

CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH

Original Application No. 925/95
Transfer Application No.

Date of Decision : 4-4-96

I.S.Talekar

Petitioner

Shri I.J.Naik

Advocate for the
Petitioners

Versus

The Administrator, Administration of U.T.

Daman, Diu & Anr.

Respondents

Shri R.K.Shetty.

Advocate for the
respondents

C O R A M :

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? X

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

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL,

MUMBAI BENCH, MUMBAI.

ORIGINAL APPLICATION NO. 925/1995.

Proounced this 4th day of April 1996.

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

I.S. Talekar. ... Applicant.

(By Advocate Shri I.J.Naik)

V/s

The Administrator,
Administration of U.T. of
Daman & Diu. & Anr.

(By Advocate Shri R.K.Shetty).

... Respondents.

O R D E R

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

In this application under section 19 of the Administrative Tribunals Act the applicant has impugned the order dt. 6.7.1995 by the Administration of Daman and Diu (at Annexure A-1) which states that Shri I.S.Talekar, Engineering Assistant is transferred and posted as Municipal Engineer on deputation to Diu Municipal Council, Diu initially for a period of one year. Thus the order is not an order of transfer simplicitor, but an order of transfer on deputation. It is not in dispute that the applicant is an employee of the Public Works Department of the Administration and that the Administration has authority to transfer him. The order, however, has been assailed on several grounds some of which have to do with transfer and some of which have to do with the transfer being on deputation. It is firstly contended that the order violates the transfer guidelines dt. 11.5.1993 which are to be seen at Annexure A-3 page 16. The Guide Line No.1 states that the transfer orders of the Government servants shall be ordinarily issued in April/May every year. It is contended that the

...2.

transfer orders having been issued in July, this violates the guidelines. It is next contended that ^{transfer of} transfer guideline No.3 states that ~~the~~ Government servants between Daman and Diu may be ordered generally at the time of promotion/initial appointment. The applicant contends that he is posted at Daman and is being transferred to Diu. It is not his initial appointment nor is he being promoted. Therefore, the Guideline No.3 has also been violated. It is next contended that apart from transfer being violative of transfer guidelines, is also arbitrary because the applicant had made a representation dt. 10.7.1995 i.e. shortly after the issue of transfer order in which he had mentioned some of his difficulties viz. his need to look after his widowed old mother, his son being handicapped (inability to walk) requiring treatment of a Physio-Therapist at Atul near Bulsar, thirdly although this ground is not taken in the representation, it is contended that the applicant had made the respondents aware through oral representation that his wife is employed as a teacher at Daman and the transfer would have involved separation from family. The contention of the applicant is that his representation was not considered, no reply was given to the representation and on the other hand on 1.8.1995 at page 21 relieving order is issued. Thus the action of the Department in transferring and thereafter directing the applicant to get relieved is arbitrary, unjust and unfair and therefore on this ground liable to be interfered with as being violative of guarantee of fair treatment under Article 14 of the AL Constitution. The most important contention raised by

the applicant is that the order not being an order of transfer simplicitor but an order of transfer on deputation his willingness ought to have been ascertained and obtained before being subjected to transfer on deputation to a body other than Government.

2. The Respondents have filed a written statement and have opposed the O.A. According to Respondents the personal difficulties of the applicant have been considered and not found to be insurmountable. The facilities for Physio-Therapist treatment are available at Veraval which is at a distance of 3 to 4 hours' drive by Bus from Diu. So far as the difficulty regarding the Wife's employment at Daman is concerned, the applicant was told that he can retain his family in Daman in the Government Quarter allotted to him. Regarding violation of transfer guidelines they are not statutory guidelines and the transfer was ordered on rotational basis and was in public interest. ~~There was no violation~~ ^{matter of} of any statutory rules in the transfer. Thirdly, so far as the need for ascertaining and obtaining willingness is concerned, according to the Department, ~~as a matter of~~ practice, ~~that~~ the Administration is deputing Assistant Engineers from P.W.D. to the Municipality on deputation without calling for any willingness of the employees.

3. It appears to me that the contention of the applicant regarding his transfer being a violation of transfer guidelines and the transfer being arbitrary is not sustainable in the light of the case law. Although the applicant has argued that there are Judgments showing that mala fide transfer is liable to be interfered with (R.Jayaraman V/s. Union of India

& Ors. decided on 30.8.1990 by CAT Bombay Bench vide (1991) 17 ATC 151) and that guidelines are meant to be followed and not ignored vide S.A.Joshi & Ors V/s. Union of India and Others (1985 G.L.H. (N.O.C.) 18), in my view the same does not apply to the facts of the case. No mala fides are alleged, much less established. Therefore, R.Jayaraman's case does not apply. So far as the case of S.A.Joshi ^{& Ors.} V/s. UOI & Ors. is concerned, it is no longer ~~is~~ good law in view of the latest Supreme Court Judgment vide Union of India V/s. S.L.Abbas (1994 SCC L&S 230) in which the Supreme Court held that the guidelines do not confer a legally enforceable right and an order of transfer can be questioned in a Court only when it is based on mala fide and when it is in violation of the statutory provisions. The counsel for the applicant at the later stage of the argument had tried to argue that the transfer was discriminatory because the applicant was picked up arbitrarily in preference to some junior officers who were required to be transferred. This was in the context of a Circular which had stated that in the absence of any government employee giving willingness for transfer on deputation to Diu, a Roster is to be prepared with juniormost Officer appearing at the top. As no facts relating to discrimination were set out, I do not think that the order of transfer simplicitor can be assailed on the ground of discrimination. I am, therefore, of the view that the order of transfer to the extent it is an order of transfer simplicitor cannot be interfered with by this Tribunal.

4. However, as observed above this is a composite order of transfer-cum-deputation. I am therefore, required to consider the contentions of the rival parties as to the competence of the Administration to transfer a Government employee on deputation without obtaining the willingness of the government employee. The applicant has, in his Rejoinder, produced certain circulars which show that it is a practice in the Administration to obtain willingness prior to deputation of Government employee to Diu, Daman etc. Thus a circular dt. 10.12.1990 (at Annexure R-1) attached to Rejoinder dt. 23.9.1995 shows that Superintending Engineer had wanted Assistant Engineers etc. to give their willingness to go on deputation to Diu Municipal Council as Municipal Engineer. It is seen that applicant by his letter dt. 11.12.1990 (Annexure R-2) had informed that he was not willing. The Circular dt. 29.12.1981 (at Annexure R-3) shows that a similar willingness was ascertained in respect of post of Assistant Engineer in Daman Municipal Council. This was evidently at the time Daman and Diu was part of Goa Union Territory and the subsequent circular dt. 17.4.1982 (Annexure R-4) shows in very clear terms that in respect of Municipal Councils Public Health Undertakings and other Departments, it was a practise to ascertain willingness before sending Government Officers on a deputation. The respondents, however, contended that although there might have been such a practice going back to days of Goa Union Territory

significance
(it has a mere historical / after Diu and Daman
separated from Goa. So far as the Rules are concerned
it is not required to ascertain the willingness of the
Government employee before being transferred. In this
connection, reference is made to F.R. 110-A which
reads as below :

"No Government servant may be transferred to
foreign service against his will :

Provided that this sub-rule shall not apply
to the transfer of a Government servant to the
service of a body, incorporated or not, which
is wholly or substantially owned or controlled
by the Government."

5. The counsel for the applicant would submit that
Diu Municipal Committee is not a Committee which is
owned or controlled by the Government, but it is a local
authority and therefore willingness is required to be
obtained. The counsel for the respondents, however,
invites our attention to Government decisions printed
under F.R. 110 which specifically state that sanction
of Government servant is necessary for foreign service
to local funds only if such local funds are not administered
by the Government. According to counsel for Respondents
Diu Municipal Committee is to be treated as a body
managed or a local fund administered by the Government.
In particular, he invites our attention to the full
decision quoted below :

"1. A question arose as to whether the proviso
to F.R. 110(a) could be invoked in cases of
transfer of Government servants to Local Funds.
It is clarified that F.R. 110(a) and its proviso
covers cases of transfer of Local Funds not
administered by Government. It has, however,
been decided in consultation with the
Comptroller and Auditor-General of India that
these powers should not, for the present, be
invoked in cases of transfer of a Government
servant to service under local funds not
administered by Government. In other words, in
the case of the transfer of Government servant
to a Local Fund not administered by Government,
his consent for such a transfer should still be
taken as a measure of practical expediency.

2. It is further clarified in this connection that according to F.R. 128, Government Servants who are paid from Local Funds administered by Government, are subject to the provisions of Chapter I to XI of the Fundamental Rules and are not subject to the provisions of Chapter XII which relates to "foreign service". Consequently, in the case of Government servant transferred to a local fund administered by Government, F.R. 110 (a) including its proviso is not attracted. In such cases, F.R. 11 will apply and the consent of the Government servant for the transfer will not be necessary.

3. The question whether the Central Government have the necessary powers under the Fundamental Rules to transfer their employees without their consent to Panchayati Raj institutions set up in the Union territories, has also been examined. It is clarified that necessary powers to do so are available under the proviso to F.R. 110(a). Accordingly consent of the Government servant will not be necessary for transfer to such institutions."

The counsel for the respondents also invites our attention to F.R. 128 which along with the instructions therein are reproduced below :

"Government servants paid from Local Funds which are administered by Government are subject to the provisions of Chapters I to XI of these rules.

AUDIT INSTRUCTIONS

(1) Employees of local funds administered by Government who are not paid from General Revenues and are, therefore, not Government servants are subject to the provisions of Chapters I to XI of the Fundamental Rules.

(2) The expression 'Local Funds which are administered by Government' means funds administered by bodies which by law or rule having the force of law come under the control of Government in regard to proceeding generally and not merely in regard to specific matters, such as the sanctioning of the budget or sanction to the creation or filling up of particular posts or the enactment of leave, pension or similar rules; in other words, it means funds over whose expenditure Government retains complete and direct control."

If the applicant is treated as having been sent on deputation to a body with a local fund administered by the Government, in that case the applicant would be subject to the provisions of Chapter I to XI of these

...8.

Rules which means the applicant is subject to F.R.11.

The F.R. 11 reads as below :

"Unless in any case it be otherwise distinctly provided, the whole time of a Government servant is at the disposal of the Government which pays him, and he may be employed in any manner required by proper authority, without claim for additional remuneration, whether the services required of him are such as would ordinarily be remunerated from general revenues, from a local fund or from the funds of a body incorporated or not, which is wholly or substantially owned or controlled by the Government."

counsel for

Thus the respondents argues that by virtue of F.R. 11 the consent of the applicant is not necessary.

6. The counsel for the respondents also invites our attention to Goa, Daman & Diu Municipalities (Common Cadre of Municipal Engineers) Rules, 1973. Rule 4 provides as below :

"4. Method of recruitment - (i) The post of Senior Grade Municipal Engineer shall be filled in by absorption of the Engineers of Municipal Councils and Comuidade Engineers, failing which by transfer on deputation of an Assistant Engineer of the Public Works Department."

The Respondents contend that this Rule has to be read in the context of Section 73 of the Goa, Daman & Diu Municipalities Act, 1968 which reads as below :

"Appointment of other officers and servants. -
(1) A Council may, with the sanction of the Director, create such posts of officers and servants other than those specified in sub-sections (1) and (2) of the last preceding section as it shall deem necessary for efficient execution of its duties under this Act."

According to the respondents, the Act read with the provisions of the Rules make it very clear that in effect the P.W.D. and the Municipal Engineers constitute a common service of Engineers and therefore, the transfer of the applicant from P.W.D. to Municipal Committee Diu is perfectly valid and does not require any consent.

7. The contention of counsel for the Respondent relating to P.W.D. Engineers and the Municipal Engineers constituting a common cadre is not at all borne out by a plain reading of the Act and the Rules. I am inclined to agree with the counsel for the applicant that the Act and the Rules the provisions of which have been relied upon by the counsel for the Respondents do not help the respondents' cause. However, the contention of the respondents relating to no consent being required in respect of a post under a local fund administered by the Government requires careful examination. The counsel for the applicant invites our attention to the Judgment of Justice D.A.Desai who was then the Chief of the Gujarat in the case of Shri Bhagwatiprasad Gordhandas Bhatt V/s. The State of Gujarat and others decided on 20.7.1976 (reported at 1979(3) SLR 805). In that case the transfer of a Police Inspector from his parent department to Civil Defence Organisation was called in question and the reliance was placed on Rule 17 of the B.C.S.R. which is para materia with F.R. 11 which has been cited before us. Justice Desai repelled the contentions and held that the deputation on transfer without obtaining willingness was arbitrary and violative of equality as incorporated in Article 14 of the Constitution and as interpreted in Supreme Court in E.P.Royappa V/s. State of Tamil Nadu (A.I.R. 1974 S.C. 555). According to the counsel for the applicant F.R. 11 cannot be called in aid for transfer of the applicant ~~without~~ ^{go on} without obtaining his willingness to a Foreign Service.

8. In my view, F.R. 11 has to be read in the light of the Judgment in Bhagwatiprasad Gordhandas Bhatt and therefore, a prior consent is required to be read into any transfer on deputation.

9. However, I would also like to observe that a Municipal body cannot be said to be a body with a local fund which is administered by Government. A Municipal Committee is a local body or a local authority. On the point of distinction of a local body we have the authority of the Supreme Court vide Union of India & Ors. V/s. R.C.Jain & Ors. 1981 (2) SCR 854 which was subsequently relied on in a recent Judgment of the Supreme Court in Housing Board V/s. H.H.B. Employees Union vide 1995(6) SCALE 139. In R.C.Jain's case Justice O.Chinnappa Reddy observed as below :

"What then are the distinctive attributes and characteristics, all or many of which a Municipal Committee, District Board or Body of Port Commissioners shares with any other local authority? First, the authorities must have separate legal existence as corporate bodies. They must not be mere governmental agencies but must be legally independent entities. Next, they must function in a defined area and must ordinarily, wholly or partly, directly or indirectly, be elected by the inhabitants of the area. Next, they must enjoy a certain degree of autonomy, with freedom to decide for themselves questions of policy affecting the area administered by them. The autonomy may not be complete and the degree of the dependents may vary considerably but, an appreciable measure of autonomy there must be. Next, they must be entrusted by statute with such governmental functions and duties as are usually entrusted to municipal bodies, such as those connected with providing amenities to the inhabitants of the locality, like health and education services, water and sewerage, town planning and development, roads, markets, transportation, social welfare services etc. etc. Broadly, we may say that they may be entrusted with the performance of civic duties and functions which would otherwise be governmental duties and functions. Finally, they must have the power to raise funds for the furtherance of their activities and the fulfilment of their projects by levying taxes, rates, charges, or fees. This may be in addition to monies provided by government or obtained by borrowing or otherwise. What is essential is that control or management of the fund must vest in the authority."

I am therefore, of the view that apart from the authority of Bhagwatiprasad Gordhandas Bhatt's case, on the basis of the Rules also the deputation of a Government employee to a local authority like a Municipal Council has to be held to be a Foreign Service rather than service under local fund administered by Government. Therefore, in terms of F.R. 110(a) also transfer without obtaining a willingness would not be valid.

10. The learned counsel for the applicant would urge that irrespective of the rules, practice which was obtaining has to be treated as bad in law under Article 13 of the Constitution. On the other hand, counsel for the Respondent would say that a mere practice without authority of law does not carry any force. I am not required to go into these contentions because I have already held that F.R. 110(a) applies to the facts of the case, and that the proviso does not apply to the facts of the case and since for a deputation to local authority i.e. the Municipal Committee, Diu, willingness was required to be obtained and since it is not in dispute that willingness has not been obtained, the impugned order is liable to be interfered. The O.A. is therefore, disposed of by passing the following order :

O R D E R

The O.A. is allowed. The impugned order dt. 6.7.1995 is quashed and set aside and the respondents are restrained from transferring the applicant to Municipal Committee, Diu without ascertaining and obtaining his willingness. There would be no orders as to costs.

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