
(2021) 08 GAU CK 0008

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 3204 Of 2021

Karge Kamki

APPELLANT

Vs

Union Of India And 6 Ors

RESPONDENT

Date of Decision : 03-08-2021

Acts Referred:

Constitution Of India, 1950 — Article 32, 226, 227, 323A, 323A(2)(d), 323B, 323B(3) (d)

Central Administrative Tribunal Rules Of Practice, 1993 — Rule 154(b)

Administrative Tribunals Act, 1985 — Section 14(2) Mumbai Municipal Corporation Act, 1888 — Section 5B

Citation : (2021) 08 GAU CK 0008

Hon'ble Judges : Kalyan Rai Surana, J

Bench : Single Bench

Advocate : T Baruah

Judgement

1) The learned counsel for the respondent nos. 2 to 6 has raised an issue of maintainability of the present writ petition as indicated in the order dated

01.07.2021. The learned senior counsel appearing for the respondent no. 7 has also reiterated the same point. Hence, the Court is inclined to hear the

learned counsel for the respondent nos. 2 to 6 and learned senior counsel for the respondent no. 7 first, having raised the preliminary issue on

maintainability.

2) Heard Mr. K.N. Choudhury, learned senior counsel appearing on instructions for the respondent no.7 and Mr. C. Baruah, learned standing counsel

for respondent nos. 2 to 6. Mr. S.S. Roy, learned CGC appearing for respondent no.1 is present. Also heard Mr. C.P. Sharma, learned senior counsel,

assisted by Mr. R. Phukan, learned counsel for the petitioner.

3) The learned senior counsel for the respondent no. 7 has submitted that the

petitioner is an officer of the respondent no. 2. By referring to Appendix-VI of the Administrative Tribunals Act, 1985 as amended, it is submitted that the said appendix is under Rule 154(b) of the Central Administrative Tribunal Rules of Practice, 1993, which provides for Classification of cases subjectwise/ departmentwise. It is submitted that services under NHAI, under the Ministry of Shipping, Road Transport and National Highways is included at serial no. 50 of Sub-para (D) of Schedule-VI, which contains list of corporations/societies/ other authorities within the purview of Central Administrative Tribunal under Section 14(2) of the Administrative Tribunals Act, 1985.

4) It is further submitted that in the case of L. Chandra Kumar Vs. Union of India & Ors., (1997) 3 SCC 261, the Special Bench of the Supreme Court with coram of Seven Judges had laid down, inter alia, that the Tribunals will continue to act as the Court of first instance and that would not be open to the litigants to directly approach the High Court. It is submitted that the said legal proposition was reiterated in the subsequently decided case of Kendriya Vidyalaya Sangathan & Anr. Vs. Subhas Sharma, (2002) 4 SCC 145. The learned standing counsel for the respondent nos. 2 to 6 has adopted the submissions made by the learned senior counsel for the respondent no. 7.

5) The learned senior counsel for the petitioner has submitted that in course of time, the Supreme Court of India has settled the legal proposition that in the event the order of transfer is tainted with mala fides, or if the transfer is by way of punishment, or is illegal, or in colourable exercise of power in retaliation of complaints made against the very officials who have triggered the transfer, the High Court would have power under Article 226 of the Constitution of India to interfere with such an unsustainable order. It is submitted that the proposition which was argued by the learned senior counsel for the respondent no. 7 was a general legal proposition, but transfer of an employee is again a specialized branch of service law and the ratio of the cases cited by the learned senior counsel for the respondent no. 7 would not come in the way of this Court to interfere with the impugned transfer order. By referring to the statements made in the writ petition, it is submitted that in this case in hand, the transfer of the petitioner was bad, tainted with mala fide, illegal and unsustainable on facts and in law, because (i) the

transfer was by way of punishment on the fourth day after submitting complaint letter against the respondent no. 7; (ii) the transfer was with an intention to protect the respondent no. 7 from corruption charges; (iii) the transfer was made to facilitate destruction of all evidence against the respondent no. 7; (iv) the transfer of the petitioner was in violation of the OM under File no. 28034/9/2009-Estt.(A) dated 30.09.2009 issued by the Ministry of Personnel, Public Grievances and Pensions, Govt. of India, which provided that if one spouse was working under Central Government and the other spouse was serving under State Government, the central government employee should be posted to the same station and/or State where the other spouse is posted. In this regard, it is submitted that the wife of the petitioner was working in PWD of the State of Arunachal Pradesh and hence, the petitioner was entitled to be protected from transfer under the said OM dated 30.09.2009. In support of his submissions, the learned senior counsel for the petitioner has referred to the following case citations, viz., (i) Union of India & Ors. Vs. Tania Construction Pvt. Ltd., (2011) 5 SCC 697; (ii) Benedict Denis Kenny Vs. Tulip Brian Mira, 2020 SCC OnLine SC 802; (iii) L. Chandra Kumar (supra); (iv) M.P. State Agro Industries Development Corporation Ltd. 7 Anr. Vs. Jahan Khan, (2007) 10 SCC 88; (v) Balkrishna Ram Vs. Union of India & Anr., (2020) 2 SCC 442; (vi) Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai & Ors., (1998) 8 SCC 1; (vii) National Hydroelectric Power Corporation Ltd. Vs. Shri Bhagwan, (2001) 8 SCC 574; (viii) State Bank of India Vs. Anjan Sanyal & Ors., (2001) 5 SCC 508; (ix) Punjab and Sind Bank & Ors. Vs. Mrs. Durgesh Kuwar, 2020 SCC OnLine 774; (x) Union of India Vs. Tapan Kumar Chakraborty & Anr., (2008) 1 GLR 819.

6) Bereft of details, and in brief, the petitioner has filed this writ petition to assail the order dated 23.06.2021, thereby transferring him to Ranchi

Regional Office of respondent no. 2. The petitioner has projected that he is aggrieved by the actions of the respondent no.7, who as per the cause title

of the writ petition is presently posted as the General Manager (Tech.), National Highways Authority of India (NHAI for short), Regional Office,

Guwahati. It is also projected that the respondent no. 7 is in command of the Regional Office of respondent no.2 at Guwahati. It is also projected that

due to alleged fraudulent, unfair and illegal activities of the Regional Officer, the

petitioner had submitted a representation dated 19.06.2021 and amongst others, sought for immediate removal of the respondent no.7 and for posting of a broad-minded and honest officer in his place. It is projected that in retaliation to the said representation, the respondent nos. 2 to 7 in connivance with other officials of NHAI, with a mala fide intention had issued the impugned office order dated 23.06.2021 by which the respondent no. 5 had transferred the petitioner to Regional office, Ranchi with immediate effect. It is further projecting that the said order was a punishment transfer order, as such, the petitioner had submitted another representation dated 24.06.2021 to relook into his transfer and to review the same. From the stand taken by the respondent nos. 2 to 6 in their affidavit-in-opposition it is seen that the General Manager (HR/Admn) of the respondent no.2 has disposed-off/ rejected the petitioner's representation dated 23.06.2021 with observation that the request cannot be considered at that stage in organizational interest, further observing that his request shall be considered at later stage, if the same can be accommodated in organizational interest.

7) Perused the cases cited at the Bar. The said cases are discussed below:-

i. In the case of Tania Construction (supra), it was held that the availability of alternative remedy under Arbitration and Conciliation Act, 1996 would not bar for invocation of writ jurisdiction by High Court.

ii. In the case of Benedict Denis Kenny (supra), the issue which came up for consideration before the Supreme Court was whether the High Court in exercise of its Constitutional jurisdiction under Article 226 of the Constitution of India can pass an order interdicting a legal fiction engrafted in a State enactment and the said question was answered by holding that Section 5B of the Mumbai Municipal Corporation Act does not oust the jurisdiction of High Court under Article 226 of the Constitution of India.

iii. The case of M.P. State Agro Industries Development Corpn. Ltd. (supra) was cited for the proposition that the High Court had power to decide a matter arising out of service matter and exercise power of juridical review by invoking the doctrine of proportionality in awarding penalty/ punishment.

The learned senior counsel for the respondent no. 7 does not dispute the said ratio.

iv. In the case of Balkrishna Ram (supra), it was held that the without exhausting alternative remedy available under Armed Forces Tribunal Act,

2007 writ petition before the High Court could be invoked. It was held that non-entertaining of writ petition when alternative remedy is available is a

rule of prudence and not a rule of law and there cannot be ousted of jurisdiction of High Court.

v. The case of Whirlpool Corporation (supra) was also cited on the point that the availability of alternative remedy and without exhaustion of remedies, the maintainability of writ petition before High Court was not barred.

vi. In the case of National Hydroelectric Power Corpn. (supra), the High Court had entertained a writ petition against the order of transfer and in that

connection, the Supreme Court of India had held that unless it is shown that the transfer was mala fide exercise of power or violative of any statutory

provision, transfer was not subject to judicial interference.

vii. In the case of Anjan Sanyal (supra), the High Court had entertained a writ petition against the order of transfer and in that connection, the

Supreme Court of India had held that unless it is shown that the transfer was mala fide exercise of power or prohibited by service rules, transfer

should not be lightly interfered with.

viii. In the case of Durgesh Kuwar (supra), the High Court had entertained a writ petition against the order of transfer where the appellant had

reported that there were irregularities and corruption in her branch and her superior was sexually harassing her and this resulted in her transfer. Under

the fact situation of the said case, the Supreme Court of India had held that interference with the transfer order by the High Court was justified.

ix. In the case of Tapan Kumar Chakraborty (supra), the Division Bench of this Court had held that power of judicial review in respect of order of

transfer can be exercised by High Court (i) if the transfer was from higher post to a lower post, (ii) the transfer adversely affects the service prospect

of the employee in his/ her service career; (iii) transfer order is mala fide; (iv) service rules prohibit the transfer order; (v) authorities who issued the

transfer order did not have the competence to pass the transfer order; (vi) transfer order was not issued in public interest or was for unholy purpose

such as to accommodate someone else, by way of punishment, under political influence or on instigation of higher authority not concerned with the

transfer of concerned employee.

8) The ratio of the herein before referred 9 (nine) cases is not disputed or under

quarrel. However, on facts the present case is distinguishable. In none of the cases cited by the learned senior counsel for the petitioner any issue arose either before this Court or before the Supreme Court of India regarding jurisdiction exercisable by Central Administrative Tribunal. The cases referred to above related to service under the Bank, Armed Force, etc. In the case of M.P. State Agro Industries Development Corpn. Ltd. (supra), the High Court had entertained a writ petition against the imposition of penalty in disciplinary enquiry and that that the learned senior counsel for the petitioner could not show that respondent employee in the said case would have challenged the penalty before the Central Administrative Tribunal. The case of Balkrishna Ram (supra) related to member of Armed Force personnel. However, the issue before the Supreme Court was whether appeal against order of Single Judge of High Court deciding a case related to an Armed Force personnel pending before High Court is required to be transferred to the Armed Force Tribunal or should be heard before High Court. The said contention to transfer intra court appeal to the Tribunal was rejected by holding that order of the High Court cannot be challenged before any forum other than Supreme Court. Although the power of the High Court to entertain a writ petition in respect of armed force personnel was not negated, but the said judgment is in no way an authority to the effect that in respect of matters which can be agitated before the Central Administrative Tribunal, a writ petition could be entertained by High Court. In the case of National Hydroelectric Power Corporation (supra), the respondent was an employee of the appellant. The learned senior counsel for the petitioner has not been able to demonstrate that the service under the said appellant was covered by Appendix-VI, and that the Central Administrative Tribunal had exclusive jurisdiction to deal with such service matter. In the case of Anjan Sanyal (supra) and Durgesh Kuwar (supra), the respondents in both the cases were employee of Bank, and it has not been shown that the Central Administrative Tribunal was vested with power to entertain service matters related to such banks. The case of Tapan Kumar Chakraborty (supra) was against the order passed by the Central Administrative Tribunal, thereby allowing the Original Application filed before it. The cases of Tania Construction (supra), Benedict Denis Kenny (supra) and Whirlpool Corporation (supra) also do not relate to jurisdiction

exercisable by the Central Administrative Tribunal.

9) Having discussed the decisions referred to by the learned senior counsel for the petitioner and keeping in mind that the well settled legal proposition

that a decision will have to be understood in the background of the fact- situation involved in each case and that a decision is an authority for what it

actually decides and not what may logically flow from it, the question is whether any of the cited case by the learned senior counsel for the petitioner

had held that in matters where the Central Administrative Tribunal had jurisdiction, the writ petition could also be entertained. The answer would be an

emphatic ‘‘no’’.

10) It would now be relevant to refer to paragraph 93 and 99 of the case of L. Chandra Kumar (*supra*), which are quoted below:-

‘‘93. Before moving on to other aspects, we may summarise our conclusions of the jurisdictional powers of these Tribunals. The Tribunals are

competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for

the High Courts and the Supreme Court which have, under our constitutional setup, been specifically entrusted with such an obligation. Their function

in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High

Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. However, this power of the

Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following

the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the

concerned High Court may be approached directly. All other decisions of these Tribunals, rendered in cases that they are specifically empowered to

adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Court. We may add

that the Tribunals will, however, continue to act as the only Courts of first instance in respect of the areas of law for which they have been

constituted. By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of

statutory legislations (except, as mentioned, where the legislation which creates

the particular Tribunal is challenged) by overlooking the jurisdiction of the concerned Tribunal.

99. In view of the reasoning adopted by us, we hold that clause 2(d) of Article 323A and Clause 3 (d) of Article 323B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the "exclusion of jurisdiction" clauses in all other legislations enacted under the aegis of Article 323A and 323B would, to the same extent, be unconstitutional. The jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution is part of the inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other Courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution. The Tribunals created under Article 323A and Article 323B of the Constitution are possessed of the competence to test the constitutional validity of statutory provisions and rules. All decisions of these Tribunals will, however be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the concerned Tribunal falls. The Tribunals will, nevertheless, continue to act like courts of first instance in respect of the areas of law for which they have been constituted. It will not, therefore, be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislation (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the concerned Tribunal. Section 5(6) of the Act is valid and constitutional and is to be interpreted in the manner we have indicated.â??

11) It is a too well settled principle that a decision is an authority for the question considered and decided. The aforesaid decision of L. Chandra Kumar (supra) is an authority for the proposition that â??â?|We may add that the Tribunals will, however, continue to act as the only Courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean what it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of

the concerned Tribunal.â? None of the cases cited by the learned senior counsel for the petitioner can be accepted to have diluted the effect of the ratio laid down in paragraph 93 and 99 of the said case of L. Chandra Kumar (supra).

12) The said decision rendered in the case of L. Chandra Kumar (supra), having been rendered by a 7 (seven) Judge Bench of the Supreme Court of

India, which still holds the field, this Court is inclined to hold that in respect of the services under NHA, in view of inclusion of NHA at serial no. 50

of Sub-para (D) of Schedule-VI of the Central Administrative Tribunal Rules of Practice, 1993, the present writ petition is not maintainable.

13) There is nothing on record to show that the Central Administrative Tribunal is powerless to interfere with the transfer order even if the transfer

order can be shown to be vitiated by any well settled principles on which transfer orders are liable to be interfered with.

14) Therefore, the Court is inclined to return this writ petition to the petitioner. The petitioner is at liberty to file an Original Application before the said

learned Tribunal as per format being followed therein. However, in addition, the petitioner shall also submit the returned writ petition before the

jurisdictional Central Administrative Tribunal along with a downloaded copy of this order. Certified copy is exempted due to Covid-19 pandemic.

15) It is made clear that the Court has not adjudicated the legality or otherwise of the transfer order impugned in this writ petition, as such, none of the

observations made in this order shall cause prejudice to any of the parties hereto when the matter is heard by the jurisdictional Central Administrative

Tribunal.