

**CENTRAL ADMINISTRATIVE TRIBUNAL  
CUTTACK BENCH, CUTTACK**

OA No. 841/2016

Date of Reserve: 07.02.2019

Date of Order: 20.02.2019

CORAM:

HON'BLE MR.GOKUL CHANDRA PATI, MEMBER(A)

HON'BLE MR.SWARUP KUMAR MISHRA, MEMBER(J)

Pruna Chandra Behera, aged about 47 years, S/o.Sukadev Behera, At/PO-Gatirout Patna, PS-Chauliaganj, Town/Dist-Cuttack – at present Junior Intelligence Officer I/G, Subsidiary Intelligence Bureau, Cuttack under transfer.

...Applicant

By the Advocate(s)-Mr.B.K.Mohapatra

-VERSUS-

Union of India represented through:

1. The Secretary, Ministry of Home Affairs, Govt. Of India, North Block, New Delhi-110 001.
2. Director of Intelligence Bureau (DIB), Ministry of Home Affairs, Govt. Of India, North Block, New Delhi-110 001.
3. Asst.Director, Subsidiary Intelligence Bureau, Govt. Of India, Cuttack at Plot No.108/1, House of Indrajit Jachak, Deulasahi, Tulasipur, Cuttack.
4. Seth Budha Bahuk, Junior Intelligence Officer I/G. Subsidiary Intelligence Bureau, Cuttack at Plot No.108/1, House Intrajit Jachak, Deulasahi, Tulasipur, Cuttack.

...Respondents

By the Advocate(s)-Mr.J.K.Nayak

ORDER

PER MR.GOKUL CHANDRA PATI, MEMBER(A):

In this case, the grievance of the applicant is against the impugned order dated 6.10.2016 (Annexure-A/1), transferring the applicant from Cuttack to Sambalpur and the order dated 15.11.2016 (Annexure-A/5) rejecting the representation of the applicant against his transfer to Sambalpur and the OA has been filed to quash these two orders and to direct the respondents to allow the applicant to continue at Cuttack.

2. Before we proceed with the order, it is seen that vide order dated 5.1.2018, the Respondent no. 1 i.e. Secretary, Ministry of Home Affairs was deleted from

the cause title as he is not connected in this case and as the respondent no. 2 is impleaded as a party. The consolidated OA filed on 8.3.2018 by the applicant has retained the Secretary, Ministry of Home Affairs as Respondent no. 1 in violation of the order dated 5.1.2018. The reason for retaining Secretary as Respondent no. 1 has not been explained by learned counsel for the applicant. Hence, the Respondent no. 1 will be treated as deleted vide order dated 5.1.2018 for the purpose of this OA.

3. Facts in brief as per the OA are that the applicant is posted as Junior Intelligence Officer (in short JIO) under the respondent no. 3 at Cuttack. The order dated 6.10.2016 transferring him to Sambalpur was issued by respondent no. 2, who also passed order dated 19.10.2016 relieving him w.e.f. 31.10.2016. He had represented for cancelling the transfer on the ground of his son's health conditions, which was forwarded to respondent no.2. His son is a disabled child with frequent epileptic feets and deaf in one ear. He is admitted to SCB Medical College frequently. The applicant has brought to the notice the DOPT's OM dated 6.6.2014 (Annexure-A/4) which allows the government servants with disabled child not to be transferred. But the respondent no.2 without considering the said OM, rejected the representation of the applicant vide order dated 15.11.2016 (A/5) which is impugned in this OA. It was further submitted that there are other staffs as mentioned in para 4.10 of the OA who have been allowed to continue in their headquarters in pursuance to the above OM dated 6.6.2014. But the applicant was not allowed the benefit of the said OM in a discriminatory manner. After the OA was filed by the applicant, the Tribunal passed an interim order dated 1.12.2016 directing the respondent no. 3 and 4 to allow the applicant to work at Cuttack against a post of JIO, if it is vacant. Accordingly, the applicant is continuing to work at Cuttack.

4. The counter filed by the respondents opposed the OA on the ground that during the applicant's posting at Cuttack, there was a complaint of inappropriate behaviour and sexual advance against him towards a woman contingent worker vide copy of her complaint at Annexure-R/1. He was transferred to Bhubaneswar in 2013 and the applicant joined. Then on his request, he was transferred again to Cuttack on 1.9.2014. After his posting at Cuttack, there were complaints against him and a departmental inquiry has been initiated against him. Considering these aspects, the applicant has been transferred to Samblapur, as his continuance at Cuttack would not be in public interest. It is pointed out that the OM dated 6.6.2014 of the DOPT, the government servant having a disabled child may be exempted from routine transfer subject to 'administrative constraints' and due to such constraints, the respondents had to transfer the applicant. The respondents have also filed the

MA No. 18/2017 to recall the interim order dated 1.12.2016 of the Tribunal directing the respondents to allow the applicant to continue at Cuttack if one post of JIO is vacant at Cuttack.

5. The applicant has filed the Rejoinder on 27.12.2017 denying the averments in the counter. The contention that the applicant has been transferred to Samblapur on administrative ground has been denied since no such reason has been mentioned in the impugned transfer order dated 6.10.2016. the complaint dated 26.4.2013 regarding his inappropriate behaviour to a woman contingent worker and the proceeding initiated against him has reached its finality after passing of the order dated 29.11.2017 (Annexure-A/7 to the Rejoinder). Hence, transferring the applicant to Samblapur for the same ground is illegal and arbitrary. It is also stated that the applicant is entitled for the benefit of the OM dated 6.6.2014 and the respondents have not any ground for not obeying the said OM by transferring him from Cuttack.

6. Respondents have filed additional counter stating that the officers whose name appear in the OA have not been given any benefit of the OM dated 6.6.2014 (A/4) as claimed by the applicant and these officers are posted in Bhubaneswar on operational grounds. The applicant filed additional Rejoinder stating that it is not denied that the officers do not have disabled dependents. The applicant is being discriminated with respect to extending the benefit of the circular dated 6.6.2014.

7. Learned counsels for both the sides were heard on 7.2.2019 in the matter and written note of submissions have been filed by both. **The relevant questions involved in the case are whether the applicant is entitled for any relief because of the OM dated 6.6.2014 as well as the judgments cited by the applicant's counsel and whether the applicant's transfer is punitive.**

8. Regarding the judgments cited by the applicant, in the case of Director General of Posts and others vs. K. Chandrashekhara Rao, (2013) 1 SCC (L&S) 596, the issue before Hon'ble Apex Court was about the scope of the scheme of compassionate appointment in the light of subsequent OMs issued by DOPT which were sought to be implemented retrospectively by government. It was held that the rights accrued on account of any policy decision cannot be diluted by another circular/guidelines, which cannot be given effect to retrospectively. The judgment will not be helpful for the applicant since it is not the case of the respondents that the applicant is not entitled for the benefit of the OM dated 6.6.2014, but the respondents have taken help of the provision regarding administrative constraints in the said OM to justify the transfer of the applicant.

9. Second judgment cited by the applicant's counsel is in the case of Pratima Dash vs. Union of India in W.P. (C) No. 12873 of 2015 decided by Hon'ble High Court on a matter relating to transfer of a personnel of the CRPF having mentally retarded child. The transfer order was quashed and the matter was remitted to the authority, with following observations:-

".....It has been suggested that such a Government employee should be kept at the place of his choice purely on the consideration of his ward with mental handicap and even, if he/she is to be transferred, efforts should be made to accommodate him/her in the same State so that the change of language does not adversely affect the education of the child."

It cannot be said from that the above cited judgment implies that such an employee cannot be transferred. It implies that the benefit of the guidelines of the Government for such employees should be implemented.

10. Third judgment cited by the applicant's counsel is in the case of Dilip K. Basu vs. State of West Bengal and others AIR 2015 SC 2887, in which Hon'ble Apex Court, in a matter relating to custodial death and protection of human rights, observed that the word 'may' in a statutory provision can be used to imply that it is binding. It was inferred indirectly that the OM dated 6.6.2014 is binding on the respondents.

11. Fourth citation on behalf of the applicant is the judgment in the case of Somesh Tiwari vs. Union of India and others AIR 2009 SC 1399, in which it was held by Hon'ble Apex Court that although transfer order can be passed in administrative exigencies, but it cannot be in lieu of punishment and transfer order in lieu of punishment is liable to be set aside. The next judgment is in the case of Sheikh Kalam vs. The Union of India, in which Hon'ble Patna High Court has held the transfer order to be punitive and stigmatic for the applicant from the averments of the parties. Even the transfer order in that case, it was mentioned that another official, on his own request, is being posted in place of the applicant after transfer. The transfer order was set aside and quashed 'with direction to the respondents to do the needful in accordance with law'.

12. The order dated 16.8.2018 of this Tribunal in OA No. 419/2016 in the case of Krishna Prasad Mohapatra vs. Union of India and others has been cited in the written note submitted by the applicant's counsel. In that case, the applicant sought to challenge his transfer from Cuttack to Kishanganj on the ground of the OM dated 6.6.2014 of the DOPT. It was found by the Tribunal in that case that the speaking order to reject the representation referred to the poor performance the applicant of OA No. 419/2016 and the fact that he had a disabled child, was not disputed. Further, it was found that the reliever was allowed to join in spite of the order of the Tribunal. Under these circumstances, the transfer order was set aside.

13. The respondents' counsel has also filed his written note of submission citing the judgments in the following cases:-

- (i) State of UP & Others vs. Gobardhan Lal, 2004 (3) Supreme 92
- (ii) UOI & ors v. Janardhan Debanath & another 2004(2) Supreme page 162
- (iii) Ajay Kumar Choudhury v. UOI and another, AIR 2015 (SC) 2389
- (iv) Rajendra Roy vs. UOI & others AIR 1993 SC 1236
- (v) State of MP & another vs. S.S. Kourav & others AIR 1995 (SC) 1056
- (vi) S.C. Saxena vs. UOI & others 2009(9) SCC 583
- (vii) Union of India & others vs. S.L. Abbas AIR 1993 (SC) 2444
- (viii) Mrs. Shilpi Bose vs. State of Bihar & others AIR 1991 (SC) 532

14. The judgments cited by learned counsel for the respondents lay down the law relating to transfer of Government servant in unequivocal terms and unless transfer order is shown to be an outcome of mala fide exercise of power or it violates any statutory provisions or it is ordered by an authority who is not competent to pass such order, the transfer order is not to be interfered as a matter of course. In the case of Mrs. Shilpi Bose (supra), it is held by Hon'ble Apex Court as under:-

"4. In our opinion, the Courts should not interfere with a transfer Order which are made in public interest and for administrative reasons unless the transfer Orders are 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, he is liable to be transferred from one place to 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 authorities 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 over looked these aspects in interfering with the transfer Orders."

15. Hon'ble Apex Court reiterated similar findings in the case of S.L. Abbas (supra) with the following observations:-

"6. An order of transfer is an incident of Government Service. Fundamental Rule 11 says that "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". Fundamental Rule 15 says that "the President may transfer a government servant from one post to another". That the respondent is liable to transfer anywhere in India is not in dispute. It is not the case of the respondent that order of his transfer is vitiated by mala fides on the part of the authority making the order, - though the Tribunal does say so merely because certain guidelines issued by the Central Government are not followed, with which finding we shall deal later. The respondent attributed "mischief" to his immediate superior who had nothing to do with his transfer. All he says is that he should not be transferred because his wife is working at Shillong, his children are studying there and also because his health had suffered a set-back some time ago. He relies upon certain executive instructions issued by the Government in that behalf. Those instructions are in the nature of guidelines. They do not have statutory force.

7. Who should be transferred where, is a matter for the appropriate authority to decide. Unless the order of transfer is vitiated by mala fides or is made in violation of any statutory provisions, the Court cannot interfere with it. While ordering the transfer, there is no doubt, the authority must keep in mind the guidelines issued by the Government on the subject. Similarly if a person makes any representation with respect to his transfer, the appropriate authority must consider the same having regard to the exigencies of administration. The guidelines say that as far as

possible, husband and wife must be posted at the same place. The said guideline however does not confer upon the government employee a legally enforceable right."

16. Again in the case of S.S. Kourav (supra), it was held as under:-

"4. It is contended for the respondent that the respondent had already worked at Jagdalpur from 1982 to 1989 and when he was transferred to Bhopal, there was no justification to retransfer him again to Jagdalpur. We cannot appreciate these grounds. The courts or Tribunals are not appellate forums to decide on transfers of officers on administrative grounds. The wheels of administration should be allowed to run smoothly and the courts or tribunals are not expected to interdict the working of the administrative system by transferring the officers to proper places. It is for the administration to take appropriate decision and such decisions shall stand unless they are vitiated either by mala fides or by extraneous consideration without any factual background foundation. In this case we have seen that on the administrative grounds the transfer orders came to be issued. Therefore, we cannot go into the expediency of posting an officer at a particular place."

17. In the case of Janardhan Debanath (supra), Hon'ble Apex Court has held as under:-

"FR 15 reads as follows:

"(a) The President may transfer a Government servant from one post to another provided that except-

"(1) on account of inefficiency or misbehaviour, or (2) on his written request, a Government servant shall not be transferred to, or except in a case covered by Rule 49, appointed to officiate in a post carrying less pay than the pay of the post on which he holds a lien."

.....  
A bare reading of FR-15 makes it clear that except in cases where the transfer is (a) on account of inefficiency or mis-behaviour or (b) on a written request the government servant cannot be transferred or except in a case covered by Rule 49 appointed to officiate in a post carrying less pay than the pay of the post on which he holds a lien. The clear intention of the prescription is that except the two categories indicated above, in all other cases the pay to be paid on transfer shall not be less than of the post on which he holds a lien. Exception is made in case of a transfer where it is on account of inefficiency or mis-behaviour. In a case where transfer is on account of inefficiency or mis- behaviour, the same can be made to a post carrying less pay than the pay of the post on which he holds a lien. Similar is the position where a transfer is made on a written request. Where the transfer is otherwise than for inefficiency or mis-behaviour or on a written request made by the transferred employee, the protection of pay is ensured. The High Court seems to have completely mis- construed the rule as if there cannot be any transfer in terms of FR 15 on account of inefficiency or mis-behaviour. The view is clearly contrary to the pronounced intention of FR 15.  
.....

The allegations made against the respondents are of serious nature, and the conduct attributed is certainly unbecoming. Whether there was any mis-behaviour is a question which can be gone into in a departmental proceeding. For the purposes of effecting a transfer, the question of holding an enquiry to find out whether there was mis-behaviour or conduct unbecoming of an employee is unnecessary and what is needed is the prima facie satisfaction of the authority concerned on the contemporary reports about the occurrence complained of and if the requirement, as submitted by learned counsel for the respondents, of holding an elaborate enquiry is to be insisted upon the very purpose of transferring an employee in public interest or exigencies of administration to enforce decorum and ensure probity would get frustrated. The question whether respondents could be transferred to a different division is a matter for the employer to consider depending upon the administrative necessities and the extent of solution for the problems faced by the administration. It is not for this Court to direct one way or the other. The judgment of the High Court is clearly indefensible and is set aside. The writ petitions filed before the High Court deserve to be dismissed which we direct. The appeals are allowed with no order as to costs."

18. In the case of Gobardhan Lal (supra), it was held by Hon'ble Apex Court as under:-

"A challenge to an order of transfer should normally be eschewed and should not be countenanced by the Courts or Tribunals as though they are Appellate Authorities over such orders, which could assess the niceties of the administrative needs and requirements of the situation concerned. This is for the reason that Courts or Tribunals cannot substitute their own decisions in the matter of transfer for that of competent authorities of the State and even allegations of mala fides when made must be such as to inspire confidence in the Court or are based on concrete materials and ought not to be entertained on the mere making of it or on consideration borne out of conjectures or surmises and except for strong and convincing reasons, no interference could ordinarily be made with an order of transfer."

19. It is undisputed that the applicant is entitled for the benefit of the OM dated 6.6.2014 of the DOPT. The respondents have stated in para 7 of the counter that due to several complaints against him, he was transferred from Cuttack on administrative ground. The impugned order dated 15.11.2016 (A/5) rejecting the applicant's representation to be retained at Cuttack, has also mentioned about the complaints for which a preliminary inquiry which was held in the matter. In reply, the applicant in his Rejoinder, has denied that his transfer is on administrative ground as no such reason has been mentioned in the impugned transfer order and that the transfer cannot be inflicted on the same ground for which the disciplinary action has been taken and penalty order dated 29.11.2017 (A/7) has been imposed on him. But the applicant has not furnished the charges for which the penalty order dated 29.11.2017 was imposed on him. In absence of details regarding the disciplinary proceedings, it cannot be said that such proceedings, culminating in the order dated 29.11.2017, are based on the same complaints as mentioned in para 7 of the counter or in order dated 15.11.2016 (A/5). Moreover, the applicant has not contradicted or denied the fact that there were a number of complaints against him.

20. In para 14 of the counter, it is stated that a preliminary inquiry was conducted by the respondents (vide copy at Annexure-R/5). In reply, the applicant has stated in Rejoinder that for the same complaints, he was earlier transferred and then reposted at Cuttack and he cannot be transferred again for the same old complaints. We take note of the fact that the applicant has indirectly admitted about these complaints, but states that he had been transferred from and back to Cuttack after such complaints. This contention of the applicant is misleading, as the date of the report at Annexure-R/5 is 30.9.2016, i.e. just before issue of the impugned transfer order dated 6.10.2016 (A/1). How he was transferred by virtue of the report dated 30.9.2016 earlier is not clear. It is clear that the applicant has no answer to

deny or contradict the preliminary inquiry report dated 30.9.2016, which reveals applicant's inappropriate conduct.

21. The applicant relies heavily on the OM dated 6.6.2014, which states as under:-

“3.....Therefore, a Government servant who is also a care giver of disabled child may be exempted from the routine exercise of transfer/rotational transfer subject to the administrative constraints.....”

Clearly, the stipulation of no transfer for a Government servant with disabled child is meant for the routine transfer or rotational transfer and it does not include transfer required for administrative constraints or necessity from point of view of the organization. In this case, there is material on record to show that there are complaints of inappropriate behaviour or conduct of the applicant, which have not been explained satisfactorily by the applicant in his pleadings. His contention that for the same grounds, disciplinary action has already been taken or he was earlier transferred, have not been substantiated by producing supportive documents. In view of the law laid down by Hon'ble Apex Court in the case of Janardhan Debanath (supra) as discussed in para 17 above, the applicant's continuation in Cuttack has been held by the respondents to be against public interest. The applicant's contention that the impugned transfer order does not specify the administrative reason does not vitiate the transfer order as no rule has been cited to show that such reason is required to be mentioned in the transfer order. It would suffice to conclude that the materials on record show that the impugned transfer order dated 6.10.2016 is issued due to administrative constraints and hence, the OM dated 6.6.2014 is not violated. **The first question of paragraph 7 is answered accordingly.**

22. Regarding the other question in para 7 as to whether the impugned transfer order is punitive, no reason except for the complaints against him for which disciplinary action was initiated, has been furnished by the applicant to prove the contention. For some of the misconducts of the applicant, penalty order dated 29.11.2017 has been imposed as averred by the applicant. Learned counsel for the applicant counsel has cited the judgment of Hon'ble Patna High Court in the case of Sheikh Kalam (supra), in which, the respondents had stated in their pleadings about inefficiency and shortfall of performance of the petitioner. The issue was not inappropriate conduct or behaviour, which is the case in the present OA before us. In the case of Somesh Tiwari (supra), the allegations against the petitioner was anonymous and such allegations were not proved. Still then the petitioner was served with a transfer order which was considered to be harsh even by the respondents. Hon'ble Apex Court held such



transfer to be punitive. The OA before us is factually different as there are serious allegations against the applicant and there is nothing on record to show that based on facts, the impugned transfer order is punitive. **Therefore, the answer to the second question of para 7 is that the impugned transfer order dated 6.10.2016 is not punitive.**

23. Lastly, the case of Krishna Prasad Mohapatra (supra) in OA No. 419/2016, cited by the applicant's counsel, this Tribunal adjudicating a similar dispute held as under (vide the operative part of the order):-

"After taking into consideration the entire conspectus of the case, we have no hesitation to set aside the transfer order dated 11/12.4.2016 and allow the petition by directing the respondents to allow the applicant to resume his duties at Cuttack at least up to completion of his tenure by keeping in mind the case of disability of the son of the applicant."

In OA No.419/2016, there was no allegation against the conduct of the applicant in that OA and he was transferred before completion of his tenure. Hence, the order dated 16.8.2018 of the Tribunal in OA No. 419/2016 will not be helpful in the present O.A. before us which is factually distinguishable.

24. In the facts and circumstances and taking into consideration the law laid down in the judgments discussed in the preceding paragraphs, we are not convinced by the grounds and arguments advanced by the applicant against the impugned orders and hold that the justifications furnished for the Tribunal to interfere with the impugned orders, are inadequate. But it is also a fact that the applicant's son has health issues which need constant medical attention and the applicant has also file a copy of the disability certificate for his son. This issue, therefore, needs to be considered on humanitarian point of view, taking into account the administrative requirement of the organization. Hence, the OA is disposed of with a direction to the respondents to consider modifying this impugned transfer order of the applicant for posting him to another place nearer Cuttack (instead of Sambalpur) if it is administratively feasible and to allow the applicant to continue at Cuttack pending a decision in the matter. The respondents are to communicate the decision in the matter to the applicant preferably within six weeks from the date of receipt of a copy of this order. It is clarified that the interim order dated 1.12.2016 stands merged with this order. There will be no order as to costs.

(SWARUP KUMAR MISHRA)  
MEMBER(J)

(GOKUL CHANDRA PATI)  
MEMBER(A)

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