% of the salary for availing of the facility of new furniture without consulting the applicant was also unfair. Therefore, as mentioned above, on 31-1-94 the applicant represented for deletion of this condition. No reply was received by the applicant to his representation but shortly thereafter he received the transfer order. According to the applicant this discriminatory treatment in the matter of housing charges as well as the summary and brusque manner in which he was relieved in absentia by a subordinate officer viz.

Superintending Engineer until he was ~~directed by the Tribunal~~ to be reposted in the same position, shows that the transfer is punitive and malafide.

3. According to the applicant he has been repeatedly and frequently transferred viz. eight transfers in a period of four years and three months. The details of these transfers are given on page 5 of the O.A. ^{are} which reproduce below:

1. 8-11-1989 to 12-7-1990 as Additional Collector, Urban Land Ceiling, Pune.
2. Deputy Secretary, Co-operation and Textile Dept., Mantralaya, Bombay (Posting cancelled subsequently for reasons not known)
3. 30-11-1990 to 31-5-1991 as Additional Collector (Employment Guarantee Scheme) Ahmednagar.
4. 7-6-1991 to 15-2-1992 as Deputy Secretary, Revenue and Forests Department, Mantralaya, Bombay.
5. 20-2-1992 to 17-6-1992, Chief Executive Officer, Zilla Parishad, Alibag, Dist. Raigad.
6. 18-6-1992 to 9-6-1993, Director of Archives, Govt. of Maharashtra, Bombay (10-6-1993 to 5-7-1993 compulsory waiting period)
7. 6-7-1993 onwards as Chief Administrator (New Towns) CIDCO, New Aurangabad, and
8. The present impugned transfer order dated 4-2-1994.

Admittedly one of the transfers viz. to the post of Deputy Secretary, Co-operation and Textile Dept., in July, 1990 did not take place and the applicant having remained on E.L. cum compulsory waiting from 12-7-90 to 30-11-90 joined the new posting at Ahmednagar from earlier posting at Pune. Admittedly the transfer from Director of Archives to the present post Chief Administrator (New Towns) was also a request transfer. Even leaving apart these two transfer orders, it appears that the applicant was transferred six times, of which three transfers were in ^{in a period of 4 years & months} Bombay, Alibag and Bombay i.e. to say in the vicinity of Bombay which the applicant had specially requested to be avoided.

4. According to the applicant he had certain personal difficulties which are mentioned at page 11 of the O.A. as below:

" The Applicant has also mentioned in the said representation that the sea-climate of Bombay does not suit his wife and that she had been remaining sick and indisposed at the time when the applicant was posted in Bombay. It is submitted that the wife of the Applicant had donated her one kidney at the time when the young medico son of the applicant had a total renal failure and the wife's kidney had to be transplanted. However, as the luck would have it, the said son of the applicant expired subsequently. This proved traumatic to the mother who could not recover from the shock owing to mental depression and anxiety and remained continuously sick thereafter. These were the main reasons on account of which the applicant had requested for transfer out of Bombay."

The applicant states that inspite of these representations, he was repeatedly and frequently transferred and many of the postings were deliberately at Bombay and its vicinity because the respondents were annoyed with the applicant for his having approached the Tribunal for the redressal of his grievance regarding non promotion to the IAS cadre. He states that it was only because of the C.A.T. judgment ^{in A 567/87} on 15-2-90 that he was promoted to I.A.S. with retrospective effect from 6-11-1987 but thereafter confirmation orders and orders regarding allotment of year were not issued for three years. According to him, his having approached the C.A.T. against the Government is the motive for respondent No.1 to bear a grudge against him. It is also alleged that another reason for discrimination against the applicant is that he belongs to ST community. In case of SC/ST it is well known that there are guidelines of the Department of Personnel dt. 24-6-85 that SC/ST officers should not be discriminated in the matter of transfer and, in particular, they should not be transferred to far off places and senior officer should keep a close watch so that such incidents do not occur at all. The applicant has, therefore, sought the quashing and setting aside of the impugned transfer order and to pass any other appropriate order. However, at the stage of argument counsel for the applicant under instructions from the applicant stated that he was not particularly keen to stay in CIDCO and that the relief sought by him was that of an alternative posting in Aurangabad.

5. Respondent No.2, CIDCO, in their first affidavit dated 29-3-94 have stated that respondent No.2 had found the performance of the applicant to be far from satisfactory. According to them the applicant had incurred an expenditure of Rs.5.36 lakhs for furnishing the house built for Chief Administrator beyond the

scope of his auth- ority and the M.D. accorded merely ex-post facto approval to maintain the credibility of the Corporation but decided to recover the expenditure attributable to the misfeasance of the applicant by imposition of rent. So far as recovery of 10% of the salary as rent in respect of the house newly constructed is concerned, respondent No.2 relied upon the Govt. Resolution dated 30-12-91 which is cross referenced in condition No.10 of the terms and conditions in subject to which the applicant was appointed. The same reads as below:

"10. The CIDCO may provide Shri S.A. Engineer with residential accommodation suitable to his status and charge him licence fee in accordance with G.R. F.D.No.1489/40/SER-5, dated 30-12-1991. In case he resides in his own house, he will be eligible for house rent allowance as would have been admissible to him under Government but for his deputation to CIDCO."

The respondents have stated that they being a Government Company, under the provisions of Companies Act, 1956, no officer/employee can be thrust upon it against their wishes and more so when even after being given the opportunity for more than six months the applicant has not been able to come upto the satisfaction of the second respondent. Therefore the Managing Director of respondent No.2 wrote a letter to the State Government Respondent No.1 requesting them to withdraw

the applicant from the second respondent. As this letter is crucial to appreciation of the reasons for the transfer, the same is reproduced in full:

"Shri S.A.Engineer has been working as Chief Administrator(New Towns) with effect from 6-7-1993. The post of Chief Administrator requires maturity, conceptional clarity, and unfailing qualities of leadership. The senior professionals like Supdt. Engineer and Sr.Planners directly report to the CA(NT). Therefore, it is expected of the CA(NT) not only to exhibit excellent administrative ability, but also provide guidance in planning and execution of developmental works. He is expected to carry with him various categories of staff which work under him.

Shri Engineer has however, failed to come up to the task. The Planning section of the New Towns has expressed great discontentment with the working of the Aurangabad set up. Though the immediate cause for this was the rearrangement of the sitting accommodation ordered by the CA(NT), the deep root cause is the inability on the part of the CA(NT) to effectively lead the staff working under him. The Joint Managing Director had visited Aurangabad on 23-12-93 to sort out the issues, but he found that there is complete breakdown of communication between the Senior Officers which resulted in an environment highly non-conducive to the working of the office. It was expected that after the visit of the Joint Managing Director the things will improve, but the same has not happened and discontent has continued.

The local newspapers (Samna, Tarun Bharat, Lokmat) have been carrying stories about the functioning of the Aurangabad office adversely commenting upon the functioning of Shri S.A. Engineer. Even the local elected representatives have complained against the functioning of Shri S.A. Engineer.

Shri S.A. Engineer incurred an expenditure of Rs.5.36 lakhs towards the purchase of furniture for the CA(NT)'s bungalow without obtaining administrative approval from the competent authority. This action of the CA(NT) is violative of the established administration and financial procedure of CIDCO and for this CA(NT) was warned.

This is brought to the notice of the Government with a request to transfer Shri S.A. Engineer."

6. The second respondent has filed a further written statement on 12-4-94 enclosing a copy of the special audit report on the payments made at New Towns at New Aurangabad during the year 1993-94 which ~~purport~~ to disclose irregularities and illegalities attributable to the applicant.

7. The first respondent, Govt. of Maharashtra in their affidavit dated 28-3-94 has stated that the various transfers of the applicant to which a reference has been made by the applicant in his application (enumerated in full) were made purely on administrative grounds. The last transfer involving the withdrawal of the applicant from CIDCO was made because CIDCO ~~did not~~ find the applicant suitable for its purpose

and wanted State Government to recall the applicant immediately. The State Government has denied that it harboured any animus against the applicant or that the transfers were made to harass the applicant or unsettle him. The State Government has stated that so far as the judgment of the Tribunal dated 15-2-90 is concerned, reference to it is not at all relevant in the present application. It is stated that the personal hardships have been taken into consideration by the State Government as far as it was administratively exigent ~~to do~~. The State Government has denied that the applicant has been subjected to hostile discrimination because he ~~was~~ belonged to the Scheduled Tribe community.

8. The applicant in his rejoinder has stated that the special audit report is ^a post facto report which has been procured to condemn the applicant. According to him the matter of any irregularity stands concluded with post facto approval given by the M.D. CIDCO on 7-1-94. The applicant has also stated that he was not directly connected with purchase of furniture for which he has been held responsible. He has given a series of examples in which he has brought about economies which ~~has~~ saved the second respondent ^{have} substantial funds. According to him, it is the ADM(A) who had placed the work order and the advance in connection with purchase of furniture was also given by ADM(A) under his own authority to which he had merely accorded approval on the next day. With reference to the problems about the

sitting arrangement to which a reference has been made in the D.O. letter of M.D. dated 2-2-94 reproduced above, the applicant states that what he had done was that since the cabin of the personal staff of the CA(NT) was falling ~~short~~ short of the requirements to maintain and safeguard the secrecy of the office record and other things of essential nature and for confidential typing etc. some additional space was required and hence an area to the extent of about only 120 sq.ft. from the immediately adjacent larger cabin was used for extension of the cabin. The work was got done in a given time and in the facts and circumstances post facto approval was given to the work which according to him was done satisfactorily.

9. The applicant has filed another affidavit dated 22-4-94 in which he has alleged that the M.D. of CIDCO bore a grudge against him because he withdrew a vehicle from a lady Assistant Town Planner, against whom there were complaints, which was not liked by the M.D. The applicant had also opposed the residential retention of/telephone connection of an Executive Engineer in the CIDCO even ~~short~~ after his transfer. The CIDCO was also compelled to ~~post~~ ^a ~~post~~ a guard ~~at~~ at the personal bungalow of the M.D. at CIDCO's cost and substantial expenditure ^{a private} in connection with the ^a visit of MD in the first week of December '93 was incurred without CA(NT)'s approval and the applicant had expressed his displeasure about the incident which was conveyed to the M.D.

For these and allied reasons the M.D. bore a grudge against him.

10. In the context of these allegations, one Vivek S. Marathe, designated Administrator Aurangabad Notified Area, has filed an affidavit in which he has stated that the allegations made against the M.D. are irrelevant to the issues falling for adjudication and also constitute an afterthought. It is also asserted by him that the plan and design of the interior decoration were approved by the applicant, the estimated cost of such decoration was approved by him and the work was carried out in the bungalow under his nose and with his knowledge. It is now disingenuous for him to plead innocence or want of knowledge about the award of contract in question.

11. With reference to the ~~rejoinder~~ affidavit of the applicant, the State Government has filed further affidavit on 13-5-94. In this affidavit, apart from reiterating what is stated in the first affidavit, it is contended that it is not necessary to give any prior notice of recall to an officer sent on deputation. It is stated that under the rules the State Government is required to be given three months' notice by the foreign employer, in this case CIDCO, before recall of the applicant from the foreign post. It is stated that the Government can be said to have waived ~~the~~ three months' notice. It is stated that the applicant was transferred on various occasions in public interest and by way of chain of

transfers and no malafides are involved. It is contended that applicant's work at Pune was found to be unsatisfactory. The Government decision to recall the applicant from GIDCO, it is contended cannot be challenged before the Tribunal.

12. The applicant, with reference to the additional affidavit of the State Government has filed further affidavit on 17-5-94. In this affidavit he has emphasised that the fact that he was required to exhaust his earned leave to undergo compulsory waiting shows the State Government's hostile attitude. He has also stated that when he was working as Additional Collector in a District, the Resident Dy. Collector, a subordinate functionary to the Addl. Collector and non IAS officer, was asked to hold the charge of the Collector during his leave vacancy when the Addl. Collector from IAS ^{like himself} ~~should have been~~ ^{enclosed} asked to do so. He has stated that many officers, as indicated by him in the list, have been accommodated by the Government in the districts or in the same place continuously at a stretch for five to 12 years. According to him the three months' notice for recalling the deputationist is mandatory and cannot be waived. According to him, in connection with his work as Additional Collector at Pune, no explanation was called from him.

13. At the argument stage the main point urged by the applicant is that his transfer is malafide. It shows malafides on the part of State Government that it subjected him to frequent and repeated transfers and it

~~xxxxxxxxxx failed~~ to observe the notice period of three months. ~~The transfer also shows malafides of CIDCO as an organisation. It shows personal malafides~~ of the M.D. as seen from the affidavit of Shri Marathe. The applicant has stated that further malafides are evidenced by the treatment meted out to him after the grant of ad-interim relief by the Tribunal. The applicant has relied on the C.A.T. Principal Bench judgment in the case ^{vide 1986(2)SLR 69} of K.K.Jindal v. G.M.Northern Railway. ~~That judgment which was delivered by Justice K.Madhava Reddy, then Chairman of C.A.T. on 25-3-1986 quoted Lord Denning Master of Rolls in Laker Airways Ltd. v. Department of Trade to the following effect:~~

"Seeing that the prerogative is a discretionary power to be exercised for the public good, it follows that its exercise can be examined by the courts just as any other discretionary power which is vested in the executive."
House of Lords in
It also quoted General Assembly of Free Church (3)
etc. Overtoun to the following effect:

"I take it to be clear that there is a condition implied in this as well as in other instruments which create powers, namely, that the power shall be used bona fide for the purposes for which they are conferred."

It has quoted the Supreme Court judgment in the case of Management of Syndicate Bank v. Workman

"If an order of transfer is made mala fide or for some ulterior purpose, like punishing an employee for his trade union activities, the Industrial Tribunals should interfere and set aside such an order of transfer,

because the mala fide exercise of power is not considered to be the legal exercise of the power given by law. But the finding of mala fide should be reached by Industrial Tribunals only if there is sufficient and proper evidence in support of the finding. Such a finding should not be reached capriciously or on flimsy grounds."

The Supreme Court ~~spelt~~ ^{out} when an action can be held to be mala fide in the case of ^{II} ~~Municipality of Bhiwandi and Nizampur vs.~~
~~M/s.Kailash Zinc~~ ["] Works as below:

"An authority is not acting honestly where an authority has a suspicion that there is something wrong and does not make further eqnuiries."

A reference is also made to the Supreme Court order in the case of E.P.Royappa v. State of ^{AIR 1974 SC 555 at p.583} Tamil Nadu where Justice Bhagwati, J speaking for the majority held:

"Articles 14 and 16 strike at the arbitrariness in State action and ensure fairness and ~~equality of~~ treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action as distinguished from motive inducing from the ante chamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16."

Considering all these judgments and considering the facts of the case the Hon'ble Justice K. Madhava Reddy concluded in para 23 of the judgment as below :

"23. From the above discussion it is clear that the impugned transfer is thus for reasons other than merely administrative. That is only the ostensible reason. The basis for the order of transfer is the suspicion as regards his conduct. Without any further enquiry they have convinced themselves that he is indulging in undesirable activities and proceed to act on that conclusion. That being the real reason, transfer ordered to bypass the enquiry needed to translate the suspicion to a positive conclusion, to our mind constitutes a colourable exercise of power. If the transfer was not sought to be justified on the grounds mentioned in the counter affidavit, perhaps it would have been unexceptional. But since the respondents themselves categorically assert that the petitioner was transferred because he was indulging in undesirable activities, it must be held to be punitive as well as the result of a colourable exercise of power. It is also discriminatory and arbitrary."

14. Respondent No.1 has argued that the transfer is an incident of service as held in B.Varadha Rao v. State of Karnataka, AIR 1986 SC 1955. It is also argued that Rule 54 of the Maharashtra Civil Service (Joining Time) Rules, 1981 read with circular dated 27-10-93 no notice is required to be served ^{upon} ~~to~~ an officer who is on deputation before ~~maxx~~ asking that he be

recalled. Notice is required to be served by the foreign employer upon the Government - which notice the Government has waived in this case, for good reasons. According to the State Government, the special audit report indicates that the officer cannot be trusted to hold independent charge of any post and intemperate allegations of the applicant against high-ranking officers of CIDCO and particularly its previous M.D. indicates that the applicant lacks restraint and discretion which are necessarily expected from a high ranking officer and therefore he has to be posted at Bombay so that he can be kept under the supervision of senior officers. So far as the posting of the officer at Bombay is concerned, the applicant cannot have a choice of his posting because of his personal difficulty.

15. The second respondent CIDCO in their argument has relied on the case of M. Sankaranarayanan, IAS v. State of Karnataka, AIR 1993 SC 763, in which ^a two Judge Bench of the Supreme Court repelled the allegation of malafides against the Govt. of Karnataka on the grounds that inference of malice must be based on factual matrix. Respondent No. 2 have contended that the allegations against the M.D. are an afterthought because they do not find any reference in the original application. According to respondent No. 2, since the M.D. in question has been transferred he could not deal with ^{these} ~~any~~ allegations nor were those allegations relevant for the purposes of the O.A.

The conduct of the applicant at Aurangabad has been highly controversial. He is involved in financial irregularities, he is not able to pull on with the colleagues and he is not responding to the public. The allegation of malice is without any factual foundation and therefore in view of ratio of the Sankaranara-yanan's case the same is to be dismissed as being vague. As held by the Supreme Court in B.Varadha Rao's case transfer is an incident of service and not a condition of service.

To quote:

"Transfer of a government servant who is appointed to a particular cadre of transferable posts from one place to another is an ordinary incident of service. No government servant can claim to remain in a particular place or in a particular post unless, his appointment itself is to a specified, non transferable post. Therefore, a transfer order per se made in the exigencies of service does not result in alteration of any of the conditions of service, express or implied, to the disadvantage of the concerned government servant. However, a transfer order which is mala fide and not made in public interest but made for collateral purposes, with oblique motives and in colourable exercise of power is vitiated by abuse of power and is open to challenge before court being wholly illegal and void."

16. We have considered the material on record and the arguments of the parties. There is no doubt, as held in the case of B.Varadha Rao that transfer is an incident of service.

That judgment was delivered in the context of appeal under Rule 19 of Karnataka Civil Services (Classification, Control and Appeal) Rules, 1957 on the point of whether an appeal lies against the order of subordinate officer, to the State Government challenging the transfer order. More recently the Hon'ble Supreme Court in "Union of India vs. H.N. Kirtania", 1989(3)SCC 447, has held that when the transfer order is legal and valid and not vitiated by unfairness or malafides, the Tribunal has no jurisdiction in issuing ~~any~~ direction. In "Shilpi Bose v. State of Bihar", 1991 SUPP(2)SCC 659, the Hon'ble Supreme Court held "that the court should not interfere with the transfer order which is made in public interest and for administrative reasons unless the transfer orders are made in violation of any mandatory statutory rule or on the ground of mala fide. A Government 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."

17. We do not however agree that a judicial review of the transfer order is ruled out altogether on the ground that transfer is an incident of service. In "B. Varadha Rao vs. State of Karnataka" 's case which is heavily relied upon by the respondents, the Supreme Court had deprecated the tendency to resort to frequent transfers and emphasised the need for a fair transfer policy. To quote:

"One cannot but depurate that frequent, unscheduled and unreasonable transfers can uproot a family, cause irreparable harm to the employee and drive him to desperation. It disrupts the education of the children and leads to numerous other inconveniences and results in hardship and demoralisation. It, therefore, follows that the policy of transfer should be reasonable and fair and should apply to everybody equally. "

In our view, the scope of judicial review of orders of transfer is succinctly summarised in Kamlesh Trivedi v. Indian Council of Agricultural Research & anr., which is a Full Bench judgment appearing at page 80 of Vol. I of Full Bench Judgments published by Bahri Brothers. This judgment is subsequent (decided on 27-4-1988) to the judgment of K.K.Jindal's case decided on 25-3-86 and clarified some points which were not clear in Jindal's case. To quote:

"18. In view of the above discussion, we hold that any order of transfer must (1) be in public interest and in the exigency of service on administrative grounds. (2) It must

not be in colourable or mala fide exercise of power. (3) It should not be arbitrary. (4) It must be made by a competent authority in accordance with the rules and the instructions, if any, governing the transfer policy. But how far a transfer policy is mandatory, we express no opinion in this case. That must depend on the wording intendment of the instructions embodying the transfer policy. (5) The transfer itself must be ordered by a competent authority in bonafide exercise of the power. (6) It should not be a "fixed" transfer or for settling scores. (7) However, merely because transfer is ordered on complaints or after an inquiry into the guilt of the employee, it cannot be said to be by way of punishment. (8) The principle that 'justice should not only be done but appear to be done' is not contravened if transfer is made without any further inquiry after a penalty is imposed in a proper disciplinary proceedings. (9) It does not amount to a double jeopardy."

It is, therefore, clear that transfer of a government employee is amenable to judicial review if specified conditions are fulfilled. Whether the specified conditions are fulfilled or not is a question of fact. Before going to the factual matrix of this particular case we refer to the case of ^{ll}Rajendra Roy v. Union of India decided by the Hon'ble Supreme Court, AIR 1993 SC 1236, which ^{ll}was also a case on the point of validity of transfer in which the Hon'ble Supreme Court in para-7 stated regarding malice as below :

"It may not be always possible to establish malice in fact in a straight-cut manner. In an appropriate case, it is possible to draw reasonable inference of malafide action from the pleadings and antecedent facts and circumstances. But for such inference there must be firm foundation of facts pleaded and established. Such inference cannot be drawn on the basis of insinuations and vague suggestions."

Let us, therefore, consider whether the factual matrix establishes ~~malice~~ at work in the instant case, keeping in view the ratio of Sankaranarayanan and Rajendra Roy.

18. In this case we have a plethora of material. Apart from the application which is fairly detailed, we have with us three replies filed by CIDCO including the one by Shri Marathe, two replies filed by the Govt. of Maharashtra and five ~~replies~~ ^{rejoinder} filed by the applicant. We make it clear that ~~for~~ the factual matrix, we ~~have~~ confined ourselves to the events upto the letter dated 2-2-94 from CIDCO. We, therefore, do not rely on the special report of the Auditors obtained by CIDCO by its requisition dated 8-3-94 except as regards events etc. ^{as} that may be referred to having taken place before 2-2-94. We proceed with an analysis of the letter of the M.D. CIDCO addressed to Govt. of Maharashtra. This letter gives the following reasons for shifting the applicant.

(i) The applicant lacks qualities of maturity, clarity and leadership;

(ii) The applicant's conduct has resulted in a highly non conducive environment of working of the office;

(iii) There are adverse newspaper reports;

(iv) There are complaints from local leaders;

(v) The applicant incurred unauthorised expenditure on purchase of furniture for CA(NT)'s Bungalow.

If we leave apart reference to the mental qualities about which any judgment is required to be necessarily subjective and the reference to the adverse newspaper reports and complaints ^{as which according to Applicant are motivated} from the local leaders, we are left with two basic counts of complaints against the applicant viz. his failure to get on with the local Planning Staff and secondly the financial irregularity. In regard to financial irregularity it is stated that applicant was warned in connection therewith. But applicant has pointed out, and it is not being denied that there is nothing on record to show that applicant was warned. Regarding the financial irregularity, the applicant contends that the matter stood concluded with the post facto approval given by the M.D. on 7-1-94. Regarding the dissatisfaction with the style of his functioning, the applicant has enclosed a copy of the report of the Joint Managing Director dt. 23-12-93 and

has contended that there is nothing adverse against him in this report. We have perused the report which appears as Ex. 'S' to the rejoinder in affidavit of the applicant and it does indicate that regarding sitting arrangements, the Joint Managing Director has issued some instructions on the spot but has not mentioned anything adverse about the applicant. If the Joint Managing Director produced any other report before the Managing Director, the same has not been brought to our notice. On the other hand, the contention of the applicant is that the so called discontent against his style of functioning was nurtured and fed by the Head of the Planning Section and he requested his immediate transfer but the M.D. deliberately retained him at Aurangabad. In our view, therefore the main surviving reason for the transfer could be stated to be the financial irregularity. The contention of the applicant is that the M.D. had, while according his post facto approval to the transaction, directed recovery of 20% of his salary, 10% by way of rent for accommodation and 10% by way of rent for the furniture, that he had represented against this order of the M.D. but the M.D. had not at all referred to the said representation in his letter. He, therefore, argues that the transfer is necessarily punitive because the respondent No.2 arrived at a conclusion regarding applicant's guilt without conducting a regular enquiry and therefore applying the ratio of Jindal's case, the

order should be set aside.

19. We must remember, however, that this is not a case of transfer ~~or~~ simpliciter but ~~xxxxx~~ a case which has two fold aspects viz. (1) repatriation from deputation to a public sector undertaking (2) posting to a position in the parent cadre viz. Govt. of Maharashtra. These two transactions have resulted in the transfer. According to standard terms and conditions of the officers on deputation vide Govt. order dated 27-10-93 appearing at Ex. 'H' of the rejoinder affidavit of the applicant dated 22-4-94 (which is a rejoinder to Govt. of Maharashtra affidavit) item 15 under "Departmental Enquiry" states as below :

"The officer shall be covered by the All India Service (Discipline and Appeal) Rules, 1969. If a departmental enquiry is to be instituted against the officer, he shall be repatriated to the cadre post under the State Government. The Subsistence Allowance shall be paid by the Government but it will be recovered from the foreign employer."

It would ~~be~~ thus ^{be} seen that ~~the~~ if the Govt. of Maharashtra, at the instance of CIDCO, wanted to conduct a departmental enquiry against the officer, it had no alternative but to repatriate the officer. But if an officer has to be repatriated, then the term No.1(ii) under the heading "Period of Deputation" would come into play which is reproduced below :

"(ii) If the officer's services are not required by the Foreign Employer, it shall be open to the foreign employer to repatriate him/her to the parent department, provided, three month's notice is given to the Government/Competent authority by the foreign employer before effecting such repatriation."

It would, therefore, be seen that the Govt. of Maharashtra, in order to take up a departmental enquiry against the applicant should repatriate the officer after receiving three months' notice from the foreign employer viz. CIDCO. As is observed by the Full Bench in Kamlesh Trivedi's case referred to above, the ratio of Jindal's case is not that every transfer for misconduct which is not preceded by enquiry is always punitive but that a finding as to misconduct and a finding which attaches stigma to the employee not preceded by an inquiry and arrived at behind the back of the employee cannot form a valid basis for an order of transfer. In some cases, the transfer itself may facilitate the enquiry and therefore Jindal's case cannot be said to have laid down that such transfers are punitive. The contention of the applicant, therefore, that his transfer was punitive is not supported by Jindal because in the present case, repatriation and transfer was the pre condition in case of a departmental enquiry under the rules. We note, of course, that in the instant case, there is no actual reference to departmental enquiry.

20. That does not, however, rule out the possibility that transfer in this particular case cannot be assailed as being in colourable exercise of power, malafide or as being arbitrary. Let us

therefore, examine the factual matrix from this point of view. In the material on record, the malafides are alleged against the state government on the ground that the applicant was subjected to repeated and frequent transfers as a vendetta for his having filed O.A. 567/87 against Govt. of Maharashtra. In our view those transfers going back to the period of November, '89 cannot be assailed in the present proceedings. The malafides, if operative in those cases, cannot be called in establishing the malafides of the State Government in this particular case. In our view, the transfer of the applicant from Bombay to Aurangabad was made at the request of the applicant and, therefore, we are required to investigate events which took place at Aurangabad. These events may be listed as below :

- (1) 5-7-93: the applicant took over as C.A.(NT) New Aurangabad.
- (2) Action initiated relating to calling quotations for furnishing the new Bungalow for CA(NT) in September, 93.
- (3) Inauguration of new bungalow at Aurangabad at the hands of M.D. - 5-11-93;
- (4) Formal proposal for ex post facto approval for purchase of furniture at the new bungalow sent by CA(NT) on 23-11-93
- (5) Private visit of MD to Aurangabad - 7-12-93
- (6) Visit of Joint Managing Director to Aurangabad 23-12-93

(7) Ex post facto approval to the extent of Rs.5.36 lakhs in connection with purchase of furniture for the new bungalow subject to deduction of 20% from salary - 7-1-94

(8) Representation by the applicant regarding withdrawal of deduction from salary - 31-1-94

(9) Letter of the M.D. to Govt. of Maharashtra requesting transfer of the applicant - 2-2-94

(10) Order of the Govt. of Maharashtra transferring the applicant - 4-2-94

(11) Representation of the applicant to Govt. of Maharashtra to cancel transfer to Bombay - 9-2-94

(12) Status-quo order by the Tribunal - 15-2-94

(13) Applicant directed by Tribunal to be reposted as CA(NT) pending hearing - 23-2-94

(14) Representation regarding rent to the Govt. of Maharashtra by the applicant - 2-4-94

21. This chronological matrix coupled with facts on record indicates that the letter of M.D. CIDCO to the Govt. of Maharashtra dt. 2-2-94 suffered from the following deficiencies *viz.* *namely*

(a) The fact that the applicant was on deputation to the Corporation on foreign service terms was overlooked and the need for giving three months' notice to the State Govt. was totally overlooked.

(b) It does not refer to the representation of the applicant regarding deduction of 20%

-: 30 :-

of the salary drawn as rent.

(c) The analysis of MD's letter vide para 19 above establishes that the material for summary transfer was flimsy.

22. So far as the State Government is concerned, the orders were issued almost immediately on receipt of the letter dated 2-2-94 from M.D. CIDCO viz. on 4-2-94. Here the Government orders disclose the following deficiencies / vices

(a) the fact that the applicant has to be first repatriated to the State Government and thereafter transferred was overlooked. There is no such recital in the order.

(b) in the context of repatriation, the need for state government to receive notice of three months from the foreign employer viz. CIDCO was overlooked;

(c) the purpose of such notice viz. the need for the State Government considering the proposals made by the foreign employer in all its aspects including the fact that foreign employer may make unfounded allegations against the government employee was overlooked, one purpose of prescribing "standard terms and conditions" and incorporating three months' notice period being to protect the government servant;

(d) the need for state government to have time to consider the next posting of the government employee from the point of view of all aspects of cadre management and transfer policy including any previous requests made by the Govt. employee for postings at a particular place was overlooked.

(e) The fact of the applicant being an S.T. employee and central guidelines to avoid discrimination in their regard were overlooked.

23. As a result of this deficiency in the making and processing of transfer proposals, the government orders were issued in a mechanical manner, posting the applicant at Bombay which might have been ^{an} immediately available vacancy but might not have been in consonance with the general principles of transfer policy of the government.

24. The failure of the CIDCO to consider various aspects including the condition requiring three months' notice and also the failure of the Govt. of Maharashtra to examine the matter in any manner including the aspect of insistence on fulfilment of the ^{"terms & conditions"} ~~State~~ ^{CIDCO} ~~Government~~ cannot be judged to be a mere matter of oversight. It certainly, indicates that there was some background to the proposal made by the M.D. CIDCO in the context of which immediate orders without examining the proposal in all its ramifications came to be issued. It is in this context that we have to consider what is the operative reason for the government action referred to in para 85 of the Royappa's case. Thus considered and keeping in view the background of the happenings during the short tenure of the applicant at CIDCO between 5-7-93 and 4-2-94 during which he had occasion to differ with M.D. on several points including some points which affected M.D. personally e.g. like withdrawal of the security guard deployed for the personal bungalow of M.D. etc. the conclusion is inescapable that the highest

for unknown reasons
authorities of CIDCO wanted to shift the
applicant from the scene as early as possible
as a result of which the letter dated 2-2-94
came to be written which was acted upon almost
instantaneously.

25. The respondent No.2 have stated that the allegations of a personal nature against the M.D. CIDCO are entirely irrelevant for the issue under adjudication before this Tribunal. The fact, however, remains that although CIDCO has filed three affidavits including two by Joint Managing Director Shri G.S.Gill, and one by Vivek Shrikant Marathe, Administrator, neither the M.D. nor any other officer has come forward to deny any of the allegations. Some of the allegations are entirely susceptible to verification by reference to record and not merely a matter of gossip. E.g. deployment of security guard at the private bungalow of M.D.; it was possible for any responsible officer with access to the connected record to file an affidavit on this point. Such a step has not been taken. We have considered the observations of the Supreme Court in the case of State of Bihar v. P.P.Sharma, AIR 1991 SC 1260, in which it is laid down as below :

"It is a settled law that the person against whom mala fides or bias was imputed should be impleaded *eo nomine* as a party respondent to the proceedings and given an opportunity to meet those allegations. In his/her absence no enquiry into those allegations would be made."

It is no doubt true that the applicant has made CIDCO through its M.D. as a party respondent and not M.D. CIDCO by name as party respondent. However, the allegations which were made have a vital bearing on the reasons for transfer and we feel that it was possible for the M.D. CIDCO

or any other responsible officer of CIDCO to file an affidavit as e.g. was done by Shri Marathe whose affidavit has been strongly opposed by the applicant. In any case at this stage we are not going into the truth of the allegations but we are only considering whether those allegations which are not denied even though an opportunity was given to do so, could lead to the conclusion of malafides. We, therefore, consider that it is legitimate for us to take into account those allegations for this limited purpose.

26. The respondent No.2 has next said that the allegations of malafides are an afterthought and therefore any arguments based thereon should be rejected. However, the applicant in para 5(k) of the application has alleged malafides generally and we consider therefore that it is not an after thought but statements made by the applicant in rejoinder affidavit were an extension of the general statement made earlier, logically arising out of the thrust and parry of statements and counter statements.

27. We, therefore, hold that the letter dated 2-2-94 suffers from the vice of malafides and the order dated 4-2-94 suffers from the vice of non application of mind, violation of requirement of the mandatory condition of three months' notice for termination of the deputation by foreign employer and the vice of abuse of power of transfer. Since the letter dated 4-2-94 is founded almost wholly on the letter of CIDCO it also suffers from the vice of "transferred" or vicarious malice.

28. We are, therefore, compelled to hold that the impugned transfer order of the applicant suffers from infirmity and is required to be set aside. We also note that the State Government did not think it fit to consider the representation of the applicant dated 9-2-94 although the Tribunal gave liberty to the State Government to deal with the same as per rules.

29. We also note that it would be open to CIDCO to propose and the State Government to accept the proposal to initiate a departmental enquiry against the applicant in connection with the allegations of financial irregularities in the matter of purchase of fixtures and furniture for the bungalow of CA(NT) New Aurangabad. However, in view of all the material which has come on record, a note of caution is to be sounded that the State Government is duty bound to see that the applicant is not subjected to hostile discrimination, vis-à-vis M.D. CIDCO inasmuch as :

- (a) one is a junior IAS Officer and the other a senior IAS Officer;
- (b) one is a subordinate and the other is or was a superior with powers of transfer and punishment;
- (c) one is an ST officer and the other is a non ST officer;
- (d) the allegations against one officer have been made officially and have been sought to be refuted by that officer point by point whereas the allegations against the other officer have been allowed to pass, subsilentio

making it appear that they are made irresponsibly. // We would therefore expect the State Government to examine both sets of allegations side by side so that the scales of justice are held even.

We would like to make it clear that we express no opinion about the allegations. Whatever we have stated should be treated as strictly in the nature of reasons for our order.

30. Although the applicant stated that he does not press for his remaining in CIDCO and would like the Tribunal to direct the State Government to consider his case for posting in Aurangabad itself outside CIDCO we are not able to grant this relief to him. We, therefore, dispose of this application by passing the following order :

O R D E R

(i) The O.A. is allowed. The order of State Government dated 4-2-94 transferring the applicant from the post of CA(NT) New Aurangabad to the post of Deputy Secretary, Cooperative and Textile Department, Mantralaya is hereby quashed and set aside. The State Government is directed to ignore the letter dated 2-2-94 from CIDCO as being non-~~est~~.

(ii) It is ~~however made~~ clear that it is open to the CIDCO, if it so desires, to send a fresh communication to the State Government requesting it to

recall the officer from his foreign posting in CIDCO, giving bonafide reasons, and also allowing three months to the state government to decide the posting of the applicant. It is open to the State Government to consider the request in all its aspects including the nature of ~~the~~ reasons given, the terms and conditions attached to the post and the transfer policy of the State Government in relation to IAS Officers and to repatriate the officer to the State Government and then to transfer and post him anywhere in public interest.

While doing so the state government should also keep in view the representation dated 9-2-94 made by the applicant.

(iii) It is also made clear that it is open to the CIDCO, if it so desires, to propose to the State Government departmental action against the applicant for his acts of omission and commission while working in CIDCO and for the State Government to take necessary action but while doing so, State Government should keep in view the need for acting in a ~~non~~^{now} discriminatory manner towards the applicant vis-a-vis Ex-M.D. of CIDCO as observed by us.

(iv) No order as to costs.

M.R.Kolhatkar
(M.R.KOLHATKAR)
Member(A)