

S.L. ABBAS

APRIL 27, 1993

[J.S. VERMA AND B.P. JEEVAN REDDY, JJ.]

Civil Services:

Fundamental Rules 11 and 15—Transfer of a Government servant—When can be questioned in a Court/Tribunal—Guidelines issued by Government—Whether have statutory force.

Constitution of India, 1950/Central Administrative Tribunals Act, 1985:

Article 323-A/Section 14—Jurisdiction of Central Administrative Tribunal—Exercise of—Whether Tribunal can interfere with an order of Transfer.

The respondent, a Central Government employee, who was transferred from one place to another, challenged the order of transfer on the grounds that: his wife was also employed at the same place in a Central Government office; his children were also studying there; he himself had suffered back-bone fracture injuries some time ago; the guidelines contained in Government of India O.M. dated 3.4.1986 had not been kept in mind while ordering his transfer; some other officials, who had been serving at the same place for a longer period than the respondent had been allowed to continue and his transfer was due to the mischief of his Controlling Officer.

In the counter-affidavit filed by the appellants, it was submitted that the transfer was ordered on administrative grounds and was unexceptionable.

A Single Member of the Central Administrative Tribunal quashed the order of transfer on the ground that the power of transfer was not an unfettered one, but was circumscribed by various circulars/ guidelines contained in the administrative instructions issued by the Government and an order of transfer could be interdicted if it was discriminatory, that in the matter of considering transfer of an individual officer, the Office Memorandum dated 3.4.1986, educational dislocation of the children and health ground, if present, deserved special consideration and that in view of the facts and circumstances of the case the transfer order in question in respect of the respondent was *mala fide*.

A Allowing the appeal, preferred by the Union of India and others, this Court,

B HELD: 1.1 An order of transfer is an incidence of Government service. 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 statutory provisions, the Court cannot interfere with it. There is no doubt that, while ordering the transfer 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, the husband and the wife must be posted at the same place. The said guideline, however, does not confer upon the government employee a legally enforceable right. Executive instructions issued by the Government are in the nature of guidelines. They do not have statutory force. [430-C-E]

D 1.2. There is no dispute that the respondent is liable to transfer anywhere in India. It is not the case of the respondent that the order of his transfer was vitiated by *mala fides* on the part of the authority making the order, though the Tribunal says so, merely because certain guidelines issued by the Central Government were not followed. The immediate superior of unit, against whom mischief had been attributed by the respondent, has nothing to do with his transfer. [430-F]

F 2.1. 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, as is evident from Article 323-A of the Constitution. The constraints and norms which the High Court observes while exercising the said jurisdiction apply equally to the Tribunal created under Article 323-A. The Administrative Tribunal is not an Appellate Authority sitting in judgment over the orders of transfer. It cannot substitute its own judgment for that of the authority competent to transfer. [430-H, 431 -A]

G 2.2. In the instant case, the Tribunal has clearly exceeded its jurisdiction in interfering with the order of transfer. The order of the Tribunal reads as if it were sitting in appeal over the order of transfer made by the Senior Administrative Officer (competent authority). [431-B]

H *Bank of India v. Jagjit Singh Mehra*, [1992] 1 S.C.C. 306, explained.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2348 of 1993.

From the Judgment and Order dated 13.7.1992 of the Central Administrative Tribunal, Guahati in O.A. No. 33/91.

Ms. K. Amareswari, B.P. Sarathy and C.V. Subba Rao for the Appellants.

P.K. Goswami, Kailash Vasdev, Ms. Lira Goswami and Ms. Alpana Poddar for the Respondent.

The Judgment of the Court was delivered by

B.P. JEEVAN REDDY, J. Heard counsel for the parties. Leave granted.

Respondent is a Garden Curator in the Office of the Scientist-SE, Botanical Survey of India, Eastern Circle, Shillong. By order dated January 29, 1991 he was transferred from Shillong to Pauri (Uttar Pradesh) by the Senior Administrative Officer, office of the Director, Botanical Survey of India, (Ministry of Environment and Forests, Government of India). As many as 19 persons were transferred under the said order, including the respondent. The respondent has been working in Shillong since the year 1979.

The respondent approached the Gauhati Bench of the Central Administrative Tribunal (Original Application No. 33 of 1991) questioning the order of his transfer. He submitted that his wife is also employed at Shillong in and office of the Central Government, that his children are studying at Shillong and further that he himself had suffered back-bone fracture injuries some time ago. He submitted that the guidelines contained in Government of India O.M. dated 3.4.1986 have not been kept in mind while ordering his transfer. He complained that some other officials who have been serving at Shillong for a longer period, have been allowed to continue at Shillong. He attributed 'mischief' to his Controller Officer, Shri B.M. Wadhwa (third respondent in the O.M.).

In the counter affidavit filed by the respondents, they submitted that the transfer was ordered on administrative grounds and is unexceptionable.

The learned Single Member of the Central Administrative Tribunal quashed the order of transfer on the following reasoning: the decisions of the Courts establish that the power of transfer is not an unfettered one but is circumscribed by various circulars/guidelines contained in the administrative instructions issued

- A by the Government. An order of transfer can be interdicted if it is discriminatory. The said principles are applicable to the case of the respondent. Further "in the matter of considering transfer of an individual officer, the Office Memorandum dated 3.4.1986, educational dislocation of the children and health ground, if all present, deserve special consideration not to pass the order." Having said so the learned Member recorded the following finding: "In view of the above facts and
- B circumstances and findings it is held unhesitatingly that the transfer order No. BSI. 80/5/80-Estt. dated 29.1.1991 in respect of applicant S.L. Abbas was *malafide* and liable to be quashed." The Union of India has preferred this appeal.

- C 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
- D 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
- E executive instructions issued by the Government in that behalf. Those instructions are in the nature of guidelines. They do not have statutory force.

- F Who should be transferred where, is a matter for the appropriate authority to decide. Unless the order of transfer is vitiated by *malafides* 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
- G however does not confer upon the government employee a legally enforceable right.

- H 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. The constraints and norms which the High Court observes while exercising the

said jurisdiction apply equally to the Tribunal created under Article 323-A. (We find it all the more surprising that the learned Single Member who passed the impugned order is a former Judge of the High Court and is thus aware of the norms and constraints of the writ jurisdiction.) The Administrative Tribunal is not an Appellate Authority sitting in judgment over the orders of transfer. It cannot substitute its own judgment for that of the authority competent to transfer. In this case the Tribunal has clearly exceeded its jurisdiction in interfering with the order of transfer. The order of the Tribunal reads as if it were sitting in appeal over the order of transfer made by the Senior Administrative Officer (competent authority).

Shri Goswami, learned counsel for the respondent relies upon the decision of this Court in *Bank of India v. Jagjit Singh Mehta* [1992] 1 S.C.C.306 rendered by a Bench of which one of us (J.S. Verma, J.) was a member. On a perusal of the judgment, we do not think it supports the respondent in any manner. It is observed therein:

“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.No doubt

- A *the guidelines requires 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."
- B

(emphasis added)

- C The said observations in fact tend to negative the respondent's contentions instead of supporting them. The judgment also does not support the Respondents' contention that if such an order is questioned in a Court or the Tribunal, the authority is obliged to justify the transfer by adducing the reasons therefor. It does not also say that the Court or the Tribunal can quash the order of transfer, if any of the administrative instructions/guidelines are not followed, much less can it be
- D characterised as *mala fide* for that reason. To reiterate, the order of transfer can be questioned in a Court or Tribunal only where it is passed *malafide* or where it is made in violation of the statutory provisions.

- E For the above reasons, the appeal is allowed. The judgment under appeal is set aside. There shall be no order as to costs.

N.P.V.

Appeal allowed.