

(77)

10-5-2011

Mr. R.N. Mathur, Counsel for applicant -
Mr. R.G. Gupta, Counsel for respondents -

Arguments heard. The OA stands
disposed of, by a separate order.

Anil Kumar
(Anil Kumar)
M(A)

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL,
JAIPUR BENCH,
JAIPUR.

Jaipur, the 10th day of May, 2011

ORIGINAL APPLICATION No.409/2010

CORAM :

HON'BLE MR.ANIL KUMAR, ADMINISTRATIVE MEMBER

Lokesh Chand Soni,
LDC (P.No.8569LDC(S),
CSD Depot,
Jaipur.

... Applicant

(By Advocate : Shri R.N.Mathur)

Versus

1. Union of India through
Secretary,
Canteen Stores Department,
New Delhi.
2. General Manager,
Canteen Stores Department,
Ministry of Defence,
Government of India,
"ADELPHI" 119, M.K.Road,
Mumbai.
3. Area Manager,
Canteen Stores Department,
Ministry of Defence,
Behind Military Hospital,
Jaipur.

... Respondents

(By Advocate : Shri R.G.Gupta)

ORDER (ORAL)

The applicant has filed this OA being aggrieved by the order dated 1.7.2010 (Ann.A/1), by which he has been transferred from Jaipur (Rajasthan) to Masimpur (Assam).

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2. The applicant is presently working as LDC at Canteen Stores Depot, Jaipur. The applicant has submitted that he is suffering from chronic low-back problem from the last 8-10 years. He is also suffering from kidney ailments. He has submitted photo-stat copy of the prescriptions prescribed by the attending doctor regarding chronic low-back problem and the kidney problem, as Ann.A/2 and A/3. Masimpur, where the applicant has been transferred, is far away from the present place of posting of the applicant and at least four days' time is consumed by train in reaching to that place. Looking to the ailments of the applicant as well as the fact that the medical facilities are not proper at Masimpur, it will be very difficult for the applicant to perform his duty at Masimpur (Assam). The applicant submitted a representation to respondent No.2 on 29.7.2010 (Ann.A/4) requesting to consider his grievance, but to no avail. The impugned order of transfer (Ann.A/1) is without administrative exigency hence it is liable to be quashed and set aside. There is not a single complaint against the applicant till date so far as his work is concerned. As per the transfer policy also, case of the applicant does not fall in any factor on which transfer is made. Therefore, he has prayed that the transfer order dated 1.7.2010 (Ann.A/1) be quashed and set aside.

3. While considering the interim prayer of the applicant, this Tribunal directed the respondents that while filing reply to the OA, the respondents shall clearly indicate whether in view of the contentions raised by the applicant, as noticed above, the applicant can be adjusted at a nearby station where the applicant can undergo proper medical treatment/operation in respect of kidney problem.

4. The respondents have filed an interim as well as a detailed reply and have stated that proper medical facility is available at the new place of posting of the applicant i.e. 160 M.H. Masimpur. In spite of this fact, the applicant has not

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submitted the relevant documents of the treating doctor, whereby the applicant has been advised to operation/surgery, whereas the treating doctor as well as the ultra sound report has also advised to the applicant for the investigation of IVP but the applicant has neither submitted the prescription slip of the doctor nor the IVP report in this regard.

5. That transfer of the applicant at Masimpur is not general in nature, whereas transfer of the applicant has been made in view of the transfer policy i.e. tenure completion i.e. "three years for staff with service of 10 years or less. 2 years for staff with service more than 10 years." Accordingly, as the tenure of Shri A.S.Rathore at Masimpur has completed, transfer of the applicant became necessary. The respondents have submitted a copy of the transfer policy at Ann.R/1. As per para-24 of the aforesaid transfer policy, "if no vacancies are available at the choice station of the individual who completes tenure at a field/hard station and replacement at the field/hard station is necessary, the longest stayee from one of the choice stations as per administrative convenience will be moved out to replace the tenure completion case." In view of the facts and circumstances narrated above, the applicant could not be posted at any of the three choice stations i.e. Delhi, Hisar & Agra.

6. The respondents have further submitted that cancellation of transfer of the applicant to Masimpur will sent a wrong message among the staff that is being transferred to tenure stations to make representation on common grounds like elderly parents, studying children, poor health of spouse and common diseases like diabetes and blood pressure etc. That at the time of initial appointment and while sending the application form for appointment as LDC, the applicant had agreed to serve in any part of the country including operational areas. The applicant is undergoing treatment of kidney stone, as stated by him in his earlier representation dated 29.7.2010, which is not a serious medical problem and now he has also

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mentioned about his low-back problem which was not mentioned by him in his earlier representation dated 29.7.2010 submitted to the answering respondents. The reasons adduced by the applicant are of common nature and may be tactics of the applicant to evade transfer and his request for change does not merit consideration and Masimpur Depot also has better M.H. facilities and highly qualified doctors are also available there and the applicant can avail the medical treatment for his problems there. Therefore, the respondents ensured the obligation of proper medical facilities. Therefore, the OA has no merit and it may be dismissed with costs.

7. Heard learned counsel for the parties and perused the documents on record.

8. During the arguments, learned counsel for the applicant reiterated the points mentioned in the OA. He further submitted that the applicant is willing to move out of Jaipur but due to the reasons recorded in his representation (Ann.A/4) he is not in a position to go to Masimpur (Assam). Alternatively, he has requested to be transferred either to Delhi, Hisar or Agra. He submitted that though this transfer has been made on administrative grounds but there is no complaint against the applicant. If Shri A.S.Rathore is to be accommodated at Jaipur because he has completed his tenure at Masimpur, even then he has no objection. Shri Rathore can be accommodated in one of the vacant posts of LDC (Store) at Jaipur and the applicant can also continue either at Jaipur or he can be transferred to one of his choice place of postings. He further argued that there is vacant post of LDC (Store) at Jaipur and, therefore, it is not difficult to accommodate both, the applicant as well as Shri Rathore, at Jaipur. He referred to paras-8&16 of the transfer policy, which are quoted below :

"8. The benefits of promotion as UDC will be given to the eligible LDCs (Office) at their respective station of posting itself without moving them to other stations as far as possible.

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16. Within the same station, the administration will be free to turn over employees from one station installation to another or to allot changes in duty within the same installation as deemed necessary in the interest of efficiency of the department."

He argued that reading of para-8 suggests that even after promotion from LDC to UDC, the employee is to be accommodated at their respective station of posting itself without moving them to other stations as far as possible. In this case, the applicant is being latterly shifted from Jaipur to Masimpur as LDC. If it is necessary to move the applicant from Store to any other branch of administration then under para-16 of the transfer policy he should be transferred from one installation to another or to allot change in duty within the same installation, but the respondents have not adhered to these guidelines.

9. Learned counsel for the applicant referred to a judgement of the Hon'ble Apex Court in the case of **Somesh Tiwari v. Union of India and Others** [(2009) 2 SCC 592] and particularly he drew my attention to paras-16, 21 & 23 of the judgement, which are reproduced below :

"16. Indisputably an order of transfer is an administrative order. There cannot be any doubt whatsoever that transfer, which is ordinarily an incident of service should not be interfered with, save in cases where inter alia mala fide on the part of the authority is proved. Mala fide is of two kinds - one malice in fact and the second malice in law. The Order in question would attract the principle of malice in law as it was not based on any factor germane for passing an order of transfer and based on an irrelevant ground i.e. on the allegations made against the appellant in the anonymous complaint. It is one thing to say that the employer is entitled to pass an order of transfer in administrative exigencies but it is another thing to say that the order of transfer is passed by way of or in lieu of punishment. When an order of transfer is passed in lieu of punishment, the same is liable to be set aside being wholly illegal.

21. For appreciating the effect of such an order, we may also notice the order dated 19.10.2005

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which has been reproduced by the High Court in its impugned judgment, the relevant portion whereof reads thus:

"2. As per para 9.1 of the New Transfer Policy, the Government may, if necessary in public interest, transfer or post any officer to any station or post. Para 9.2 of the policy stipulates that an officer against whom the CVC has recommended initiation of vigilance proceedings, should not normally be posted or remain posted at the station where the cause of the vigilance proceedings originated. He shall also not be posted on a 'sensitive' charge. This restriction will remain in operation till such time the vigilance matter is not closed.

3. In the case of Shri Tiwari, he belongs to Madhya Pradesh and on enquiry into complaint of working on caste biased ideology he was to be over dependent upon a set of officers, apparently giving an impression that he (is) working on caste biased ideology. These circumstances have necessitated his transfer from Bhopal Central Excise Commissionerate to Shillong Commissionerate"

No vigilance enquiry was initiated against him. The order to transfer was passed on material which was non-existent. The order, therefore, not only suffers from total non-application of mind on the part of authorities of Respondent 1, but also suffers from malice in law.

23. This Court in Karnataka Housing Board v.C. Muddaiah laid down the law, thus; (SCC pp. 700-01, para 33 -34)

"33. The matter can be looked at from another angle also. It is true that while granting a relief in favour of a party, the court must consider the relevant provisions of law and issue appropriate directions keeping in view such provisions. There may, however, be cases where on the facts and in the circumstances, the court may issue necessary direction in the larger interest of justice keeping in view the principles of justice, equity and good conscience. Take a case, where ex facie injustice has been meted out to an employee. In spite of the fact that he is entitled to certain benefits, they had not been given to him. His representations have been illegally and unjustifiably turned down. He finally approaches a court of law. The court is convinced that gross injustice has been done to him and he was wrongfully, unfairly and with oblique motive deprived of those benefits. The court, in the

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circumstance, directs the authority to extend all benefits which he would have obtained had he not been illegally deprived of them. Is it open to the authorities in such case to urge that as he has not worked (but held to be illegally deprived), he would not be granted the benefits? Upholding of such plea would amount to allowing a party to take undue advantage of his own wrong. It would perpetrate injustice rather than doing justice to the person wronged.

10. Learned counsel for the applicant submitted that in this particular case, the transfer order of the applicant is based on malice in law and, therefore, it should be quashed. He submitted that the applicant has two sons who have completed their study and are searching for job under the guidance of the applicant and, therefore, his presence at Jaipur or near Jaipur is required. His wife used to remain ill frequently and the applicant has to look after her regularly and that the applicant himself is suffering from kidney stone, so better treatment is required and operation may also be required for the same. Therefore, looking to the entire circumstances of the applicant, the transfer order passed vide Ann.A/1 may be quashed.

11. On the other hand, learned counsel for the respondents argued that the applicant has not been transferred on administrative ground but he has been transferred on tenure completion ground, as mentioned in the transfer policy dated 15.10.2011 (Ann.R/1). He referred to paras-18 & 24 of the transfer policy, which are quoted below :

"18. To accommodate a tenure completion case, in case the longest stayee to be transferred happens to be a female employee and the corresponding vacancy available is only at field/tenure, in that case the next longest stayee male candidate will be moved out.

24. If no vacancies/volunteers are available at the choice station of an individual who completes tenure at a field/hard station and replacement at the field/hard station is necessary, the longest stayee from one of the choice stations as per the administrative conveniences will be moved out to replace the tenure completion case."

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12. Learned counsel for the respondents submitted that since Shri A.S.Rathore has completed his tenure, therefore, he has to be accommodated at his choice place of posting and the provisions of paras-18 & 24 are squarely applicable in the case of the applicant because he has the longest stay among the LDCs at Jaipur and, therefore, he has been transferred to Masimpur to replace the tenure completion case. He further submitted that there are proper medical facilities at Masimpur, where the applicant can be treated for his ailments. The applicant, as per the service conditions, has all India transfer liability. Transfer is an incidence of service which should not be interfered with. He referred to a judgement of the Hon'ble Apex Court in the case of **Airport Authority of India v. Rajeev Ratan Pandey & Ors.** [2009 (3) Apex Court Judgements 401 (SC)], wherein, in para-5, the Hon'ble Apex Court held, as under :

"5. In a matter of transfer of a government employee, scope of judicial review is limited and High Court would not interfere with an order of transfer lightly, be it at interim stage or final hearing. This is so because the courts do not substitute their own decision in the matter of transfer. In the present case, High Court fell into a grave error in staying the transfer order which, if allowed to stand, may cause prejudice to the administrative functioning of the appellant."

He also referred to another judgement of the Hon'ble Apex Court in the case of **Prabir Banerjee v. Union of India & Ors.** [2007 (3) Apex Court Judgements 560 (SC)], wherein, in para-11 of the judgement, the Hon'ble Apex Court held as under :

"11. Having regard to the submissions made the High Court observed that the grievance of the petitioners was based on the apprehension that their seniority would be affected. However, relying on the decision of this Court in the case of **Shilpi Bose v. State of Bihar, AIR 1991 SC 532**, the High Court ultimately came to the conclusion that transfers made in administrative exigencies or in

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public interest or for smooth functioning of the system did not warrant any interference under Articles 226 and 227 of the Constitution of India.”

Learned counsel for the respondents referred to another judgement of the Hon'ble Apex Court in the case of **Mohd. Masood Ahmad v. State of U.P. & Ors.** [2007 (3) Apex Court Judgments 213 (SC)], wherein, in para-4, the Hon'ble Apex Court held as under :

“4. The petitioner-appellant, who was an Executive Officer, Nagar Palika Parishad Muzaffarnagar, had in his writ petition challenged his transfer by the State Government by order dated 21.6.2005 as Executive Officer, Nagar Palika Parishad Mawana, District Meerut. Since the petitioner was on a transferable post, in our opinion, the High Court has rightly dismissed the writ petition since transfer is an exigency of service and is an administrative decision. Interference by the Courts with transfer orders should only be in very rare cases. As repeatedly held in several decisions, transfer is an exigency of service vide **B. Varadha Rao v. State of Karnataka** AIR 1986 SC 1955, **Shilpi Bose v. State of Bihar** AIR 1991 SC 532, **Union of India v. N.P. Thomas** AIR 1993 SC 1603, **Union of India v. S.L. Abbas** AIR 1993 SC 2444, etc.”

13. Learned counsel for the respondents further argued that the transfer order is not bad on the ground of malice in law, as argued by learned counsel for the applicant. The ratio of the case of Somesh Tiwari (supra) is not applicable in this case. Transfer of the applicant is not based on any complaint or on administrative ground. Transfer of the applicant has been made under para-24 of the transfer policy. Since one employee had to be shifted from Masimpur because he had completed his tenure, therefore, the applicant has been transferred in his place having the longest stay at Jaipur. Therefore, the present OA deserves to be dismissed being devoid of merit.

14. Having considered the rival submissions made by the respective parties, I am of the view that the ratio of the case of

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Somesh Tiwari (supra) is not applicable in the present case. The facts of that case and the facts of the present case are entirely different. The transfer of the applicant, in the instant case, is not based on any administrative ground. The applicant has been transferred under Para-24 of the Transfer Policy. The ratio laid down by the Hon'ble Apex Court in the judgements referred to by learned counsel for the respondents is squarely applicable in the present case. I am of the view that there is no reason to interfere with the transfer order of the applicant. The OA has no merit and the same is dismissed. Accordingly, the interim order passed by this Tribunal on 7.9.2010 is vacated. No order as to costs.

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(ANIL KUMAR)
MEMBER (A)

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