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**CENTRAL ADMINISTRATIVE TRIBUNAL
JABALPUR BENCH: JABALPUR.**

O.A. No.717/2003

Date of Decision: 17.10.2003

Hemant Sausarkar, S/o late Shri Shobha Das, aged about 55 years working as Judicial Member in Income Tax Appellate Tribunal, Jabalpur Bench, Jabalpur, r/o F.3 Arjun Complex, Napier Town, Jabalpur.

: Applicant.

Versus

1. Union of India through the Secretary, Ministry of Law and Justice Shastri Bhawan, New Delhi.
2. President, Income tax Appellate Tribunal,
Central Govt. Offices Building, 4th Floor,
Maharshi Karve Marg, Mumbai. 400 020.

: Respondents.

Mr. P. Chaturvedi : Counsel for the applicant.

CORAM:

The Hon'ble Mr. J.K. Kaushik, Judicial Member.

The Hon'ble Mr. Anand Kumar Bhatt, Administrative Member.

ORDER

Per Mr. J.K. Kaushik:

Mr. Hemant Sausarkar, Judicial Member, Income Tax Appellate Tribunal, (I.T.A.T. for short) Jabalpur has assailed the order dated 29.09.2003, Annex. A.1, which has been issued in partial modification of earlier order of even No. dated 17.02.2003, by which he has been ordered to be transferred in the same capacity to the Visakhapatnam Bench of the ITAT.

2. The Original Application was listed for admission today and we have heard the learned counsel for the applicant on admission. Incidentally, from Shri B.D'Silva, who had earlier represented the concerned department in respect of the case which was filed by the same applicant, before this



Bench of the Tribunal and as well as before the High Court of Madhyapradesh against the judgement of the Tribunal, is present and we sought help from him for the disposal of this case.

3. The Brief facts of the case are that the applicant while working as Judicial Member, ITAT, Jabalpur Bench, was ordered to be transferred in the same capacity to ITAT, Patna Bench vide order dated 17.02.2003. The applicant challenged the said order vide O.A. No. 165/2003, and his case was rejected at the admission stage itself.

4. The aforesaid order was challenged before the High Court of Madhyapradesh, which came to be dismissed vide order dated 18.09.2003, on the prayer of the counsel for the applicant, in view of the fact that one Shri D.K. Tyagi, was posted at ITAT Patna Bench in place of the applicant, vide letter dated 22.08.2003. Subsequently, the impugned order has been passed, by which the earlier order of transfer in respect of the applicant has been modified to the extent that instead of Patna, the applicant has been posted at Visakhapatnam. The grounds of challenge of the impugned order are almost identical/similar to the one which were taken in the earlier O.A.

5. The learned counsel for the applicant has submitted that a fresh cause of action has arisen to the applicant on the same grounds since the case before the High Court of Madhyapradesh was dismissed as infructuous. He has reiterated the facts and grounds raised in the O.A. and has submitted that the impugned order cannot be sustained in the eye of law. When he was put a query as to whether the applicant is still interested to go to Patna, the answer was that he would go to Patna instead of Visakhapatnam.

6. Shri B.D'Silva, facilitated the Tribunal with the orders which have been passed by this Bench of the Tribunal in the earlier O.A. as well as the order of the High Court of



Madhyapradesh and has submitted that before the order of transfer was modified, the applicant had submitted before the High Court of Madhyapradesh that he was not pressing for the Writ Petition. Thus the matter is also hit by res judicata since the earlier order dated 17.02.2003, has been modified only by changing the place of transfer. It is also submitted that the issue stood concluded and the judgement of this Bench of the Tribunal has attained finality.

7. We have considered the rival contentions submitted on behalf of the applicant as well as the assistance rendered by Shri B. D'Silva. To appreciate the controversy, it would be appropriate to extract the order, which has been passed by the High Court of Madhya Pradesh on 18.09.2003 which reads as under:

" 18.09.2003.

Shri Parag Chaturvedi, Adv. For the petitioner.

Shri Brian D'Silva, Sr. Advocate for respondents.

The petitioner has approached this Court assailing the order of his transfer as Judicial Member of Income Tax Appellate Tribunal, Jabalpur, Jabalpur to Income Tax Appellate Tribunal, Patna Bench. It is submitted by Shri Chaturvedi that presently Shri D. K. Tyagi has been posted at Patna and in view of this, he does not press the present petition for the present.

The Writ Petition is rendered infructuous and the same is dismissed. We may however mention that it is always open to the Union of India/competent authority to pass order of transfer, same being incidence of service."

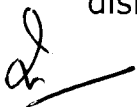
Sd.

**Kumar Rajaratnam
Chief Justice**

Sd.

**Dipak Misra
Judge.**

From a perusal of the aforesaid order, it is amply clear that it was submitted on behalf of the applicant that he did not press the Writ Petition and that was the prime reason for dismissing the case. The order also makes a mention that



it is always open to the Union of India/competent authority to pass order of transfer, same being incidence of service. Perhaps instead of passing a separate order, the earlier order has been ordered to be modified. The other inference from the aforesaid order is that the order passed by this Bench of the Tribunal in the earlier O.A of the applicant has not been interfered.

8. From the pleading and the order which has been passed earlier, we find that the difference between this case and the earlier case is only that instead of Patna, the place of posting has been changed to Visakhapatnam. Rest there is no change in the grounds taken in the earlier O.A as well as in the present O.A. Para 2 of the order earlier passed contains the findings of this Bench of the Tribunal against the order dated 17.02.2003, which is now modified vide the impugned order dated 29.09.2003 and the same is extracted hereunder:

"2. After hearing the learned counsel of the applicant and after considering the material available on record, this Tribunal is of the view that no interference is called for in the Transfer order dated 17.02.2003 (Annex. A.3) and subsequent order dated 05.03.2003 (Annex. A.6) passed by respondent No. 3 because the same are in accordance with the provisions contained in the Rules and Powers given to the President of the ITAT. It is noticed in the impugned order dated 5th March 2003 where the respondent No. 3 has stated that " the President of the ITAT, being the Head of the Department, is the competent authority to make orders in respect of the transfers of the Members of the Tribunal, as is clear from Sec. 255 (1) of the Income Tax Act, 1961, which is confirmed by the Hon'ble Bombay High Court and which is also in accordance with the powers delegated by the Ministry of Law & Justice to the President, Income Tax Appellate Tribunal." It is also noticed that the alleged guidelines dated 14.11.2002 are in the form of office notice issued by the Joint Secretary and Legal Adviser of Department of Legal Affairs endorsed to Private Secretary to Solicitor General of India, Supreme Court, New Delhi. The respondent No. 3 has specifically stated that these guidelines have not been notified. As such the applicant cannot rely on those guidelines which provide that a Member shall not be posted at a place for a period exceeding 5 years. Even if the argument of the learned counsel of the applicant was accepted, this does not specifically say that the respondents have no jurisdiction or power to transfer him before expiry of 5 years. The Hon'ble Supreme Court in a number of cases have held



that the scope of interference by Courts/Tribunals is very limited. The applicant has raised the plea of order being malafide to the extent that one Judicial Member is shifted from Patna to Bangalore and the applicant is being posted at Patna in place of that Judicial Member. During the course of the arguments, the learned counsel has stated that the applicant could have well been transferred to Bangalore instead of Patna. However, on the records, there is no such request of the applicant made to the respondents. The Hon'ble Supreme Court in the case of **National Hydro Electric Power Corporation vs. Shri Bhagwan and another** [2002 (1) SLJ 86] had stated that transfer is incidence of service and none has right to continue at one place. The Hon'ble Supreme Court have further observed as follows:

"Unless an order of transfer is shown to be an outcome of malafide exercise of power or stated to be in violation of statutory provisions prohibiting such transfer, the Courts or the Tribunals cannot interfere with such orders as a matter of routine, as though they are the Appellate Authorities substituting their own decision for that of Management as against such orders passed in the interest of administrative exigencies of service concerned."

As has been stated earlier, the alleged guidelines have not been notified as per respondents and the applicant cannot take benefit of those guidelines even if they were notified. They do not prohibit transfer of employees in administrative exigency. The applicant by his representation dated 18.02.2003 (Annex. A.4) against the transfer order dated 17.02.2003 (Annex. A.3) had made a request for being "posted at Nagpur". There is no request for any other place. The respondent No. 3 by the impugned order dated 5th March 2003 (Annex. A.6) has stated that there is no vacancy at Nagpur. The argument of the learned counsel that there was no vacancy at Patna also, but still the applicant has been transferred, therefore has to be rejected because it is for the administration to post individuals to a particular station, to get the maximum work in the interest of administration. It is neither for the applicant nor for the Tribunal to decide as to who should be posted where. Therefore the argument of the applicant fails and rejected. Once it is accepted that the applicant holds liability of transfer anywhere in India, he cannot



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11. The upshot of the aforesaid discussion is that the Original Application sans merits. The same stands dismissed in limine at the admission stage.

Jsv.

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