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O.A. 759 of 2018

CENTRAL ADMINISTRATIVE TRIBUNAL CALCUTTA BENCH, KOLKATA

O.A.759 of 2018

Coram : Hon'ble Ms. Bidisha Banerjee, Judicial Member
Hon'ble Dr. Nandita Chatterjee, Administrative Member

Deepak Sharma,
Son of Shri Phanindra Sharma,
Presently residing at Quarter No. 475,
IC-Block, Salt Lake, Sector-3,
Kolkata – 700 106,
Permanent resident of
Village: Baratiguri Pogamini,
District : Biswanath Chariali,
Assam, PIN Code: 784 172.

Applicant

Versus

1. The Union of India,
Service through the Secretary
Ministry of Youth Affairs and Sports,
Government of India,
Department of Youth Affairs,
Shastri Bhawan, Dr. R. P. Road,
New Delhi – 110 001.
Email: secy-ya@nic.in

2. The Director,
Directorate of National Service Scheme,
12 / 11 Jam Nagar House,
New Delhi – 110 011.
Email: pacnss@gmail.com

3. Regional Directorate of NSS-Kolkata,
Government of India,
Ministry of Youth Affairs & Sports,
Department of Youth Affairs,
3, Church Lane,
Kolkata – 700 001.
Email: nsskolkata@gmail.com

4. Regional Directorate of NSS-Guwahati,
Government of India,
Ministry of Youth Affairs & Sports,
Department of Youth Affairs,

"Chakralaya" Hari Mandir Road,
 House No.4, Bye Lane No.4,
 Mathuranagar,
 Police Station : Dispur,
 Guwahati – 781006.
 Email: nssghy@yahoo.co.in

5. Dipak Kumar,
 Service through: The Regional Director,
 Regional Directorate of NSS, Patna,
 Government of India,
 Ministry of Youth Affairs & Sports,
 Kela Bgan, Phulwari Sharif,
 Patna – 801505.
 Email: patna-nss@nic.in

..... Respondents.

For the applicant : Mr. S.K. Bhattacharyya, Counsel

For the respondents : Mr. P. Mukherjee, Counsel

Reserved on : 10.07.2018

Date of Order : 16.8.18

ORDER

Per : Bidisha Banerjee, Judicial Member

The applicant in this O.A. has sought for the following reliefs:

"8(a) To declare that the order No. F. No. A – 12015 / 1 / 16 – NSS, Government of India, Ministry of Youth Affairs and Sports, Department of Youth Affairs, Shastri Bhawan, Dr. R. P. Road, New Delhi – 110 001, Shastri Bhawan, New Delhi, Dated 25th May 2018 being Annexure "A-5" herein followed by Office Order No. Admin-1 / RD / NSS / KOL / 2018-19 / 196001966, Government of India, Ministry of Youth Affairs & Sports, Department of Youth Affairs, Regional Directorate of NSS, 3 Church Lane, Kolkata – 700 001 dated the 30th May 2018 being Annexure "A-8" herein in respect of the Applicant herein and the Respondent No.5 herein are bad in law and not sustainable in the eye of law and;

(b) To hold and pass an order that the Office Order No. F. No. ADMN.1 / RD / NSS / KOL / 2018-2019 / 1926 dated 07.05.2018 issued by the Regional Directorate at Kolkata to be directed to be implemented in respect of the Applicant herein in consonance with the clause 3.3 of the Rotational Transfer Policy for Group A and Group B Officers of National Service Scheme-reg vide Order No. A. 12015 / 1 / 2013-NSS, Government of India, Ministry of Youth Affairs & Sports (NSS Section), Shastri Bhawan, New Delhi, Dated the 28th January, 2014;

(c) Costs;

(d) Such further order or orders, direction / directions as this Learned Tribunal may deem fit and proper in accordance with law."

2. The service particulars of the applicant can summarised as under:

- (i) Joined the National Service Scheme at Guwahati to the post of a Youth Assistant Gr-II on 28th September 1987 as his first appointment.
- (ii) Served at Delhi from 23.03.1990 to 07.07.1991 as Youth Assistant Gr-II
- (iii) Served at Guwahati from 08.07.1991 to 30.04.1999 initially as Youth Assistant Gr-II and thereafter promoted to Youth Assistant Gr-I.
- (iv) Served at Kolkata from 03.05.1999 to 19.06.2001 as Youth Assistant Gr-I
- (v) Served at Guwahati from 26.06.2001 to 08.08.2014 initially as Youth Assistant Gr-I and promoted as Youth Officer on 01.12.2008.
- (vi) Served at Kolkata from 14.08.2014 till date as Youth Officer."

He is due to retire on 28th February 2020 on attaining the age of superannuation.

3. A Rotational Transfer Policy for Group A and Group B Officers of National Service Scheme was introduced vide Order No-A 12015 / 1 / 2013-NSS, Government of India, Ministry of Youth Affairs & Sports (NSS Section), Shastri Bhawan, New Delhi, dated the 28th January 2014 and has been in vogue since then in the respondent organisation. It explicitly and unambiguously spells out the following:

"3.3. Officer having less than two years of service before superannuation may be considered for posting at a place of their choice, subject to availability of vacancies. Such officers shall not be subjected to Rotational Transfers as stipulated in Para-2 of this Policy."

4. A Circular Dated May 04, 2018, being a Friday, was issued by the Respondent No.2 desirous of compliance within Sunday, the 6th day of May 2018. Since the applicant was left with near about a year and a half of his service tenure in terms of clause 3.3 of Transfers on Compassionate Grounds under the Rotational Transfer Policy. He sought for posting at Guwahati at his native place, yet vide Transfer order dated 25.05.2018 (Annexure-5) he was transferred to Patna. His representation dated 29.05.2018 was turned down in 29.05.2018 itself (Annexure – 7).

5. The Ld. Counsel for the applicant would vociferously argue that the entire exercise was to deprive the applicant of his rightful consideration in order to favour respondent No. 5 with posting of his choice.

Ld. Counsel would further submit that it was a case where a discretionary power was exercised for an unauthorised purpose and therefore it was immaterial whether its repository was acting in good faith or bad faith.

6. Per contra the Ld. Counsel for the respondents vehemently opposing the claim would submit the following.

In the Rotational Transfer Policy for Group A and B officers of the NSS, it has been clearly mentioned at para 4.1 that notwithstanding anything contained in the Policy, the Government may, in public interest, transfer or post any officer to any station. The contention of the applicant that he was less than two years of service before superannuation is not a valid ground since such cases come under 'consideration' clause and such consideration clause does not come under the purview of any mandatory provision. Be that as it may, it is the established legal position that a Government Servant

has no vested right to remain posted at a place of his choice nor can he insist that he must be posted at one place or the other. He is liable to be transferred in the administrative exigencies from one place to the other.

7. The respondents have averred that Shri Deepak Kumar, Assistant Programme Advisor in the RD, Patna has been transferred to RD, Guwahati, since he is senior to Shri Deepak Sharma and the jurisdiction of RD, Guwahati is wider than that of RD, Patna. It is an administrative decision taken by the Ministry keeping in view the shortage of officers in the RSS and to bring balance or conformity in the smooth functioning of the RDs and as many as six officers including Shri Deepak Sharma have been transferred from one RD to another.

8. The respondents have further submitted that RD, Guwahati caters to the needs of the entire North Bengal Region which comprises of seven States whereas RD, Patna looks after only Bihar and Jharkhand. Further, Shri Deepak Sharma, the applicant has been made full in-charge of RD, Patna whereas in RD, Kolkata he had been working under the Regional Director held by another Youth officer and as the comparative distance from Kolkata to Guwahati and Patna to Guwahati are concerned, there will arise no difference for him to travel, since both distances are almost the same.

9. The respondents have, still further, submitted that Shri Deepak Sharma has served more than 23 years at Guwahati itself out of his total service of 30 years and 8 months till now and served at Kolkata and at Delhi for the total period of only seven years, taken together, in both the above places and that apart the applicant vide his representation dated 29.05.2018 requested the Ministry for posting him at RD, Guwahati and if that was possible to allow him to remain

posted in Kolkata for rest of his 1 year and 9 months service and without waiting for the reply he rushed to this Tribunal. The O.A. is therefore, liable to be dismissed not only for the reason that it is devoid of merit, but also for the fact that the application of the applicant before this Tribunal is premature.

10. The respondents have clarified that the Ministry vide their letter F No Admn 23/ NSS/DTE/2018 dated 4th May 2018 instructed all the employees of all the Regional Directorate for giving three choices for their posting in various Regional Directorates, and directorate, but, in reply, the applicant opted only for Guwahati.

11. Further that the respondents submitted that the applicant's claim that with less than two years to superannuate, he should be posted at a place of his choice, may be considered, subject to administrative exigencies as it was not a mandatory provision and therefore did not base on the decision confer any right.

12. The respondents have contradicted existence of sufficient personal ground of the applicant to seek transfer to Guwahati already constructed his own house at Guwahati. Besides that he has two brothers who can look after his aged parents at his native place. More so, transfer on administrative ground or Public Interest, is "liable to supersede the personal ground of any nature whatsoever" and that he has already been struck off the strength from the office of the Regional Director, Kolkata and as such, he is not entitled to any interim order.

13. The respondents have reminded this Tribunal of the following legal propositions:

"(i) In the case of Rajendra Singh vs. State of U.P & ors. (2009) INSC 1351 (31.7.2009), the Hon'ble Supreme Court has been pleased to hold, inter alia, that "a Government Servant has not vested right to remain posted at a

place of his choice nor can he insist that he must be posted at one place or the other. He is liable to be transferred in the administrative exigencies from one place to the other. Transfer of an employee is not only an incident inherent in the terms of appointment but also implicit as an essential condition of service in the absence of any specific indication to the contrary. No Government can function if the Government Servant insists that once appointed or posted in a particular place or position, he should continue in such place or position as long as he desires.

(ii) In State of U.P. vs. Gobardhan Lal (2004) 11 SCC 402 it has been held by the Hon'ble Apex Court "that the courts are always reluctant in interfering with the transfer of an employee unless such transfer is vitiated by violation of some statutory provisions or suffers from malafide.

(iii) The landmark Judgment of the Hon'ble Supreme Court in Shilpi Bose (Mrs.) & ors. vs. State of Bihar & ors., AIR 1991 SCC 532, wherein at paragraph 4 of the Judgment Hon'ble Court held

"4. In our opinion, the courts should not interfere with a transfer order which is made in public interest and for administrative reasons unless the transfer orders 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. 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 authority in the department. If the courts continue to interfere with day-to-day transfer orders issued by the government and its subordinate authorities, there will be complete chaos in the administration which would not be conducive to public interest. The High Court overlooked these aspects in interfering with the transfer orders.

In N.K. Singh vs. Union of India & others 2, this court reiterated that the scope of judicial review in matters of transfer of a Government Servant to an equivalent post without adverse consequence on the service or career prospects is very limited being confined only to the grounds of mala fides or violation of any specific provision."

14. We heard the Ld. Counsels, considered their rival contentions and perused the materials in record.

15. We noted that the applicant is due to retire on 28th February, 2020 i.e. he has less than two years to retire. He is a resident of Assam.

AS per the transfer policy in vogue he deserves to be considered for his posting at a place of his choice.

He has exercised his choice and opted for Guwahati, to settle down at the fag and of his service.

He is entitled to be considered in terms of para 3.3 of the RTP which lays down policy on Transfers on Compassionate Grounds and specifies that "officers, having less than two years of service before superannuation" may be considered for posting at a place of their choice subject to availability of vacancy, and that "such officers shall not be subjected to Rotational Transfers as stipulated in para 2 of this Policy". Para 2 of the policy lays down the following:

2. Rotational Transfer.

- 2.1 Group-A Gazetted Officers shall be liable to transferred to another station on completion of 5 years in a particular station.
- 2.2 Group-B Gazetted Officers shall be liable to transferred to another station on completion of 7 years in a particular station.

5. Further para on General Instructions stipulates as under:

X X X

- 5.2 Officers who are due for transfer as per Rotational Transfer requirement stipulated in Para-2 shall have be asked to indicate 5 places of their choice and effort shall be made to accommodate them within their places of choice subject to availability of vacancies."

The provisions although not mandatory, cannot be given a complete go bye for it lays down the guidelines for effecting transfer, considering and acceding to the requests of employees on compassionate ground etc.

A bare perusal of the policy would exemplify and demonstrate that the applicant's case fell under para 3.3 of the policy and therefore he was not

required to opt for 3 or 5 places as choice postings in term of para 5.2 of the policy as extracted supra.

Therefore while expecting three choices from the applicant, to consider his request in terms of 3.3 of the RTP the authorities have misjudged the provisions and misdirected themselves.

16. Ld. Counsel for the applicant has therefore legitimately voiced his concern in regard to malice in law.

17. He has cited the decision reported in (1979) 2 Supreme Court Cases 491 with regard to SMT. S. R. VENKATARAMAN Versus UNION OF INDIA AND ANOTHER (albeit in a case on compulsory retirement) in a case where appellant had alleged malice in law, Hon'ble Apex Court elucidated its implications in the following Words:

"Malice in law is, however, quite different. Viscount Haldane described it as follows in **Shearer v. Shields (1914) AC 808 813**:

A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far the state of his mind is concerned, he acts ignorantly, and in that sense innocently.

Thus malice in its legal sense means malice such as may be assumed from the doing of a wrongful act intentionally but without just cause or excuse, or for want of reasonable or probable cause.

6. It is however, not necessary to examine the question of malice in law in this case, for it is trite law that if a discretionary power has been exercised for an unauthorised purpose, it is generally immaterial whether its repository was acting in good faith or in bad faith. As was stated by Lord Goddard. C.J., in **Pulling v. Abergele Urban District Council (1950) 1 KB 636 : (1950) 1 All ER 76**, where a duty to determine a question is conferred on an authority which state their reasons for the decision,

and the reasons which they state show that they have taken into account matters which they ought not to have taken into account, or that they have failed to take matters into account which they ought

to have taken into account, the court to which an appeal lies can and ought to adjudicate on the matter.

7. The principle which is applicable in such cases has thus been stated by Lord Esher, M. R. In **The queen on the Prosecution of Richard Westbrook v. The Vestry of St. Pancras (1890) 24 Q BD 871, 375 : 62 LT 440:**

If people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion.

This view has been followed in **Sadler v. Sheffield Corporation (1924) 1 Ch 483.**

It is equally true that there will be an error of fact when a public body is prompted by a mistaken belief in the existence of a non-existing fact or circumstance. This is so clearly unreasonable that what is done under such a mistaken belief might almost be said to have been done in bad faith ; and in actual experience, and as things go, these may well be said to run into one another.

9. The influence of extraneous matters will be undoubted where the authority making the order has admitted their influence. It will therefore be a gross abuse of legal power by putting a rule which makes a useful provision only in the "public interest" to a purpose wholly unwarranted by it, and to arrive at quite a contradictory result. An administrative order which is based on reasons of fact which do not exist must therefore be held to be infected with an abuse of power.

18. Such being the position as enumerated supra, the respondents, at the hearing, were asked to indicate availability of vacancies in Kolkata.

They indicated as under:

"There are two Nos. of Sanctioned Posts of Group B (Gazetted) in the Regional Directorate of NSS, Kolkata.

Out of that Ms. Sarita Patel, Youth Officer is holding one post and the other post is lying vacant w.e.f 30.05.2018 (AN) after relieving of Shri Deepak Sharma Youth Officer from Regional Directorate of NSS, Kolkata to join at Regional Directorate of NSS, Patna as Ministry of Youth Affairs & Sports Order No A12015/1/16-NSS dated 25.05.2018"

19. In view of the aforesaid admitted position, we feel it appropriate to dispose of the O.A. with a direction upon the respondents to allow the applicant to

continue at Kolkata till his superannuation, in case they are unable to adjust him at Guwahati as per his exercised choice.

20. Appropriate orders be issued within 10 days of receipt of the copy of this order. No costs.

(Dr. Nandita Chatterjee)
Administrative Member

drh

swarajee
(Bidisha Banerjee)
Judicial Member

