

(1992) 04 AP CK 0037

In the Andhra Pradesh High Court

Case No : Writ Petition No. 3131 of 1992

C.V.V. Reddy

APPELLANT

Vs

Team Leader, Army Team Bharat Dynamics Ltd. and Others

RESPONDENT

Date of Decision : 15-04-1992

Acts Referred:

Constitution of India, 1950 — Article 14, 21, 226, 33, 5

Citation : (1992) 2 ALT 363 : (1993) 1 LLJ 194

Hon'ble Judges : V. Sivaraman Nair, J

Bench : Single Bench

Advocate : K. Gopala Rao, for the Appellant; K. Rajanna, for the Respondent

Judgement

1. In his first personal letter addressed to all officers of the Indian Army, its first Indian Commander-in-Chief, General K. M. Kariappa, laid out perspectives of the Army of the future. Among the various topics which he dealt with, one was transfer. He stated in that letter dated May 1, 1950, that :

"Transfer - I am sorry there have been, in the last two years, rather frequent transfers of some officers. This just could not have been and cannot be helped. It is often a question of officers who are sincere and suitable for appointments, being given their proper place as and when vacancies occur. If this is not done, officers then complain that they have been passed over. You cannot have it both ways. When things return to normal and our post-trouble army comes into being, I assure you no such frequent transfers will take place. We will then revert to the old policy of officers being kept on in their appointment for three or four years at a time and not moved out before, unless it is unavoidable.

I would like to ask you all, please not to talk loosely about these matters of promotions, appointments and transfers. I assure you my Military Secretary and staff always do their very best in all these matters to see every officer has a fair deal and also to avoid frequent transfers as far as possible. I give this matter my personal attention."

Wading through the pleadings in this writ petition, I have a lurking suspicion that the Army has miles to go before these promises are fulfilled. It seems that individual whims and fancies still prevail in those matters. That is the impression which I get, on a detailed examination of the affidavits filed on either side-as many as five altogether-with material papers, some of them repetitive-burdening the record.

2. It all started probably, because of a tiff between the first respondent-Team Leader of a Special Army Team and the petitioner who was one of the six officers under him. They were detailed to Bharat Dynamics Limited near Hyderabad. The assignment was in respect of Prithvi and Trishul missile projects of the defence research and developments efforts. The officers were handpicked by the Vice-Chief of Army Staff for their academic excellence and research orientations. We have got the details as far as the petitioner is concerned; and they are quite impressive. Equal, if not better, must be the record of the 1st respondent.

3. Petitioner was a merit scholar at Sainik School Korukonda (A.P.) from 1969 to 1976. He was a first ranker throughout and topped the school in mathematics and science. Naturally, he got an easy access to the National Defence Academy at Pune in August 1976. That led to his commissioning in the Army on June 7, 1980 in the Corps of Electrical & Mechanical Engineers. He joined the Military College of Electrical & Mechanical Engineering (MCE ME), Secunderabad. He secured over 80% of marks in the Degree course and was awarded MC EMR Commandant's Silver Medal for the best project in Mechanical Engineering. He secured nearly 95% of marks in the Graduate Aptitude Test for selection for M.E. Course in Indian Institute of Science, Bangalore. He secured very high first class in that course and was recommended for research scholarship for Ph.D. He could not pursue research, because he had been deputed by the Army otherwise. He has completed 12 years of service in various Commands in India. He was selected to a Special Army Team on the project Prithvi and Trishul on July 1, 1991. The Team is located at Bharat Dynamics Ltd., Kanchan Bagh, Hyderabad. The first respondent who has the rank of Lieutenant Colonel is the Team Leader. Since the Special Army Team has not been formed into a separate Unit, the seven officers in the Team including the petitioner and the first respondent, were attached to their local Units. Petitioner was posted to I-EME Centre, Secunderabad, whereas the 1st respondent was posted to 54th Artillery Brigade, since he belongs to Corps of Artillery. Respondent No. 2 who is the Commander of Artillery Brigade which is the parent Unit of the 1st respondent has to co-ordinate the development of Prithvi missile system including training and documentation.

4. Petitioner joined the Special Army Team on July 1, 1991. Internal relationship among the officers of the Team seems to have been cordial and satisfactory till the 2nd week of September, 1991. On September 19, 1991 there appears to have been a party organised by the Army Team. On September 20, 1991 petitioner did not report for duty, when the 1st respondent required to do so. He

sought leave (sick in quarters) due to illness and also the illness of his daughter as justifying his absence. The leave was granted by the officer holding charge in the absence of the Commandant of his parent Unit. The 1st respondent did not accept the genuineness of the cause for absence of the petitioner. He called for explanation of the petitioner for disobedience of command and non-collection of leave certificate as per rules in his Memo. dt. September 26, 1991. The 1st respondent took him to the 3rd respondent, Commandant of the petitioner's parent Unit namely-1 EME Centre at Bolaram, Secunderabad. Petitioner owned up his lapses as indicated in letter dt. September 26, 1991. He stated in writing that

"notwithstanding the implications of the same, I sincerely apologise for having taken a totally unwarranted egotistic stand and shall strive not to give you any cause for complaint."

I should have thought that the unpleasantness ended with the expression in writing of apology by the petitioner. Unfortunately that was not to be. On October 29, 1991 the 2nd respondent sent a letter to the Army Headquarters to transfer the petitioner out of the Army Team. This was followed by a movement order which the first respondent issued on November 1, 1991 ordering the petitioner to report back to 1 EME Centre. According to the petitioner, 1st respondent sought to justify the movement order by showing him a letter dated November 2, 1991 addressed by the 2nd respondent asking the Project Manager, Prithvi Army Headquarters, Delhi to post a relief immediately in the place of the petitioner. That statement, if it had been made, was obviously incongruous, since a letter dated November 2, 1991 could not be the reason for a transfer dt. November 1, 1991. The movement order did not contain any reference to any authority in support thereof. The letter which the 2nd respondent addressed to the Army Head Quarters, seems to have stated that the over-all performance of the petitioner was indicative of a negative approach and he should be replaced immediately since he was being returned to 1 EME Centre, Secunderabad. Petitioner submits that this letter was inspired by the undue pressure exerted by the first respondent and that the facts stated therein condemning him for his conduct and lack of contributions to and achievements in the project, were factually incorrect. All these comments were consequent on and with reference to the incident of September 25, 1991 as seems to be evident from the letter which the 1st respondent sent to the second respondent on November 2, 1991. The 2nd respondent did not take the trouble of verifying the facts as reported to him by the 1st respondent. It was without any attempt at verification or conciliation or counselling as was obligatory that the 2nd respondent recommended the replacement of the petitioner in the Army Team. The Army Headquarters, however, in its letter dt. November 20, 1991 held that the first respondent had no authority to issue the movement order and therefore, the petitioner would continue as a member of the Team. As a matter of fact, the 3rd respondent had, in his letter dt. November 11, 1991 informed the Army Headquarters that the movement order dt. November 1, 1991 issued by the 1st respondent was without

authority and that it was causing considerable financial loss, humiliation and harassment to the petitioner. He also pointed out that the Controller, Defence Accounts would not accept the movement order issued by the 1st respondent to grant the petitioner the allowances, thus depriving him of his due entitlements. He, therefore, stated that "the onus to regulate/compensate the monetary loss incurred by the petitioner will rest with your officer." In a Signal dt. November 19, 1991 to Army Headquarters which referred to the communication dt. November 11, 1991 of the 3rd respondent had stated that authority for the movement order dt. November 1, 1991 was not given in that order and the petitioner was now held with 1-EME Centre, Secunderabad. In movement order dt. November 30, 1991 the 3rd respondent returned the petitioner to the Army Team at B.D.L., Hyderabad. The 1st respondent, on receipt of movement order dt. November 30, 1991 however, required the petitioner to proceed on leave from December 2, 1991 to December 7, 1991 with permission to prefix 1st and suffix 8th of December 1991, being Sundays due to "administrative reasons". On expiry of leave, he was to report to the 1st respondent.

5. It appears that, in the mean-time, respondent No. 2 addressed a Signal dt. November 28, 1991 to the 4th respondent with reference to a letter dt. November 12, 1991 of the Project Manager, Prithvi to Director EME (Personnel). Petitioner submits that the letter dt. November 12, 1991 referred to above was written in pursuance of intimation from 1st and 2nd respondent about what they called the "highly irresponsible and immature conduct of the petitioner" and requested that he be posted back to EME Center, Secunderabad with effect from November 2, 1991. Petitioner asserts that the 4th respondent, on receipt of the signal from the 2nd respondent, wrote to respondent No. 5 on December, 3, 1991 to transfer him out of the Army Team. He also refers to the fact that the 2nd respondent had found the petitioner unsuitable for continued assignment in the Army Team. Letter of the 2nd respondent dt. October 29, 1991 to that effect was alleged to have been enclosed in support of that statement. It was pursuant thereto that the 5th respondent issued a signal transferring the petitioner from 1-EME Centre, Secunderabad to 43-EME Battalion in Telegram No. 389339/MS/EME dt. December 20, 1991. Petitioner submits that the Vice-Chief of Army Staff having been instrumental in selecting the Team of Officers for assignment to project Prithvi and Trishul, the Vice-Chief of Army Staff ought to have been consulted or at least informed of his posting out of the Team. According to the petitioner, respondents, 1, 2, 4 and 5 adopted a well orchestrated maneuver to post him out of the Army Team and also out of the station before the normal tenure of three years expires. He submits that his immature transfer out of Secunderabad was illegal, arbitrary and discriminatory in that it violated the norms. He also submits that there existed no administrative or service exigency which required a justified departure from the ordinary rule. It is his submission that he could have been transferred out to 43 EME Centre, Srinagar, in the usual course, only through Andhra Sub Area, Secunderabad, Area Headquarters, Madras, Command Headquarters, Pune and Army Headquarters, Delhi. Petitioner

submits that instead of adopting this usual procedure, respondents 1, 2, 4 and 5 acted in indecent haste and on the sly to harass, punish and victimise him for not having fallen in line with the individual fancy and exaggerated superiority complex of the 1st respondent; Petitioner submits that there was no such urgency or immediate exigency of service requirements to post him to 43 Batallion, Srinagar, because soon after his transfer to Srinagar, he was granted leave for 60 days which was due to expire on March 6, 1992.

6. On February 1, 1992 petitioner addressed a letter to Maj. Gen. J. S. Ahulwalia, Colonel Commandant of E.M.E. requesting for cancellation of his transfer. In letter dated February 6, 1992, he was informed that :

"The case has been discussed with MS-16 by the Col. Comdt. and there is no change being made by them at present."

7. On February 8, 1992 he sent a representation to the Additional Director General, EME (Per & Admn.), New Delhi requesting that :

"Before my move is physically carried out in March, 1992 may I request you to enable issue of necessary posting diversion so that I could complete a normal tenure in station."

8. Petitioner had sent a representation dt. January 3, 1992 requesting that he may be posted to a technically challenging assignment-MC EME or MAG or MSQAA or DRDD. The 3rd respondent in his recommendations dt. January 10, 1992 stated that :

"However in view of the fact that the officer possesses high technical educational qualification it is recommended he be given a posting to an establishment like MC EME or HR Tech. G.P. where the Orgn. can make use of the Officer's expertise."

9. Col. J. S. Kapoor, Joint Director (Production) Missile System Quality Assurance Agency (MSQAA), Hyderabad sent a note adverting to the transfer of the petitioner to 43 EME Batallion. He stated that :

"It appears his posting out is due to some mishandling/misunderstanding. He is a Prithvi Trained officer and posting him to EME Bn (Transport) will be waste of a trained officer. Since there exists a vacancy of a Major with MSQAA at Hyderabad and a Prithvi trained officer can be more gainfully employed, it may be a good idea to redirect his posting to MSQAA, Hyderabad from 43 EME BN (Transport). This redirection of posting will have twin advantages of avoiding a move of the officer within a short period and using an officer on a job where he can put his training to use.

Commander TG may consider taking up this matter with Army Headquarters for issue of the posting orders as suggested above."

10. In spite of all the above proposals to retain the petitioner in the interests of the services, the Additional Director General EME (Personnel and Administration)

replied on February 14, 1992 to petitioner's representation dt. February 8, 1992 to the following effect :

"I have got the case examined by the appropriate authority. It will not be possible to divert your posting as desired. You are advised to move to the new unit accordingly.

11. From the files produced by the Addl. Central Government Standing Counsel, it appears that the Southern Command Headquarters of the EME at Pune in its letter dt. March 6, 1992 turned down a request of the 3rd respondent proposing diversion/cancellation of posting of the petitioner as suggested in letter of latter dt. January 28, 1992. That saw the end of the efforts of the petitioner to seek redressal to his grievance through staff channels. Petitioner submits that he came to this court, having exhausted all normal remedies available to him.

12. Petitioner submits that his relationship with the 1st respondent in the Special Army Team and with other officers in the unit was extremely cordial till it was disrupted by the incidents on November 20, 1991 and November 25, 1991 which were referred to above. According to him, he was forced to take leave on 20th because of genuine sickness and he went out of quarters as his child took ill in the meantime. He could not have avoided taking his child for treatment. He submits that his own medical condition and the fact that he had taken the child to the hospital to a Military Doctor are evidenced by records of the MI room. He also submits that whatever be the faults which he had committed on those two occasions, he had apologised to the 1st respondent in writing on September 26, 1991. He asserts that thereafter, the 1st respondent took him to the 3rd respondent who congratulated both of them for having patched up their differences and reconciled with each other. Petitioner submits that deficiency in his conduct, and his alleged unsuitability for continuance in the Special Army Team at Bharat Dynamics Limited were discovered later as a part of a witchhunt and an orchestrated effort to drive him out of the Special Army Team and to unceremoniously kick him out of the station, hardly six months after his three year tenure had commenced. He submits that there was undue anxiety on the part of respondents 1, 2 and 4 to act on the sly to post him out in deviation of the norms because the normal channel to route a proposal to transfer him out of the station, would have been through Andhra Sub Area, Area Headquarters at Madras, Command Area Headquarters, Pune and thereafter, the Army Headquarters. He submits that instead of closing the disciplinary case on the basis of the written apology which he tendered as desired by the 1st respondent and pursuant to personal discussion he and the first respondent had with the 3rd respondent, respondents 1, 2 and 4 initiated proposals to transfer him out alleging unsuitability and immaturity to him. He submits that the entire normal process was short-circuited to wreak vengeance on him for his refusal to be cowed down to unreasonable dictates of the 1st respondent. He submits that the 5th respondent was beguiled into the offending action by the highly motivated information which respondents 1 and 2 fed him through the 4th respondent. He

also submits that the action which the 5th respondent took in ordering his transfer and in refusing to reconsider the same in spite of the positive recommendations of the 3rd respondent and Col. J. S. Kapoor, Joint Director (Production) of MSQAA reveals malice in law, since relevant matters were deliberately over-looked.

13. The 1st respondent has filed a counter affidavit. He has reiterated that the petitioner was found to be unsuitable and his conduct unsatisfactory. He has also denied the allegations which the petitioner has made against him. He has also asserted that the boot is on the other foot. I do not propose to go into the details excepting to state that the allegations and counter allegations which have been exchanged indicate in unmistakable terms that there is no love lost between the two. I do not therefore, propose to delve into the details regarding what transpired on September 20, 25, 1991 between them or what preceded or followed. Suffice it for me to state that the differences between them did persist even after and inspite of the written apology which the petitioner tendered on September 26, 1991. The 1st respondent did persist in moving the petitioner out of the Special Army Team, initially by issuing a movement order which he has no authority to make. When the Army Headquarters rescinded that order and the petitioner was re-posted to the Special Army Team on November 30, 1991 the 1st respondent required the petitioner to proceed on leave with immediate effect from December 1, 1991 to December 8, 1991. It was in the meantime that messages were exchanged between respondent 1, 2, 4 and 5 which ultimately resulted in the impugned Signal to the Army Headquarters dt. December 20, 1991 transferring the petitioner from 1 EME Centre, Secunderabad to 43 EME Battalion, Srinagar.

14. The 1st respondent has asserted in his counter affidavit that the petitioner having been posted out from 1 EME Centre, Secunderabad, as per EME Centre Movement Order dt. January 9, 1992, his name was struck out of its strength with effect from January 10, 1992. In the meantime, he submitted his application for leave on December 30, 1991 to 1 EME Centre, Secunderabad. On the same day 43 EME Battalion was addressed for permission to allow the petitioner to proceed on annual leave. It is asserted that leave was sanctioned by 43 EME Battalion in their Signal No. Q. 8016 dt. January 4, 1992. Petitioner filed this writ petition on March 4, 1992. The 1st respondent submits further that petitioner ought to have requested for cancellation of his posting u/s 27 of the Army Act or submitted a representation against his transfer under Para 361 of the Army Regulations. He submits that approach to this court without exhausting statutory remedies available under the Army Act and Regulations should not be encouraged. He also submits that it is improper on the part of the petitioner to voice his grievance and make allegations against superiors in the Army before the Court without voicing such grievances and complaints before any Army Forum. The 1st respondent submits that petitioner's impression of his indispensability either for the Army Team or for EME Centre at Secunderabad or to MC EME or MSQAA is not justified. He also asserts that the desire of the

petitioner seems to be to continue at Secunderabad as long as possible, because he belongs to Srisailem which is a place nearby. He also states that excepting for a period of less than four years, petitioner had not served in the field and the requirements of Field Service are such that his transfer to Srinagar in the exigencies of Defence requirements, cannot be successfully assailed in these proceedings. He asserts that the impression which the petitioner has sought to create that his services were required in the Defence Research and Development Laboratory, MC EME, MSQAA or other Research oriented Defence Organisations at Secunderabad only indicates his anxiety to continue in Secunderabad at any cost, irrespective of Defence requirements. He therefore, submits that no relief may be granted to the petitioner.

15. This counter affidavit provoked a fairly lengthy reply affidavit running in 35 pages and 25 paragraphs. Not to be left behind, an additional counter affidavit was filed on behalf of the respondents. It is unfortunate that the additional counter affidavit containing caustic comments about the petitioner was filed by the comparatively junior officer of 1 EME Centre, even though respondents 1 to 3 were very much present at Secunderabad. Respondents 1 and 2 who seem to make a fetish of army discipline should not have made a subordinate to make controversial assertions to defend them. Apparently not to be outsmarted by the petitioner, the additional counter affidavit runs into 16 pages and 27 paragraphs. Both have produced additional material papers. Petitioner then filed a reply affidavit to the additional counter affidavit. That runs into 27 paragraphs and consists of 22 pages.

16. I had virtually to wade through a lot of pleadings and lot more of documents. I heard impassioned pleas of counsel on both sides. Sri. K. Gopal Rao, counsel for the petitioner, submitted that the self-respect of any officer in the Army is as important as discipline among officers. He submitted that they shall not be treated as slaves having no rights. They are entitled to rights as any other citizen and seek enforcement of such rights in courts. Sri Rajanna, Additional Central Government Standing Counsel pleaded that it is desirable that the court does not interfere with attempts of superior officers in the Army to enforce discipline or to order transfer in the exigencies of Defence requirements. He submitted that the Army Act and the Regulations have provided sufficient safeguards for officers and men to voice their grievances before superiors and it is undesirable that allegations and counter allegations are traded in proceedings in courts. He submits that such proceedings, if permitted, will be disruptive of discipline in the Army and therefore, the court shall exercise considerable restraint in dealing with problems of Army life and its internal discipline.

17. I had indicated to counsel after hearing them that in a case of conflicting egos, it is not for this court to decide as to who shall remain and who shall go out of a particular Army unit or Team. Nor will it be possible or desirable for the court to direct that an officer should be continued in a Unit in spite of proved hostility between him and the Leader of the Team. It is not for me therefore, to

consider whether the movement order whereby the petitioner was withdrawn from the Special Army Team at Bharat Dynamics Limited, Hyderabad, was correct and justified. Even otherwise, he has not chosen to avoid his transfer out of the Army Team at Bharat Dynamics Limited, Hyderabad. The only question for my consideration therefore, is the validity of the transfer of the petitioner from 1 EME Centre, Secunderabad to 43 Battalion, Srinagar by the impugned Headquarters Signal (Telegram) dt. December 20, 1991.

18. Parties joined issue on the scope of interference with an order of transfer in exercise of jurisdiction under Article 226 of the Constitution of India. Counsel for the petitioner submitted that the order of transfer was contrary to the usual norms and was meant to harass the petitioner by transferring him out of Secunderabad before the normal term of his tenure at that station expires. He submitted that no administrative exigency justified his transfer. He also submitted that there is no justification to depart from the ordinary norms or procedure for sending him to Field posting. Counsel submitted that the petitioner has worked for about 56 months in Field postings-15 months in Baramula in Jammu & Kashmir, 17 months in Jaipur in Rajasthan, 17 months in Dingjon and 7 months in Aalong. He submitted further that according to the Rules and Orders and the assurances contained in communications from the Headquarters he was entitled to serve in Secunderabad for a minimum period of three years before being posted out. He submits further that there must have been compelling reasons why he should have been posted out before the expiry of the normal period. He insisted that none has been shown to exist. According to him, respondents plead that his normal period could be curtailed and the procedure could be short-circuited in the exigencies of administrative requirements. But no such administrative exigency as justifying the short circuit procedure or the reduction in the normal tenure in a station, has been pleaded or proved by the respondents. He submits therefore, that the transfer out of the station in a manner not warranted by the usual procedure without stating any extraordinary or exceptional circumstances justifying such departure, is vindictive, mala fide and arbitrary. It is on the basis of these submissions that he seeks to avoid the order of transfer. He submits that the impugned order completely ignored the recommendation of the 3rd respondent to retain him in Secunderabad in MC EME or HQ Tech. group so that his technical qualification and expertise may be more profitably utilised and the recommendation of the Jt. Director MSQAA to provide the petitioner in a vacancy of a Major available in that organisation.

19. Counsel for the respondents submits that orders of transfer shall not be usually interfered with and courts shall definitely desist from doing so in cases of transfers in the Armed Services, which may be required by reasons of security of the country and exigencies of the Defence Services. He submits that the petitioner ought to have complained under Clause 361 of the Regulations of Section 27 of the Army Act. He could have obtained redress if he had a genuine case against the transfer. He submits that it is not for the petitioner to challenge the wisdom of his superiors in issuing administrative orders by resorting to

proceedings under Article 226 of the Constitution of India. Counsel submits that any such attempt will be disruptive of internal discipline.

20. Respondents were at pains to point out that the petitioner had worked in Secunderabad for more than four years and his only anxiety was to cling to his post, because he belongs to a place near Srisailem in Andhra Pradesh. Petitioner controverted this assertion. On a scrutiny of the pleadings and the documents, I find that the alleged period of 48 months of posting in Secunderabad consisted of 18 months when he was a student in the Military College of Electrical and Mechanical Engineering, Secunderabad, and a further period of seven months in the same institution in addition to the period of six months when he was attached to Special Army Team. I do not find any justification in asserting that the petitioner was seeking to overstay the normal period of three years at Secunderabad.

21. Counsel for the respondents relies on the decisions of the Supreme Court in Gujarat Electricity Board and Another Vs. Atmaram Sungomal Poshani, and M. Doss v. Senior Divisional 445., Ex-Havildar Ratan Singh Vs. Union of India (UOI) and Others, ., and Major G.S. Sodhi Vs. Union of India (UOI), . He also relies on the decisions of the Central Administrative Tribunal in Ashok Kumar Sabharwal v. Union of India 1988 (1) CAT 498, Kamalesh Trivedi v. Indian Council of Agricultural Research (AIR) 1988 (2) CAT 116., N. Dandapani v. The Engineer-in-Chief, Army Headquarters, North Delhi and others (AIR) 1989 (2) CAT 462, V. K. Srivalsan v. Central Provident Fund Commissioner 1991 (5) SLT 365 and M. Doss v. Senior Divisional Mechanical Engineer (AIR) 1988 CAT 610 in support of the submission that the court may not interfere with orders of transfer.

Counsel for the petitioner relied on a decision of the Calcutta High Court in Sovan Lal Chatterjee v. State 1992 (1) SLT 485.

22. The propositions laid down by these decisions had dealt with cases of transfer in different fact-situations and from different perspectives. I had occasion to consider the same question at length in a recent decision in W.P. No. 14314/91 dt. November 25, 1991.

23. The proposition is clear that if a discretionary power is exercised for an unauthorised purpose, it is generally immaterial whether the authority acted in good faith or not. In Pilling v. Abergele Urban District Council 1950(1) K.B. 636, Lord Goddard, Chief Justice observed that :

"..... 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."

In Queen on the Prosecution of Rechar Westbrook v. Vestry of St. Pancras

1890(24) QBD 371, Lord Esher M.R. observed that :

"..... 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.

In *S. R. Venkataraman v. Union of India* 1979 I LLJ 25 following the above observations, the Supreme Court held that :

"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."

24. I have to test the arguments addressed before me on this touch stone. In *Smt. S.R. Venkataraman Vs. Union of India (UOI) and Another*, , the Supreme Court observed that :

"The authorities ordering transfer of employees are bound to act in a reasonable manner and any complaint of unreasonableness must be considered by the authority superior to that which orders transfer."

The same view was expressed in *B. Varadha Rao Vs. State of Karnataka and Others*, that : at paras 5 and 6 -

"It is no doubt true that if the power of transfer is abused, the exercise of the power is vitiated" and "one cannot but deprecate that frequent, unscheduled and unreasonable transfers can uproot a family, cause irreparable harm to a Government servant and drive him to desperation. It disrupts the education of his children and leads to numerous other complications and problems and results in hardship and demoralisation. It ... should be reasonable and fair should apply to everybody equally."

25. In *Gujarat Electricity Board and Another Vs. Atmaram Sungomal Poshani*, Supreme Court observed that :

"Transfer of a Government servant appointed to a particular cadre of transferable posts from one place to the other is an incident of service. No Government servant or employee of Public Undertaking has legal right for being posted at any particular place. Transfer from one place to other is generally a condition of service and the employee has no choice in the matter. Transfer from one place to another is necessary in public interest and efficiency in public administration. Whenever, a public servant is transferred he must comply with the order; but if there be any genuine difficulty in proceeding on transfer, it is open to him to make representation to the competent authority for stay, modification or cancellation of the transfer order. If the order of transfer is not stayed, modified or cancelled the concerned public servant must carry out the order of transfer. In the absence of any stay of the transfer order, a public servant has no justification to avoid or evade the transfer order merely on the ground of having made a

representation, or on the ground of his difficulty in moving from one place to the other. If he fails to proceed on transfer in compliance to the transfer order, he would expose himself to disciplinary action under the relevant rules, as has happened in the instant case."

26. It is well to remember that *Atmaram* (supra) dealt with quite extraordinary facts. A Deputy Engineer of the State Electricity Board who was transferred on March 29, 1974 and relieved on the next day, refused to join the new station on the ground that he had made a representation requesting for cancellation of his transfer. When his representation was rejected, he filed a civil suit. In the meantime the Chief Engineer discharged the officer from service by order dt. May 27, 1974 with effect from March 31, 1974 under Service Regulation 113. He filed a writ petition assailing the order. A single judge of the Gujarat High Court held the order of discharge void and inoperative but did not grant any consequential relief in view of the recalcitrant conduct of the officer. On appeal, a Division Bench of the High Court directed all consequential reliefs of reinstatement with continuity of service, arrears of salary, seniority, promotion etc. The Electricity Board appealed against that judgment before the Supreme Court. A reading of the decision clearly shows that it was the recalcitrance of the transferred officer in complying with the order, his continued disobedience and absence from duty that provoked the Supreme Court to make the (above) observations.

27. In *Union of India v. H. N. Kirtania* (supra) the Supreme Court observed :

"Transfer of a public servant made on administrative grounds or in public interest should not be interfered with, unless there are strong and pressing grounds rendering the transfer order illegal on the ground of violation of statutory rules or on ground of mala fides".

28. Shorn of the facts, the principle as enunciated above by the Supreme Court makes the position of the petitioner more plausible rather than assist the respondents.

29. In *Merricks v. Nott Bower* 1964(2) WLR 702 , Lord Denning observed as follows :

"It is a well-known principle of our law that any power conferred by statute or regulation on an executive or administrative authority must be exercised in good faith for the purpose for which they are granted. They must not be misused or abused by being applied to an ulterior purpose. Whether that principle applies here or not, I do not stay; all I do say is that ... this was a misuse of the power of transfer, that it was used, not for the purpose of good administration and efficiency but for the motive of punishment ... they have an arguable case which they are entitled to have tried by the Courts."

30. I had occasion to deal with the same question at considerable length in *G. Babu Vs. Chief Engineer (PS and GL) and Others*, , Kerala where, on review of all

the relevant decisions that far, I had held that it was open for the court, of course in very limited circumstances, to investigate whether the power of transfer was exercised for legitimate purposes, in compliance with the accepted procedure and for genuine administrative reasons or in public interest. The decisions of the Supreme Court which I have referred to, on some of which petitioner places considerable reliance, are H. N. Kirtania (supra) and Atmaram (supra) which make it abundantly clear that if there are strong and pressing grounds rendering the transfer order illegal on the ground of violation of statutory rules or on the ground of mala fides, it is open to courts to interfere. Varada Rao (supra) makes the position clear beyond any dispute that frequent unscheduled and unreasonable orders of transfer which can have the effect of uprooting a family, cause irreparable harm to the Government servant, drive him to desperation, disturb the education of his children and will lead to enormous other complications and problems resulting in hardship and demoralisation, can be interfered with, on the ground of arbitrariness, since rules, orders or principles relating to transfer must apply to everybody and equally.

31. In the light of these principles emanating from the decisions of the Supreme Court, I do not think it necessary to refer to various decisions of the Central Administrative Tribunal which counsel for the respondents has chosen to cite. Even otherwise, they do not lay down any different proposition. Ashok Kumar Sabharwal (supra) M. Doss (Supra) and V. K. Srivasalan (supra) dealt with cases where there was conflict of personalities in the unit of appointment which justified administrative orders of transfer in the exigencies of service. The Tribunal refused to look further into the allegations of the officer who was transferred. That principle is unexceptionable. I need not consider these decisions even otherwise, because the petitioner has not challenged before me the order whereby he was transferred out of the Special Army Team. His challenge is confined to his transfer out of 1 EME Centre, Secunderabad.

32. In Kamalesh Trivedi (Supra) a Full Bench of the Central Administrative Tribunal considered the question whether after conducting an enquiry under Article 311(2) and finding the Government servant guilty, the competent authority can transfer him without stating any reason. The Full Bench held that :

"Any order of transfer must be in public interest and in exigency of service on administrative ground. It must not be in colourable or mala fide exercise of power. It should not be arbitrary. It must be made by a competent authority in accordance with the rules and the instructions, if any, governing the transfer policy. But how far a transfer policy is mandatory, we express no opinion in this case. That must depend on the wording/intendment of the instructions embodying the transfer policy. The transfer must be ordered by a competent authority in bonafide exercise of power. It should not be a "fixed" transfer or for settling scores. However, merely because transfer is ordered on complaints or after an inquiry into the guilt of the employee, it cannot be said to be by way of punishment. The principle that justice should not only be done but appear to be

done is not contravened if transfer is made without any further inquiry after a penalty is imposed in a proper disciplinary proceedings. It does not amount to double jeopardy."

34. I am of the opinion that the above case does not render any assistance to the respondents. On facts, it was found that the complaints against the petitioner were justified, after conducting a detailed disciplinary enquiry according to the rules. Instead of imposing punishment, the competent authority felt that a transfer would be sufficient. The Government servant assailed that order on the ground that though the order was worded as an innocuous order of transfer, it was really an order of punishment and was therefore unsustainable.

35. I am of the opinion that the principle laid down in that decision is confined to facts found therein as mentioned above. In the present case, such circumstances are not available. There was no disciplinary enquiry against the petitioner. For all intents and purposes, the 1st respondent accepted the written apology which he tendered on September 26, 1991. No proceedings were continued thereafter. No findings were entered against him. He was not held liable to be penalised. It was not held liable to be penalised. It was not in substitution of a punishment for any proved misconduct as a member of the Special Army Team that he was transferred out of 1 EME Centre, Secunderabad. On these facts which are undisputed, I hold that the principle of the decision in Kamalesh Trivedi (supra) does not apply against the petitioner in the facts of the present case.

36. The Supreme Court in Major G. S. Sodhi (supra) while considering a petition under Article 32 of the Constitution of India against the proceedings of a Court Martial against Army Officer on allegations of mala fides and parties trading allegations against each other, held that it would not make a roving enquiry into allegations and counter allegations relating to the conduct of the Court Martial proceedings. I have adopted the same course and have refrained from delving into allegations and counter allegations raised by the petitioner and respondents one against the other in relation to the rupture in their relationship which commenced from September 20, 1991, nor do I propose to enter a finding as to who was right or wrong. I do not propose to conduct an enquiry as to which of those allegations are correct or which are entitled to more weight than the other. I have cautioned myself that I do not have to consider the propriety or validity of the order whereby the petitioner was transferred out of the Special Army Team. Allegations are relevant only for the purpose of deciding as to whether the petitioner is right in his submission that respondents 1, 2, 4 and 5 devised a well orchestrated manoeuvre to transfer the petitioner out of Secunderabad on the sly and that was not supported by any administrative exigencies or Defence requirements.

37. Ex. Havildar Ratan Singh (supra) dealt with Summary Court Martial of a member of the Defence Force who deserted his post at a crucial moment and was tried for serious offences punishable under clauses (a) and (h) of Section 34 and Section 120 of the Army Act. The observations contained in that decision

relating to the seriousness of the offence of a person who deserted his post at a critical moment, cannot have any application to the facts of the present case.

38. Section 27 of the Army Act 1950 indicates a remedy for aggrieved officers in the following terms :

"Any officer who deems himself wronged by his commanding officer or any superior officer and who on due application made to his commanding officer does not receive the redress to which he considers himself entitled, may complain to the Central Government in such manner as may from time to time be specified by the proper authority."

39. In the literal sense, there is an alternative statutory remedy available to the petitioner. But I find that in the facts and circumstances of this case, there is nothing wrong in his not resorting to that remedy. The facts which are undisputed fully justify the approach of the petitioner to this court. The facts which are not disputed are the following.

40. Petitioner was transferred and attached to the Special Army Team, at Secunderabad on July 1, 1991. Such posting in the Special Army Team or otherwise entitled him to continue in that station for the normal period of three years. There is no dispute about the effect of the Rules in that regard. In the normal course, his transfer would have been processed through Andhra Sub Area, Area Headquarters at Madras, Command Area Headquarters at Pune and the Army Headquarters at Delhi. In the present case, admittedly this procedure was short-circuited by respondents-respondent No. 1 initiating the proposal, respondent No. 2 following it up with the aid of a letter from the Project Manager, Bharat Dynamics Limited, and the 4th respondent of receipt of the same, proposing his transfer to 43 EME Centre. The principles which should be "reasonable and fair and should apply to every body equally", as found in R. Vardha Rao's case (supra) were admittedly not followed. So was the procedure in initiating and finalising the proposal for transfer of the petitioner. On both grounds there was departure from the normal course. Far more important is the fact that though respondents plead that the transfer was effected by short-circuited procedure in the exigencies of service by a signal (Telegram) of the Army Headquarters dt. December 20, 1991, petitioner was granted leave for 60 days administrative exigencies justifying departure from the norms and the usual procedure. Though the petitioner was required to join duty on January 13, 1992, 43 EME Centre did not find any difficulty in granting him leave upto March 6, 1992. It is clear that there was absolutely no justification for the departure from the ordinary procedure in initiating and finalising the transfer of the petitioner. If exigencies demanded the respondents to act otherwise than in usual channel-namely through Andhra Area, Area Headquarters, Command Headquarters and the Army Headquarters, they could have shown that by definite pleadings. It is clear from the pleadings that respondents 1, 2, 4 and 5 were instrumental in devising a departure from the ordinary course and in passing an order which was not justified in the light of the principles" which apply to every body equally". In

Kamlesh Trivedi (supra) a Full Bench of the Central Administrative Tribunal held :

"Transfer must be made by a competent authority in accordance with Rules and the instructions if any governing the transfer policy".

There is a departure from the transfer policy and that departure, unless supported by valid and cogent reasons, has to be struck down in terms of the decision in S. R. Venkataraman (supra) and the other decisions of the Supreme Court which I have referred to above.

41. It is clear, that petitioner had submitted representations to the Colonel Commandant, Corps of EME, Delhi on February 1, 1992 requesting for cancellation of his posting to EME Centre, stating that :

"I could be more fruitfully employed in MSQAA on Prithvi Missile system or in MC EME."

He requested for order of retention before expiry of his leave. That request was turned down on February 6, 1992. Petitioner has also filed another representation to the Additional Director General of EME on February 8, 1992 requesting that :

"Before my move is physically carried out in March, 1992, may I request you to enable to issue of necessary posting diversion so that I could complete a normal tenure in station."

That was also turned down in letter dt. February 14, 1992. Petitioner submits that any approach to the Government of India would have served no purpose, because it would have taken more than six months to respond in any manner. He had approached his superiors with entreaties against the unusual order of transfer, but they turned a deaf ear instead of examining his request with reference to the attendant facts and circumstances involved and the availability of posts in Secunderabad to retain him. Had there been even a assurance that the case of petitioner will receive unbiassed attention, I would have relegated him to departmental remedies. But he cannot be banished at the threshold in spite of the obviously negative response of his superiors. I am therefore, satisfied that the petitioner is right in approaching this court by filing this writ petition under Article 226 of the Constitution of India assailing his transfer order.

42. Counsel for the respondents submits that internal discipline of the Defence Forces which is the very core of its existence and its excellence will be disrupted if officers or men of the Defence Services are encouraged to challenge order of their superiors in courts. He submits that the need of a disciplinary force engaged in the defence of the country, shall get the highest priority in such circumstances.

43. All along this judgment, I have cautioned myself with specific reference to the need for self-restraint in dealing with complaints of defence personnel. However, that shall not mean that the defence personnel are not entitled to raise

their voice of protest when their rights fundamental or otherwise-are trampled upon. Occasions are not a few when courts have interfered to safeguard the rights of service personnel. They are as much self-respecting citizens of this country as any one else is. They are not mercenaries spoiling for gain. They are dedicated soldiers who have sworn to lay down their lives if need be for the defence of the country. They shall not be dealt with any less honour and respect than other citizens. They are as much entitled as any other citizen to enforce their right to equality, subject of course to Constitutional and other limitations. They are entitled to seek fulfillment of the promises laid out in the perspective for Indian Army of the future which the first Indian Commander-in-Chief visualised in his letter dt. May 1, 1950.

44. In *Ranjit Thakur Vs. Union of India (UOI) and Others*, at para 10 the Supreme Court held that :

"The competent Authority under the Army Act can be compelled to comply with the procedural safeguards."

45. The court relied on the famous dictum laid down by Justice Frankfurter in *Vitarelli v. Seaton* 359 US 535 to the following effect :

"If dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed ... this judicially evolved rule of administrative law is now firmly established and, rightly so. He that takes the procedural sword shall perish with the sword."

46. The same principle finds its reverberations in *Benjamin M. C. Nabby. U.S. 1942 (318) U.S. 332* to the following effect :

"The history of liberty has largely been the history of observance of procedural safeguards."

47. In *Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others*, the Supreme Court had occasion to consider the question whether persons subject to Army Act cannot enforce rights under Articles 5 and 21 of the Constitution of India. The Court held that :

"Reluctance of the apex court more concerned with civil law to interfere with internal affairs of the Army is likely to create a distorted picture in the minds of the military personnel that persons subject to Army Act are not citizens of India. It is one of the cardinal features of our Constitution that a person by enlisting in or entering Armed Forces does not cease to be a citizen so as to wholly deprive him of his rights under the Constitution. In the larger interest of national security and military discipline, Parliament in its wisdom, may restrict or abrogate such rights in their application to the Armed Forces, but this process should not be carried so far as to create a class of citizens not entitled to the benefits of the liberal spirit of the Constitution. Persons subject to Army Act are citizens of this ancient land having a feeling of belonging to the civilised community governed by

the liberty-oriented Constitution. Personal liberty makes for the worth of human being and is a cherished and prized right."

48. Right to equality is emphasised in the decision in S. R. Venkataraman (supra). It is the same thread of reasoning which we find in R. Vardha Rao (supra) H. N. Kirtania (supra) Merricks (supra) G. Babu (supra) and Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others, .

49. It is clear that rules and instructions governing transfers ensure that, ordinarily, the petitioner will have a tenure of three years at a station. He was transferred to Secunderabad on July 1, 1991. It is not that this term shall not be curtailed. It may be so done in the exigencies of service. But such exigencies must be manifest when it is called in question. It is evident that there was departure from the normal procedure in ordering transfer of the petitioner. When challenged, it must be shown why it was so done. Respondents have not divulged the "why" on these two counts. The result is that the petitioner is right in his submission that he was chosen for hostile treatment and for no reason at all, and that there was no administrative exigency justifying his transfer. If that complaint is right, there has been infraction of his rights under Article 14 of the Constitution of India. It is true that Article 33(a) of the Constitution of India enables the Parliament to restrict or abrogate the rights conferred by Part III in their application to members of the Armed Forces. The Parliament has spoken through the Army Act. That does not preclude the petitioner from assailing in this court, the infraction of his right to be treated equally like his colleagues in the matter of transfer. I find that such right which is founded on the solemn promise which the Commander-in-Chief of India conveyed to all officers and men as far back as on May 1, 1950 and the norms adopted pursuant thereto have been infringed by the impugned order to transfer. I also find that the petitioner is entitled, as any other citizen of India, to seek remedy from this court to avoid such infringement.

50. In this view I allow the writ petition and declare that the Signal (Telegram) of the Army Headquarters dt. December 20, 1991 transferring the petitioner to 43 EME Battalion is illegal, invalid and inoperative. All other consequential orders also stand vacated. The claim of the petitioner to be retained in Secunderabad, Andhra Pradesh in accordance with the ordinary norms of transfer for the normal period of three years in any other Research or technical organisation like MC EME, MSQAA, DRDL or Technical HQ if not in 1 EME Centre, Secunderabad, will be duly considered. No order as to costs.