

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL,  
JAIPUR BENCH, JAIPUR

This, the 20th day of September, 2005

**ORIGINAL APPLICATION No. 322/05 and**  
Misc. Application No. 480/2005

CORAM:

HON'BLE MR. M.L.CHAUHAN, MEMBER (JUDICIAL)

B.L.KHATRI  
S/o Shri P.R.Khatri,  
aged about 60 years  
r/o B-5 Gandhi Nagar, Jaipur  
holding the post of Accountant Member,  
Income Tax Appellate Tribunal,  
Jaipur Bench, Jaipur.

.. Applicant

(By Advocate: Mr. Mahendra Singh)

Versus

1. Union of India  
through Secretary to the Government of India,  
Ministry of Law and Justice,  
Shastri Bhawan,  
New Delhi.
2. The President,  
Income Tax Appellate Tribunal,  
Lok Nayak Bhawan,  
N.D.M.C. Complex,  
Khan Market,  
New Delhi  
(Through Registrar, ITAT, New Delhi.)

.. Respondents

(By Advocate: Mr. V.S.Gurjar)

O R D E R

Per Hon'ble Mr. M.L. CHAUHAN

The order of transfer dated 30.6.2005 (Ann.A1) passed against the applicant transferring him to the post of Member of Income Tax Appellate Tribunal, Patna from the post of Member of Income Tax Appellate Tribunal, Jaipur is the subject matter of challenge in the instant case.

2. The applicant was initially appointed as Accountant Member, Income Tax Appellate Tribunal (ITAT) vide order dated 11.4.2001 and posted at Nagpur. Thereafter the applicant was sent for two months' orientation and training at Mumbai and after undergoing the said training, he joined at Nagpur on 17.5.2001. It is further stated that this transfer order was again cancelled and he was retained at Mumbai. It is further stated that again on 2.7.2001, the applicant was transferred from ITAT, Mumbai Bench to ITAT, Nagpur Bench and again transferred from ITAT, Nagpur Bench to ITAT, Jodhpur Bench on 4.9.2001. It is further stated that although the applicant has requested for his transfer to Delhi, but he was again transferred to Jaipur vide order dated 22.6.2001 and since then the applicant is working at Jaipur and it is now vide impugned order dated 30.6.2005 (Ann.A1) that the applicant has been transferred to ITAT, Patna

Bench. It is further stated that the applicant has been transferred 5 times within a span of four years' tenure, which caused hardship to the applicant, his wife and children. The applicant has initially challenged the order of transfer inter-alia on the ground that such order of transfer has not <sup>been</sup> passed for administrative reasons or in the interest of public exigencies but for extraneous reasons and is contrary to the law laid down by the Apex Court in the case of Ajay Gandhi and anr. Vs. B.Singh and ors., (2004) 2 SCC 120, as the applicant has been transferred 5 times, during his tenure of 4 years. The applicant has also pleaded that he is on advance age and suffering from Hyperlipendemia, Cervical Spondylosis and Lumbago Pain and his wife is also <sup>patient of</sup> High Blood Presure and Hypertension with Diabetes and severely scared of change of place at such frequent intervals. The applicant has also made representation to respondent No.2 in that behalf. Further ground taken by the applicant is that he has less than two years of retirement on superannuation and thus according to the policy of the Government no transfer should be made where a person has to retire on superannuation within a period of less than two years.

3. On the basis of averments made by the applicant, this Tribunal vide order dated 15.7.2005 granted ex parte stay to the applicant till the next date of

hearing and the matter was adjourned to 1.8.2005. When the matter was listed on 1.8.2005, this Tribunal after considering the Misc. Applications No. 254/2005 and 255/2005 moved by the applicant for calling record and for seeking time to file rejoinder respectively disposed of these Misc. Applications and the matter was adjourned for final hearing on 11.8.2005. Further, this Tribunal was pleased to allow the applicant to file rejoinder by 11.8.2005 and the respondents were further directed to make the record available on the next date of hearing. However, on 11.8.2005 the matter was adjourned to 16.8.2005 as the original counsel for the applicant was not available. At this stage, it may be stated that on 11.8.2005, the OA as well as Misc. Application No. 267/2005 which was filed by the applicant for making amendment in the OA was listed before the Bench. On 16.8.2005 when the matter was taken up for hearing, since MA No. 267/2005 filed by the applicant for making amendment in the OA was pending, as such the matter could not be heard finally till appropriate order could be passed on MA No. 267/2005 moved by the applicant. Accordingly, the MA No. 267/2005 was considered by the Bench and this Tribunal after noticing the averments made by the learned counsel for the respondents that respondents do not want to file either reply to the MA No. 267/2005 for seeking amendment in the OA or that the respondents are also not interested in filing the

reply to the amended OA which opportunity was granted to the respondents when it was made clear that the said MA for amendment requires to be allowed as in the opinion of the Bench the basic structure of the OA is not altered by the proposed amendment; as to what is sought to be incorporated by way of amendments is allegation of mala-fide in order to substantiate that the impugned order of transfer is not passed in public interest and is mala-fide, the matter was listed for final hearing on 22.8.2005 and the applicant was directed to file amended OA within 3 days. It was also made clear in the order dated 16.8.2005 that though this Tribunal intended to grant time to the respondents to file reply to the amended OA since the allegation of mala-fide has been alleged by the applicant and also that averment not controverted by the respondents shall be deemed to have been admitted by the respondents, the respondents themselves did not want to avail the opportunity to file reply to the amended OA, as such this Tribunal has no other option but to list the case for final hearing at the earliest. Copy of this order was also made available to the parties. It appears that after taking notice of the observations made by this Tribunal in its order dated 16.8.2005 to the effect that averment not controverted by the respondents shall be deemed to have been admitted, the respondents moved MA No.280/2005 thereby praying that order dated 16.8.2005

passed in MA No.267/2005 may be recalled or in the alternative, the respondents may be permitted to file counter affidavit to the amended OA. On 22.8.2005, this MA was taken up for consideration alongwith OA and time to file reply was granted to the applicant and the matter was adjourned to 5.9.2005 for the purpose of consideration of MA No.280/2005. At this stage, it will be relevant to mention here that after filing of MA No.280/2005 and issuance of notice on this MA by this Tribunal <sup>on</sup> 22.8.2005, the respondents challenged the validity of the said order before the Hon'ble High Court by filing Writ Petition No. 7076/2005. When this fact was brought to the notice of this Tribunal on 5.9.2005 this Tribunal observed that it is not understood how the respondents in OA could file Writ Petition before the High Court when they have already filed MA No. 280/2005 before this Tribunal for reviewing or modifying the order dated 16.8.2005 and this Tribunal has also issued notices on 22.8.2005. It was also observed that filing of Writ Petition before the Hon'ble High Court is grave abuse of the process of court. However, the matter was adjourned sine-die till the Writ Petition filed in the Hon'ble High Court is disposed of as the Hon'ble High Court was already seized of the matter and also judicial propriety demands that the Tribunal should not proceed with the matter further. However, the aforesaid Writ Petition filed before the Division

Bench of the Hon'ble High Court was finally disposed of on 6.9.2005 whereby Hon'ble High Court passed the following order:-

"At the outset, both the parties agreed that now the pleadings before the Tribunal is complete and both are prepared to argue.

Considering the submissions, we direct the Tribunal to decide the O.A. on or before 20.9.2005. If O.A. is not decided on or before 20.9.2005, the stay so granted by Tribunal stands vacated automatically.

However, it is made clear that if the party-respondents before Tribunal ask for adjournment, then the period of 20.9.2005 will be extended so long they ask for adjournment.

The Writ Petition stands disposed of."

In view of the order passed by the Hon'ble High Court as reproduced above, since the relief of quashing the order dated 16.8.2005 as sought by the respondents was not granted, as such the MA No. 280/2005 moved by the respondents and which is pending before this Tribunal cannot be accepted, as now        it is not legally permissible for the respondents to contend that the order dated 16.8.2005 passed in MA No.267/2005 be recalled and in the alternative they may be permitted to file reply to the amended OA in view of the principle of res-judicata and provisions contained in explanation V of Section 11 CPC. Even otherwise also from the order of the Hon'ble High Court which has been reproduced hereinabove, it is clear that both the parties had agreed that pleadings before the Tribunal are complete and both are prepared to argue and it was in these circumstances that the Hon'ble High Court directed the Tribunal to decide the

OA on or before 20.9.2005. As on 6.9.2005 pleadings which form part of the record were the amended OA filed by the applicant, reply to the un-amended OA filed by the respondents and rejoinder to the reply filed to the un-amended OA filed by the respondent. The reply to the amended OA which was annexed by the applicant alongwith MA No. 280/2005 could not have form part of the record till the said MA was not allowed. As such, in view of the order passed by the Hon'ble High Court it was not permissible for this Bench now either to pass an order in MA No.280/2005 or to take amended reply on record. Accordingly, the MA No.280/2005 for reviewing/recalling the order dated 16.8.2005 is rejected.

4. At this stage it may be relevant to mention here that amendment in the OA was sought by the applicant, as can be seen from para 4 of the MA No.267/2005, on the ground that after passing of the order of transfer the applicant discovered that the order of transfer is malafide as it is a fall out of a litigation which is pending in the Bombay High Court Bench at Nagpur where the Writ Petition has been filed by the Commissioner of Income Tax against the ITAT, Nagpur. It was an appeal before the ITAT filed by the Commissioner of Income Tax against the order of refusal of adjournment of appeal. In the appeal the Commissioner of Income Tax has levelled allegation against the Tribunal on

which the applicant was also one of the Members. It is in these circumstances that the applicant wants to amend the OA with permission to introduce sub-ground (i) to (k) after sub-ground (h) in paragraph 5. In these grounds the plea taken by the applicant is that the order of transfer has been effected on extraneous consideration on the ground that the applicant while being a Member of the Bench presided over by the other Hon'ble Member has refused to adjourn the cases on the request made by the Revenue authorities and for that purpose explanation of the applicant was called for vide DO letter dated 16.5.2005 (Ann.A7) which was replied to by the applicant vide Ann.A8 followed by another letter dated June 1, 2005 (Ann.A9) which was also replied by the applicant vide letter dated 21.6.2005 (Ann.A10).

5. In the counter, the respondents have taken the plea that the transfer was effected in public interest inasmuch as pendency of the cases in Jaipur has been reduced to about 1800 cases whereas in Patna since 26<sup>th</sup> Sept.2003 the Bench had become defunct for want of Accountant Member and total pendency at Patna as on 1<sup>st</sup> July, 2005 is 1661 appeals. The respondents have also denied the allegation of applicant that he had 5 transfers within a period of 4 years. It is further pleaded that the applicant was transferred from Jodhpur to Jaipur on his own request. It is further

stated that son-in-law of the applicant one Shri O.P.Kant, an officer of Indian Revenue Service, has been working as Dy. Commissioner of Income Tax at Jaipur and in that capacity he has decided cases, list of which has been enclosed with the reply at Ann.R7. Judicial propriety demands that the appeal against these order be not heard by a Bench consisting of the applicant. It is furter stated that a representation dated 25.5.2004 was received by the respondents from the Members of the Jaipur Tax Bar Association. It is further stated that the applicant having all India transfer liability and his transfer from Jaipur to Patna has duly been made in accordance with the guidelines framed by the Hon'ble Supreme Court for the Member of the ITAT.

6. The applicant has also filed rejoinder thereby denying that the applicant has requested for transfer to Jaipur from Jodhpur. It is stated that in fact the applicant has made a request for his transfer to Delhi on account of personal difficulties and health problems as the applicant was taking treatment at Delhi. However, his request was not accepted and he was transferred first to Jodhpur and thereafter to Jaipur for which the applicant did not protest as these stations being nearer to Delhi.

7. I have heard the learned counsel for the parties and gone through the material placed on record.

7.1 Before I proceed further in the matter, it will be useful to notice decisions of the Apex Court in transfer matters. The apex Court has repeatedly held that the court should not interfere with the transfer order which are made in public interest and for administrative reason unless the transfer is made in violation of any mandatory or statutory rules or on the ground of malafide. The Govt. servant holding a transferable post has no vested right to remain at one place or other, he is liable to be transferred from one place to other. Transfer order issued by the competent authority do not violate any of his legal right. Even if a transfer order is passed in violation of executive instructions or orders, the court ordinarily should not interfere with the order instead affected party should approach the higher authorities in the department. The Apex Court has further held that the Court and Tribunal cannot go into the question whether the transfer is in the public service or public interest would be served or not and also that the Court and Tribunal shall not interfere in the transfer matter as a matter of right as though they were appellate authority substituting its own decision for that of the employer because the order passed in the interest of administrative exigencies of service

concerned. This is what the Apex Court had held in the case of *Shilpi Bose vs. State of Bihar* AIR 1991 SC 532, *Union of India vs. S.L.Abbas*, AIR 1993 SC 2444, *State of UP and ors. vs. Gobardhan Lal*, (2004) 11 SCC 402, *State of UP vs. Siya Ram*, (2004) 7 SCC 405 and in other cases. Further the Apex court in the case of *Rajinder Roy vs. Union of India* AIR 1993 SC 1236 has held that it is true that the order of transfer often causes a lot of difficulties and dislocation in the family set up of the concerned employee but on that score the order of transfer is not liable to be struck down. Unless such order is passed mala fide or in violation of the rules of service and guidelines for transfer without any proper justification, the Court and Tribunal should not interfere with the order of transfer. In a transferable post an order of transfer is normal consequence and personal difficulties are the matter of consideration for the department, the SC has further held as under:-

“.....The appellant has not made any representation about the personal hardship to the department. As such there was no occasion for the department to consider such representation. If is, however, made clear that the appellant will be free to make representation to the concerned department about personal hardship, if any, being suffered by the appellant in view of the impugned order. It is reasonable expected that if such representation is made, the same should be considered by the department as expeditiously as practicable.”-

7.2 The learned counsel for the applicant has put forth three contentions in order to substantiate his plea that the order of transfer is vitiated inasmuch as (i)

it is contrary to the law laid down by the Supreme Court in the case of Ajay Gandhi (supra) (ii) it suffers from malice in fact and law and (iii) it is even otherwise in violation of Article 14 which mandate that every action should be reasonable, fair and just.

In order to substantiate his first plea that the order of transfer has been passed in violation of law laid down by the Apex Court in the case of Ajay Gandhi (supra), the learned counsel for the applicant has drawn my attention to the impugned order of transfer which indicates that the decision of transfer of the applicant besides others were taken in the meeting of collegium of the ITAT consisting of Hon'ble President, ITAT and two Vice Presidents of ITAT and contended that as per the observations made by the Apex Court in the case of Ajay Gandhi in para 22 and 23 the order of transfer has to be passed by the President in consultation with two Senior Vice Presidents whereas the present order has been passed by the President in consultation with two Vice Presidents and not in consultation with two senior Vice Presidents. The learned counsel for the applicant has brought to my notice statement showing Member-wise disposal of cases in the month of August, 2005. Perusal of this document shows that, in all, there are 103 Members who are presently working in ITAT including one President, one Senior Vice President, nine Vice Presidents, Judicial

Members and Accountant Members. In order to see whether the impugned order of transfer has been passed in consonance with the guidelines laid down by the Apex Court in Ajay Gandhi's case as stipulated in para 22 and 23 of the judgment, this Tribunal has summoned the record. The respondents have produced record. From perusal of the record, it is clear that order of transfer has been passed by a collegium consisting of the President and two Vice Presidents. These proceedings have been drawn on 'slip pad' - ordinary paper which paper is not generally used for the purpose. This is the only original document which has been produced by the respondents alongwith other papers. No agenda of the meeting was produced whether at all the meeting was convened for the purpose of effecting the transfer of the officer which culminated into passing of the impugned order Annexure-A1. Other papers which have been produced for the perusal of this Tribunal are Photostat copies of the correspondence, on the basis of which reply was prepared by the respondents. Thus, it is clear that transfer of the applicant was effected on the basis of the so called proceedings dated 24.6.2005 recorded on a 'slip pad' and signed by the President and two Vice Presidents. At this stage, it will be, relevant to quote para 22 and 23 of the judgment in Ajay Gandhi's case, which is in the following terms:-

“22. Although, it is not necessary that the President should consult the Senior Vice Presidents, we are of the opinion that he in all fairness should consult them keeping in view the fact that a large number of members are functioning at different places and, thus, it may sometimes becomes impossible for the President to know about the intellect or otherwise of the member for the purpose of his posting, including his efficiency, disposal and other relevant factors.

23. During the course of discussions, it was suggested that in exercise of the aforementioned powers, the President must consult the two Senior Vice Presidents by forming a collegium therefore. Although we are of the opinion that such a course of action may not be necessary but we hasten to add that the President, in all fairness, should consult two Senior Vice-Presidents before passing such orders of transfer and posting. Such a measure may be necessary having regard to the fact that the President may not be aware of the efficacy or otherwise in relation thereto. In view of the fact that a large number of members are functioning at different places and, thus, the advice of the Senior Vice-President as regards the functioning of a particular member including his efficiency, disposal and other relevant factors may be considered by the President in ultimately passing such orders of transfer and posting.” (emphasis mine)

Admittedly, Shri A.Kalyansundhram who is holding the post of Senior Vice President was not consulted while effecting the transfer of the applicant, rather the collegium consist of the President and two Vice President namely Shri R.P.Garg and J.P.Bengra. Even if at the relevant time there was only one Senior Vice President who was holding the post and other Senior Vice President was not available, in that eventuality it was permissible for the President to include name of Vice President as one of the member of the collegium. It was not legally permissible for the President to all together ignore the Senior Vice President and thereby constituting the collegium which consist of President and Vice Presidents in utter

disregard of the observations of the Hon'ble Apex court in Para 22 and 23 as reproduced above.

The learned counsel for the respondents submitted that the point which is sought to be raised by the learned counsel for the applicant has not been specifically pleaded, as such, according to the learned counsel for the respondents in case the applicant has any grievance, he should file representation to the appropriate authority in that behalf.

7.3 So far as the second contention raised by the learned counsel for the applicant that the impugned order is violative of Article '14 which mandate that every action should be reasonable, fair and just, it was argued that the applicant has been frequently transferred from one place to another and he is at the verge of retirement and further that the applicant and his wife is undergoing medical treatment, it was incumbent upon the respondents to take these aspects into consideration while effecting the order of transfer. Admittedly, such facts have not been taken into consideration while passing the impugned order. For that purpose, the learned counsel for the applicant has placed reliance on the decision of the Rajasthan High Court, Jodhpur in D.B.Special Appeal No. 1430 of 1999 decided on 16.12.1999, Dr.

(Smt.) Pushpa Mehta vs. Rajasthan Civil Services Appellate Tribunal wherein in para 4 of the judgment the Hon'ble High Court has made the following observations:

“..... We are of the view that unless there are compelling reasons, ordinarily, an employee should not be disturbed from the place of his/her posting, when he/she is at the verge of retirement. An employee should be given sufficient time, which may be of two years or so to plan peacefully his/her post retirement life. This can be the legitimate expectation of an employee who has served the Department for major part of his/her life. In exceptional case, if the transfer in such case is felt necessary in the public interest, it must be kept in mind while giving the fresh posting that minimum inconvenience is caused to the concerned employee. Any transfer contrary to aforesaid principle will lead to interference that the order is malafide. We find no good reason to interfere with the order of the learned single Judge.”

7.4 The learned counsel for the applicant further argued that no public interest was involved in the instant case and in any case the order of transfer could not be passed by Respondent No.2 without the approval of the Central Government, in as much as, vide order dated 6.1.2004 (Ann.A14) the Central Government created 10 additional permanent Benches and one additional bench was created in Jaipur. Vide letter dated 20.9.2004 (Ann.A15) subordinate staff for 10 newly created benches was also created. Subsequently, on 28.3.2005 Shri V.P.Jain, Accountant Member was also posted as Jaipur. It is further argued that vide order dated 29.3.2005, 12 Members were transferred and in case there was no work available at Jaipur, as has been contended by the respondents, in

that eventuality the Central Government would not have created an additional bench at Jaipur in January, 2004 and also posting one Accounts Member vide order dated 29.3.2005. The learned counsel for the applicant argued that simply because the applicant while on tour was one of the Members of the Bench of ITAT at Nagpur during the period 2.5.2005 to 13.5.2005, an order came to be passed whereby adjournment was refused, cannot be made basis for his transfer. According to the learned counsel by this incident revenue authorities did not feel happy with the judicial order and this is the circumstances which led to transfer of the applicant vide the impugned order dated 30.6.2005. For that purpose the applicant placed reliance on some of the letters written by respondent No.2 to the applicant thereby seeking explanation of the circumstances under which the appeals were taken up for hearing. The applicant has submitted reply to the said explanation sought by respondent No.2 thereby stating that the Bench is always presided by the senior Member and the said order has not been passed by the applicant in his individual capacity. This allegation, as already stated above, has remained uncontroverted. The learned counsel for the applicant argued on the basis of these facts that the plea now taken by the respondents to justify the impugned transfer order that it is not possible for the applicant to post him at Jaipur because his son-in-law

is posted here and he is performing the judicial duties also is an after thought plea inasmuch as the son-in-law of the applicant was very much working at Jaipur at the relevant time when he was transferred to Jaipur in the year 2003 though the applicant has prayed for his posting at Delhi. Similarly, when the impugned order was passed no judicial work was assigned to son-in-law of the applicant and he was performing the administrative work. Thus, the stand taken by the respondents in the reply has to be outrightly rejected. The learned counsel for the applicant further argued that post of Accountant Member at Patna is vacant since September, 2003. It was permissible for the respondents to post a suitable officer so that the work of that Bench did not suffer in the year 2003, 2004 and also at the time when general transfer was made vide order dated 29<sup>th</sup> March, 2005 and also when fresh appointment was made in March, 2005. Thus, according to the learned counsel for the applicant, the plea regarding pendency of cases at Patna Bench taken by the respondents is not tenable and has been taken just to defeat the legitimate claim of the applicant. The learned counsel argued that these facts coupled with other circumstances led to irresistible conclusion that the order of transfer has been passed by the respondents for extraneous consideration and not in public interest. In any case, the learned counsel for the

applicant further argued that even if it is assumed that the impugned order of transfer has been passed in conformity with the law laid down by the Hon'ble Supreme Court in the case of Ajay Gandhi (supra), in that eventuality, it was not open for respondent No.2 to pass impugned order of transfer which will amount to interfering with the policy decision of the Government, inasmuch as, the cadre strength of the Jaipur Bench has been raised to two Benches by the policy decision of the Government. For that purpose, additional staff was created vide order/ dated 20.9.2004 and Shri V.P.Jain, Accountant Member was also posted on 28.3.2005. Transferring the applicant to Patna will amount to disbanding one of the Bench which was created by the Government. In any case, it was necessary for respondent No.2 to refer the matter to respondent No.1 and obtain Government's approval in case such a transfer was necessitated in the public interest or in the administrative exigency. Having not done so, the impugned order is liable to be quashed on this count also.

The learned counsel for the applicant has also argued the manner in which unusual concern was shown by respondent No.2 in the instant case. He has argued that contrary to the judicial norms, the respondent No.2 ventured upon writing letters to this Tribunal by sending fax message on 16.8.2005 that the matter may

be heard. The learned counsel for the applicant has rightly argued that such a course was not permissible for respondent No.2 who is not a layman but holding a judicial post and well conversant with the law and sending a fax to this Tribunal thereby stating that the matter may be heard on 16.8.2004 on the basis of the material placed on record is wholly unwarranted especially when respondent No.2 was party to the case and he was duly represented by an advocate. It is further argued that in case respondent No.2 was interested in disposal of the case, he should have made such submissions through his advocate or by moving a Misc. Application. The learned counsel for the applicant further argued that respondent No.2 did not stop here. It was given on his behalf when the matter was listed on 16.8.2004 not to file reply to the amended application and reply to amended OA and accordingly the case was fixed for hearing on 22.8.2005. Yet on the next date of hearing i.e. 22.8.2005, MA No.280/2005 was filed on behalf of respondent No.2 for recalling/reviewing the order dated 16.8.2005. The learned counsel for the applicant also argued that on 22.8.2005, the applicant was afforded opportunity to file reply to MA No.280/2005 filed by the respondents within 10 days and the matter was adjourned to 5.9.2005 for consideration of this MA, yet the respondent No.2 had challenged the validity of the order dated 16.8.2005 subsequently by

filling Writ Petition before the Hon'ble High Court in which respondent No.2 has been impleaded as petitioner No.1 whereas the Central Government has been impleaded as petitioner No.2 which fact also shows that in order to avoid scrutiny of order dated 16.8.2005 at the hands of Central Government, the respondent No.2 has suo-moto decided to file Writ Petition before the Hon'ble High Court, which was not maintainable at all.

The learned counsel for the applicant further argued that if the facts as stated above is considered, in its entirety, the only inference which can be drawn is that the impugned order of transfer has been passed on the basis that the judicial order was passed by the Bench consisting of the applicant whereby the Bench has refused to adjourn the matter at the instance of the revenue authority, which fact, according to the learned counsel has remained uncontroverted.

Be that as it may, the action on the part of respondent No.2 to send fax message to hear the case is beyond comprehension and may in a given case amount to interference in the administration of justice, hence liable for contempt proceedings. The Apex Court in number of decisions has ruled that the judges have the absolute and unchallengeable control of the court domain. It is not for the counsel, parties or the witnesses to regulate the court proceedings. The Apex

Court has further held that if there is one principle of cardinal importance in the administration of justice, it is this, the proper freedom and independence of Judges and Magistrates must be maintained and they must be allowed to perform their functions freely and fearlessly and without undue interference by anybody even by the Hon'ble Supreme Court, as stated in the case of State of UP vs. Mohd. Naim (1964) 2 SCR 363. Be that as it may, I do not wish to go into this aspect of the matter as I am reminded that sobriety, cool, calm and poise should be reflected in every action and expression of a judge and sweeping and uncalled for observations while criticizing the conduct of parties should be avoided as far as possible.

On the contrary, the stand taken by the respondents is that the order has been passed in conformity with the law laid down by the Hon'ble Apex court in the case of Ajay Gandhi (supra) and also that the transfer is made in public interest and that this Tribunal cannot interfere in the matter in view of the principle of law as stated above. The learned counsel for the respondents further argued that in any case if the applicant has any grievance regarding his personal difficulties and that the order has not been passed in conformity with the guidelines laid down by the Hon'ble apex Court in the case of Ajay Gandhi, the applicant is not remediless and in that eventuality,

he could always approach to respondent No.1 in the light of guidelines as stipulated in para 21 (iii) of the aforesaid judgment.

8. In the light of aforesaid contentions raised by the parties, the question which requires consideration is ~~whether~~ whether the applicant has made out a case for interference of this Tribunal and if so what relief the applicant is entitled for.

9. I have already noticed that the impugned order of transfer has not been passed strictly in conformity with the observations made by the Apex Court in para 22 and 23 in the case of Ajay Gandhi. Further, the Apex Court in para 21 of the aforesaid judgment has laid down the guidelines which has to be followed while effecting transfer and posting of the Members. One of the guidelines as stipulated in Para 21(iii) is in the following terms:-

"21....

(iii) The president shall keep the Government informed about the orders of posting. The Government, if it so thinks fit, shall have the liberty to bring to the notice of the President, ITAT relevant facts including that transfer and posting of a member is not in conformity with the aforesaid guidelines. It shall also be at liberty to bring to the notice of the President any case of extreme hardship which may be faced by a member by reason of such an order of transfer and posting."

In view of the aforesaid provisions, I am of the view that the applicant is not remediless. In case the applicant is aggrieved that the transfer order has not been passed in conformity with the law laid down by

the Apex Court in Ajay Gandhi's case and that it is a case of extreme hardship, it is always open to the applicant to make proper representation before the appropriate authority. To that effect is also the law laid down by the Apex Court in the case of Rejendra Roy (supra) whereby the Apex Court has held that the appellant therein is free to make representation to the concerned department about the personal hardship and such representation, if made, shall be considered by the department as expeditiously as practicable. At this stage, it will be useful to quote decision of the Apex Court in the case of Shanti Kumar vs. Regional Deputy Director, Health Services, AIR 1981 SC 1577. This was a case where nurse in the Health Department was transferred from a place in her home district to another district. It was alleged that the said transfer order is in contravention of the State Government directions. Although the Supreme Court has declined to interfere with the impugned order, however, in para 2 it was specifically observed...

".... Shri Grover learned counsel for the appellant, however, contends that the impugned order was in breach of the Government instructions with regard to transfer in the Health Department. If that be so, the authorities will look into the matter and redress the grievance of the appellant." (emphasis mine)

Keeping in view the law laid down by the Apex Court as stated above and also taking assistance from the decision rendered by the Hon'ble Rajasthan High Court in the case of Dr. (Smt.) Pushpa Mehta (supra), I

am of the view that ends of justice will be met direction is given to the applicant to file representation before the appropriate authority and the appropriate authority may decide representation of the applicant. In the instant case, the applicant has made representation to respondent No.2 who has passed the impugned order and against whom allegation of mala-fide has also been levelled. In the facts and circumstances of this case there is hardly any chance of proper consideration at the hands of respondent No.2 who has passed the impugned order. This argument further invigorates when one consider the common experience that once a decision has been taken there is inevitably a propensity to uphold it and a representation may not yield any fruitful purpose. Even otherwise also, as per law laid down by the Apex Court in Ajay Gandhi's case (supra) the Government has been clothed with the power to bring to the notice of the President, ITAT relevant facts including that the transfer and posting is not in conformity with the guidelines issued by the Hon'ble Apex Court in Ajay Gandhi's case and also that this is case of extreme hardship nature required to be considered in proper perspective. Further, the Central Government has also been given power to pass appropriate order in public interest where the President refuse<sup>to</sup> to comply. As already stated above, since respondent No.2 has passed the order and the validity of the order is seriously

disputed, it will be in the fitness of the things if direction is given to the Central Government to consider representation of the applicant in case the same is made by him.

10. At this stage it will be useful to notice the decision rendered by this Bench in the case of Smt. Nirmala Sharma, OA No. 308/2004 decided on April 19, 2005 whereby the applicant has filed representation which was pending before the authorities and in operative part, the DB of this Tribunal consist of Hon'ble Mr. Kuldip Singh, Vice Chairman and Hon'ble Shri A.K.Bhandari, Member (Adm). Has made the following observations:-

“Thus, we dispose fo this O.A. at this stage itself with a direction to the respondents to consider the representation submitted by the applicant and dispose of the same by passing a reasoned and speaking order, as per the policy guidelines which were in operation at the time when the impugned order was passed. The respondents shall pass such speaking order and will not give effect to such order if the same is adverse to her interests for a period of one month from the date of service of such order on the applicant so that the applicant get s a chance to move the competent court of law if she feels aggrieved of such an order to be passed against him. Till then, status quo qua about the posting of the applicant at Kota, shall be maintained. No costs. “

11. Thus, in view of what has been stated above and more particularly in view of the law as noticed in para 9 above and in the light of the observations made by this Tribunal in the case of Smt. Nirmala Sharma, I am of the view that this OA can be disposed of by

issuing almost identical directions as given in the case of Smt. Nirmala Sharma (supra). Accordingly, the applicant will be at liberty to make representation alongwith a copy of this order about his personal hardship and the manner in which the impugned order has been passed to respondent No.1 i.e. the Secretary, Ministry of Law and Justice, Department of Legal Affairs, within a period of three weeks from today. In case such a representation is made within the aforesaid period, the respondent No.1 shall entertain the same and pass a speaking and reasoned order keeping in view the contentions raised by the applicant and the observations made hereinabove. In case such order is adverse, the same shall not be given effect to for a period of one month from the date of service of such order on the applicant so that the applicant may move the competent Court of law in case he feels aggrieved by the order to be passed on his representation. Till then, status quo about the posting of the applicant at Jaipur shall be maintained. No costs.



(M.L.CHAUHAN)

Member (J)

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