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CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

OA No.1560/2003

New Delhi this the 8th day of August, 2003.

HON'BLE MR. SHANKER RAJU, MEMBER (JUDICIAL)

Dr. (Smt.) Deepshikha Jiwan Pandit,
w/o Sh. Jiwan Pandit,
R/o Type IV/7, NCERT Residential
Complex, Nasirpur, New Delhi-45. -Applicant

(By Sh. A.K. Singh, Senior Counsel with Sh. Ajay Kumar,
Sh. Pankaj Gupta and Ms. Promila Kaul, counsel)

-Versus-

1. The National Council of Educational
Research & Training, Sri Aurobindo
Marg, New Delhi-16 through its
Secretary.

2. Prof. Krishna Kant Vashishta,
Head, Deptt. of Elementary Education,
NCERT, Sri Aurobindo Marg,
New Delhi-110016.

3. Director, National Council for
Educational Research & Training,
Sri Aurobindo Marg,
New Delhi-110016.

-Respondents

(By Sh. M.N. Krishnamani, Senior Counsel with Sh. R.K.
Singh and Sh. Saurabh Chauhan, Counsel)

O R D E R

At the outset, in view of plural remedies claimed in the present OA it cannot be sustained as per Rule 10 of the Central Administrative Tribunal (Procedure) Rules, 1987. Leaving liberty to applicant to pursue her remedy with regard to other reliefs OA is entertained only in respect of para 8 (b) and (c) of the OA, whereby order of transfer and orders passed on representation rejecting the request for cancellation of transfer have been assailed.

2. Briefly stated, applicant who belongs to a ST community underwent a legal and formal change to Dr. (Mrs) Deepshikha Jiwan Pandit. Although, initially she was

denied on this change of name the benefits available to SC/ST, but later on the order has been modified. On a competitive selection held from the open market applicant was appointed against a general category post as Lecturer with the respondents. As per the terms and conditions applicant was on probation and confirmation was dependent upon successful completion of probation period with a specific declaration. Applicant was placed on probation for a period of two years and extension was at the discretion of the Council. By an office order dated 11.7.2002 to provide opportunity to applicant to gain first hand experience of pre-school education she was directed to attend IIT Nursery School. In the minutes of the meeting of Faculty held on 11.7.2002 regarding performance of applicant it has been observed that she could not contribute any thing, against which a representation putting objections has been made.

3 As the performance of applicant was not found satisfactory her probation was extended for a period of one year w.e.f. 1.6.2002 to 31.5.2003.

4 More than ⁴50 memos were issued to applicant to improve upon her performance respondent No.2 against whom mala fides have been alleged had joined in 2001. R-2 was the reporting officer of applicant who ordered to work under the supervision of Head Mistress IIT, Nursery School.

5 Applicant filed a petition before the National Commission for SC and ST against R-2 for untouchability against her and harassment without any

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basis Applicant in the interregnum sent several representations and one of it was from her husband who also met the Director, NCERT regarding harassment and threat to applicant. On the direction of the Commission to enquire into the grievance of applicant a two-Member Committee was constituted on 16.9.2002. One of the members was from the category to which applicant belongs. The aforesaid Committee furnished a questionnaire to applicant and allowed fullest participation and opportunity to applicant to establish her claim. Vide report dated 13.1.2003 after meticulously examining the material produced in the enquiry the Committee was of the view that applicant has failed to perform during the probation period and had not completed her assignments. It was also established that applicant has misbehaved with the Head of the Department. Through the supplementary record on account of fresh evidence on 6.2.2003 reiterated the earlier conclusions.

6. Applicant thereafter by an order dated 13.3.2003 was transferred to Regional Institution of Education at Bhubaneswar and was relieved and had withdrawn TA/DA.

7. Applicant approached the Tribunal in OA-1289/2003. By an order dated 25.1.2003 respondents have been directed to treat the OA as representation and to dispose of the same by a detailed and speaking order within two weeks. Till then impugned orders have been *Stayed.*

8. By an order dated 5.5.2003 as the performance of applicant was not found satisfactory during the extended period of probation the probation was further extended for a period of one year w.e.f. 1.6.2003.

9. By a detailed order dated 4.6.2003 request of applicant against the transfer has been rejected. By an interim order dated 20.6.2003 this Court directed respondents, if not yet given effect to order dated 4.6.2003, to keep it in abeyance.

10. Learned Senior Counsel appearing for applicant assails the impugned order on the ground that despite an order passed by the Commission to post applicant along with her husband at Mysore and till then to keep the transfer in abeyance being a mandate has not been followed by respondents. It is further stated that the transfer is mala fide without any administrative exigencies or public interest in it and is a colourable exercise.

11. In the aforesaid backdrop it is stated that applicant's performance remained very good in her first year of probation whereas the same has been shown poor in the second year without giving her an opportunity and informing her. Learned counsel further stated that as per the well established government policy of posting spouse to nearby station, rejection of applicant's request is mala fide.

12. It is further stated that applicant on her merit qualified for the job but her service career was ruined at the very inception due to caste discrimination

and mala fide on the part of respondent No.2. In so far as enquiry conducted by respondents it is stated that the report of it has never been served on her and an incorrect information was sent to the Committee. Transfer is solely rested upon the finding of two Member Committee. In this backdrop it is stated that the Commission when in seise of the matter there cannot be any question of constitution of the Committee.

13 Learned Senior Counsel further stated that applicant had objected to her posting in a lower grade to Nursery School which has been represented but without any reply from respondents. The harassment of applicant is apparent as she has been issued 50 memos since 19th July, 2002. In so far as relieving order and acceptance of TA/DA is concerned, it is stated that at the time of receiving amount orders passed by the National Commission were not in the knowledge of applicant which were taken on 1.5.2003. In view of the clear findings of the Commission as to harassment of applicant to terminate her service providing incorrect information and its recommendation regarding transfer of applicant at Mysore to avoid any threat to her life, as advised, necessary arrangements have not been made by respondents, shows mala fide on their part. Though applicant offered return of TA/DA received but was refused by respondents. In so far as satisfactory performance is concerned, it is stated that order extending probation beyond 31.5.2002 has been passed without any material and the memos issued after this cannot be taken into consideration. As there is no department at Bhubaneswar related to Elementary Education the posting of applicant is not in administrative interest.

14. In so far as complaint before the Commission is concerned, the enquiry conducted by applicant was considered. Complaints have been filed against respondent No.2 in a concerned Police Station.

15. Applicant disputed the factual contention put-forth by respondents and stated that in the IIT Nursery School was not assigned any specific work. Referring to the order on representation passed by respondents it is stated that as per the direction of the Tribunal representation was not considered and her contentions have not been considered and a bald order has been passed without application of mind.

16. In nut shell, what has been stated is that the conduct of respondent No.2 amounts to *Caste*^h discrimination and being biased against applicant her transfer has been manipulated at the behest of R-2. According to learned counsel as the mandatory guidelines of posting husband and wife together have not been adhered to which is an inbuilt provision in the transfer guidelines violation of which vitiates the transfer and being mala fide it cannot be sustained in law.

17. On the other hand, respondents '*Ld. Senior Counsel*'^h contested the oA and vehemently opposed the contentions. According to Sh. Mani OA is liable to be dismissed having become infructuous as in pursuance of transfer order dated 13.3.2003 applicant accepted the same and had withdrawn TA/DA on 21.3.2003 and as she was relieved on 13.3.2003 nothing survives in the OA.

18. It is further stated that transfer and posting cannot be claimed as a matter of right and if it is neither mala fide nor in violation of the statutory rules, routine transfer in administrative exigencies and public interest cannot be interfered with by this court in a judicial review.

19. In so far as recommendation of Commission for SC/ST is concerned, by referring to Article 338 of the Constitution of India it is stated that the National Commission for SC/ST has to function in relation to protection, welfare, development and advancement of SC/ST and within its purview the power of investigation and powers of Civil Court trying a suit, which include summoning and enforcing the attendance of a person, requiring the discovery and production of any document, receiving evidence on affidavits and production of documents.

20. In so far as enforceability of the recommendations made by the Commissioner is concerned, it is stated that the same are not mandatory but only recommendatory in nature and in view of the allegations levelled against R-2 for practising untouchability against applicant and other allegations made the same have been enquired into by a Special Committee of two independent outsider members viz. Sh. T.P. Srivastava, a retired IAS and Sh. Puran Chand, retired Joint Commissioner belonging to SC community to ensure that the allegations of applicant regarding caste status are properly looked into. In the aforesaid Committee applicant had been given full

participation and an opportunity to furnish all the materials. On meticulous examination of the same the allegations levelled are not found valid and are the outcome of applicant's own perception.

21. In so far as performance is concerned, on account of unsatisfactory performance for which applicant had been given ample opportunities by issuance of 50 memos and having failed to complete important assignments by way of indulgence and taking a lenient view instead of dispensing with her services another opportunity to improve upon has been afforded to applicant by extending her probation.

22. In order to ensure that applicant ⁴work in a more conducive environment looking to the special areas of satisfaction in public interest and administrative exigencies and keeping in view the paramount interest of the organisation applicant was transferred to Bhubneshwar.

23. In so far as posting of husband and wife together and the recommendations made by the Commission are concerned, even in case of guidelines of Government regarding posting of husband and wife together respondents had considered the request of applicant for posting to Mysore but as no post was vacant at Mysore and the guidelines cannot be used as a thumb rule for posting at Mysore or at a particular place but is to be done on administrative requirements and exigencies.

24. Respondents' counsel lastly rely upon the following decisions of the Apex Court to contend that the transfer unless proved to be mala fide which are proved to its hilt cannot⁴ be questioned in law and interfered in a judicial review:

- i) State of Madhya Pradesh & Ors. v. Sri S.S. Kourav & Ors., JT 1995 (2) SC 498.
- ii) Shilpi Bose v. State of Bihar, 1991 (2) Supp. SCC 659.
- iii) Bank of India v. Jagjit Singh Mehta, AIR 1992 SC 519.

25. On the other hand, respondent No.2 against whom mala fides have been alleged denied the contentions and stated that the work and performance of applicant were poor for which she was suitably advised through memos. The aforesaid performance was also found substantiated by an independent committee. Applicant who had failed in almost all assignments entrusted to her by the Department as a hostile act to create a defence complained against respondent No.2 which was not found substantiated on an enquiry.

26. In so far as extension of probation is concerned, it is stated that the decision is taken by the Council on recommendation of the DPC after considering all the relevant materials.

27. It is stated that applicant refused to work at IIT Nursery School and despite allowing TA she has not submitted any claim.

28. Lastly, it is contended that mala fides are not proved with laying down a firm foundation of specific facts and mere averments would not be sufficient to hold the action of respondents as mala fide.

29. In the rejoinder, applicant re-iterated her pleas and annexed several documents to establish the plea of mala fide.

30. I have carefully considered the rival contentions of the parties and perused the material on record. On a limited scope of judicial review in the matter of transfer the same vitiates when it is actuated with mala fides in violation of statutory rules or passed without any jurisdiction and competence.

31. In so far as the recommendations of SC/ST Commission are concerned, no doubt it has been recommended to post applicant along with her husband to Mysore. The Commission being a constitutional body created under Article 338 of the Constitution of India in so far as enforceability of its recommendations is concerned the same are recommendatory in nature. It is not to be treated as a mandate or binding upon Government. However, the same cannot be ignored.

32. In the matter of posting of husband and wife which has been a part of the guidelines of Government it is to be implemented as far as possible but does not confer upon a Government servant a legally enforceable right. Posting depends upon the vacancies and other administrative exigencies. The Apex Court in Union of India v. S.L. Abbas, 1993(2) SLR 585(SC) held as follows:

"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.

The jurisdiction of the Central Administrative Tribunal is akin to the jurisdiction of the High Court under Article 226 of the Constitution of India in service matters. This is evident from a perusal of Article 323-A of the Constitution."

33. Further the Apex Court in Bank of India v. Jagjit Singh Mehta, AIR 1992 SC 519 held as follows:

"5. There can be no doubt that ordinarily and as far as practicable the husband and wife who are both employed should be posted at the same station even if their employers be different. The desirability of such a course is obvious. However, this does not mean that their place of posting should invariably be one of their choice, even though their preference may be taken into account while making the decision in accordance with the administrative needs. In the case of All-India Services, the hardship resulting from the two being posted at different stations may be unavoidable at

times particularly when they belong to different services and one of them cannot be transferred to the place of the other's posting. While choosing the career and a particular service, the couple have to bear in mind this factor and be prepared to face such a hardship if the administrative needs and transfer policy do not permit the posting of both at one place without sacrifice of the requirements of the administration and needs of other employees. In such a case the couple have to make their choice at the threshold between career prospects and family life. After giving preference to the career prospects by accepting such a promotion or any appointment in an All-India Service with the incident of transfer to any place in India, subordinating the need of the couple living together at one station, they cannot as of right claim to be relieved of the ordinary incidents of All-India Service and avoid transfer to a different place on the ground that the spouses thereby would be posted at different places. In addition, in the present case, the respondent voluntarily gave an undertaking that he was prepared to be posted at any place in India and on that basis got promotion from the clerical cadre to the Officers' grade and thereafter he seeks to be relieved of that necessary incident of All-India Service on the ground that his wife has to remain at Chandigarh. No doubt the guidelines require the two spouses to be posted at one place as far as practicable, but that does not enable any spouse to claim such a posting as of right if the departmental authorities do not consider it feasible. The only thing required is that the departmental authorities should consider this aspect along with the exigencies of administration and enable the two spouses to live together at one station if it is possible without any detriment to the administrative needs and the claim of other employees."

34. If one has regard to the above, no doubt guidelines require posting of husband and wife as far as possible at one place but this cannot be claimed as a matter of right. The only requirement is that such a request should be considered in the context and aspect of exigencies of administration without any detriment to the

administrative needs. Respondents have considered the request of applicant for her posting at Mysore but as no post was available at Mysore same was not acceded to. As this cannot be claimed as a matter of right respondents' action cannot be termed as in violation of the rules. The only requirement is to consider the possibility of posting but it is not necessary that husband and wife are posted together against the administrative exigencies.

35. The request of applicant was thoroughly examined. Merely because her husband has been posted at Bangalore cannot be a ground to post her at her choice place. As the same would not have been conducive to the Council's policy and after meticulously examining what has been arrived is that the posting of a person is to be done at a place where his/her skill could be utilized for the best advantage of the Council. The organizational interest is paramount and over-rides any personal interest. Acceptance of applicant's request without any administrative requirement only on her specific preference for a particular post would have created a precedent leading to administrative chaos. In so far as mala fides against R-2 and applicant's allegations of caste discrimination the same have been meticulously gone into by an independent two Member Committee out of which one Member was from SC community. Applicant was afforded reasonable opportunity to produce the entire material and after meticulous examination the Committee had reached the conclusion that applicant herself had behaved in a defiant manner and her allegations levelled against R-2 are not

well founded. The Committee also found performance of applicant unsatisfactory as most of the assignments given to her during the probation period were not fulfilled.

36. In fact on a supplementary report also the earlier findings have been re-iterated. Once the Committee had gone into the allegations levelled by applicant and found them to be baseless her contention put-forth alleging mala fides cannot be sustained in law. Respondents are the best judges of her performance and once the same have been enquired into by an independent committee, I cannot reappraise the same or substitute my own view in a judicial review.

37. In so far as mala fides are concerned, Apex Court in Indian Railway Construction Co. Ltd. v. Ajay Kumar, (2003) 4 SCC 579 held as follows:

"23. Doubtless, he who seeks to invalidate or nullify any act or order must establish the charge of bad faith, an abuse or a misuse by the authority of its powers. While the indirect motive or purpose, or bad faith or personal ill will is not to be held established except on clear proof thereof, it is obviously difficult to establish the state of a man's mind, for that is what the employee has to establish in this case, though this may sometimes be done. The difficulty is not lessened when one has to establish that a person apparently acting on the legitimate exercise of power has, in fact, been acting malafide in the sense of pursuing an illegitimate aim. It is not the law that mala fides in the sense of improper motive should be established only by direct evidence. But it must be discernible from the order impugned or must be shown from the established surrounding factors which preceded the order. If bad faith would vitiate the order, the same can, in our opinion, be deduced as a reasonable and inescapable inference from proved facts. (See S. Partap Singh v. State of

Punjab, AIR 1964 SC 72). It cannot be overlooked that the burden of establishing malafides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility. As noted by this Court in E.P.Royappa v. State of T.N. (1974 (4) SCC 3) courts would be slow to draw dubious inferences from incomplete facts placed before it by a party, particularly when the imputations are grave and they are made against the holder of an office which has a high responsibility in the administration."

38. If one has regard to the above, mere vague averments^k and unsubstantiated facts would not constitute mala fides. A strong and firm foundation is to be laid down with specific facts and burden lies on the person who alleges mala fides to establish the same. In the present case keeping all the facts in view applicant has failed to establish mala fides by laying down firm foundation through specific facts and material. Merely because she belongs to SC category and respondent No.2 being the controlling authority if issued memos to improve her performance and despite that no efforts have been made by applicant to improve her performance extension of probation which is at the discretion of the authority^k has been exercised judicially and there is no malice in the action of R-2. The allegations of caste discrimination have not been borne out from the record or established even in the findings of the Committee. A vague assertion to the mala fides cannot be a valid compliance. Applicant has miserably failed to establish mala fides against R-2.

39. As the representation against transfer has been meticulously dealt with by respondents by a detailed and speaking order dealing with her contentions I do not

find any legal infirmity in the same. As the DPC on consideration of Committee's finding as to defiant behaviour and inability to work with R-2 recommended her transfer to Bhubaneswar is with a view to offer better opportunity and a more conducive work and environment which was in the interest of applicant for her career development the suitability at Bhubaneswar was considered to be appropriate for applicant to work in a new environment and improve her performance and conduct is a decision in administrative exigencies as well as in public interest.

40. Apex Court recently in State Bank of India v. Anjan Sanyal, AIR 2001 SC 1748 as well as in CA-1095/2001 decided on 11.9.2001 in National Hydro Electrical Power Corporation v. Sri Bhagwan held that no government servant has any legal right to be posted for ever at a particular place on an all India liability. Transfer is not only an incident of service but a condition of service, which is necessary in public interest and efficiency in the public administration. Unless the transfer is shown to be an outcome of mala fide exercise of power or in violation of statutory provisions Tribunal cannot interfere as a matter of routine acting as an appellate authority substituting their own decision. I respectfully follow the same.

41. In the result, for the foregoing reasons, I do not find any merit in the OA, which is accordingly dismissed. No costs.

42. Interim order is hereby vacated.

S. Raju
(Shanker Raju)
Member (J)

'San.'