

(2006) 01 AHC CK 0185

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 39064 of 2005

P.K. Srivastava

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 24-01-2006

Acts Referred:

Administrative Tribunals Act, 1985 — Section 14, 5(2), 5(6)
Constitution of India, 1950 — Article 12

Citation : (2006) 6 AWC 5675

Hon'ble Judges : Prakash Krishna, J; Amitava Lala, J

Bench : Division Bench

Advocate : Shashi Nandan and Namit Srivastava, for the Appellant; U.N. Sharma, B.N. Singh, C.L. Pandey, R.K. Saxena, Subodh Kumar and N.P. Shukla and S.S.C., for the Respondent

Final Decision : Allowed

Judgement

Amitava Lala, J.—On 21st September, 1984 the petitioner was appointed as Assistant Divisional Engineer Telecom on probation. On 31st December, 2002 the petitioner was transferred from Meerut (U.P.) to Jamshedpur (Jharkhand Circle) on promotion as General Manager. On 15th March, 2005, 59 officers of the telecom services, who were working with Bharat Sanchar Nigam Ltd. transferred to different places throughout the country. The petitioner was at SI. No. 36 therein. He was transferred from Jamshedpur to Allahabad whereas respondent no. 4 was transferred from Allahabad to Katihar (Bihai Circle). On 18th April, 2005, respondent no. 4 handed over charge of Allahabad office to Sri Shyam Babu, Deputy General Manager. On 25th April, 2005, petitioner was relieved from Jamshedpur. On 27th April, 2005, petitioner joined his duty as General Manager, Telephone, District Allahabad. On 5th May, 2005, Joint Deputy Director (Personnel) has passed an order permitting Sri Radhey Shyam to be retained at Allahabad upto 30th October, 2005. On the same day another order was passed by the Deputy General Manager (Administration) where under the petitioner was posted as General Manager (Operation) Telephone, District Allahabad with

immediate effect. The petitioner contended that Sri Radhey Shyam, respondent no. 4 herein, after handing over charge at Allahabad did not join his duty at Katihar and started exercising political influence through large number of members of Parliament upon the Communication Minister of the Government of India. On such influence and pressure he obtained an order from the Joint Deputy Director (Personnel) to remain in the post at Allahabad upto 30th October, 2005. As aforesaid, on the same day, the Deputy General Manager (Administration) informed the petitioner, who had joined as General Manager Telephone, District Allahabad on 27th April, 2004 shall be posted as General Manager (Operation) while the respondent no. 4 shall continue to function as General Manager Telephone, Allahabad till 30th October, 2005.

2. According to the petitioner, there is only one sanctioned post i.e. General Manager telephone, District Allahabad. There is no post of General Manager (Operation), Telephone, District Allahabad. Therefore, the temporary creation and posting of the petitioner in such post is clearly illegal. It has only made to accommodate the respondent no. 4. The post of General Manager (Operation) can be created by the headquarters of the Bharat Sanchar Nigam Ltd. or appropriate authority of the telephone. Neither the Chief General Manager, Telephone U.P. (East Circle), Lucknow is competent to create a post or to pass any order of posting on that post. The respondent no. 4 was already transferred and he had to join in the transferred post within 10/12 days from such transfer. In utter disobedience with the order of the superior authorities, the respondent no. 4 was allowed to remain at Allahabad. Assuming the post of General Manager (Operation) has created it should have been filled up by said Sri Radhey Shyam, respondent no. 4, but not by the petitioner who has been posted by a valid departmental order. Therefore, posting of the petitioner on the newly created post was meant to oblige the respondent no. 4 and, therefore, it is clearly illegal and unjustified. When one is retained in a particular post beyond the capacity, he should be: retained in a post which is not regular otherwise the interest of the regular incumbent would be vitiated.

3. According to the respondent no. 4, the writ petitioner belongs to Indian Telecom Service (ITS). He is of 1984 batch while the respondent no. 4 is of 1978 batch. The Bharat Sanchar Nigam Limited (hereinafter called as BSNL) has been created w.e.f. 01st October, 2000. As per the circular of the Government of India dated 15th April, 2005 both the petitioner and the respondent no. 4 have to submit their option for absorption in BSNL from department of Telecommunication, Ministry of Communication & Information Technology, Government of India. Since both belong to same service of Government of India, their cases are covered by Section 14 of the Administrative Tribunals Act, 1985 with the interpretation of the Supreme Court in the case of L. Chandra Kumar Vs. Union of India and others, . In view of L. Chandra Kumar (supra) Central Government employees will approach the Central Administrative Tribunal first and then before a Division Bench of High Court but not directly. The Tribunal is the Court of first instance. Moreover, the petitioner was a party petitioner before

the Tribunal similarly with respondent no. 4 for a common interest under Original Application No. 1011 of 2005. The petitioner is in the serial no. 38 therein, whereas, the respondent no. 4 is at serial no. 37. The respondent has also annexed a copy of the application to establish that this writ petitioner has submitted to the jurisdiction of the Tribunal.

4. From there we find that both the Union of India and the BSNL are party respondents therein. The main relief is sought in connection with quashing/setting aside the order dated 24th March, 2005 passed by the Joint Secretary (Administration), Ministry of Communications & Information Technology, Government of India, New Delhi, calling upon for the options of absorptions from Group-A Officers of Indian Telecom Services in MTNL/BSNL. However, the petitioner contended that the order passed therein is sub-judice before the Supreme Court.

5. The respondents further said that the writ petition has become infructuous by the passage of time. The order impugned permitting to retain respondent no. 4 in the post at Allahabad expired on 30th October, 2005. Therefore, there is no question of any interference of the Court at this stage of the proceeding.

6. The respondent no. 2 BSNL contended that the post of General Manager (Operation) was sanctioned by way of diversion by the competent authority keeping in view of the necessity and exigency of the work. A request to sanction another post of General Manager is under consideration for last two years. The competent authority has temporarily postponed transfer order retaining respondent no. 4 as General Manager Telecom, District Allahabad and simultaneously sanctioned the post of General Manager (Operation) in Telecom District Allahabad, so that the petitioner may be retained at Allahabad and not to face personal difficulty. The order of diversion and sanction of the post of General Manager (Operation) has been issued only for retention of the petitioner by Headquarters and the competent authority/department had done justice with the petitioner. Sri Radhey Shyam, staff no. 735, is much senior officer as compared to Sri P.K. Srivastava, staff no. 8029, petitioner herein. A representation was made by the respondent no. 4 to allow him to stay at Allahabad, since his daughter is studying in M. Tech. in the Indian Institute of Information Technology, Allahabad in the final year, and Another daughter is suffering from disease and under treatment of Dr. Prof. Krishna Mukherjee, Director, Kamla Nehru Hospital, Allahabad. He has not completed his four years of service at Allahabad as per transfer policy. From the annexure, being representation of the respondent no. 4 dated 4th April, 2005, it appears that he made prayer for consideration of the representation for retaining him at Allahabad till the completion of the academic session of one of the daughter in June, 2006.

7. In another affidavit it appears that the respondent no. 4 has joined in the post of General Manager Telecom on 6th May, 2005. The competent authority can consider the grievance of the individual incumbent. An order of transfer can be postponed, therefore, postponing transfer upto 30th October, 2005 is a bonafide

decision and can not be challenged in the court of law. The respondent no. 4 is in the All India Telecom Services and holding civil post under the Central Government along with writ petitioner and as such Writ Petition is not maintainable u/s 14 of the Administrative Tribunal Act, 1985.

8. A separate affidavit has been filed by the respondent no. 5 and contended that one SAG post was diverted from Palakkhad TD, KRL to Allahabad on 27th April, 2005 to 30th April, 2005. The petitioner has been transferred by the order of Head of the Circle wherein the respondent no. 4 was retained by the order of BSNL headquarters. The respondent no. 4 being senior to the petitioner was given charge of General Manager.

9. In reply, the petitioner contended that all the affairs of the BSNL including transfer and posting of Indian Telecom Service Officers as well as other employees are being managed and controlled by its Chairman-cum- Managing Director, having its Office at New Delhi. The Union of India, through the Secretary, Ministry of Telecommunication-cum-Chairman, as respondent no. 1 has nothing to do in the matter of transfer and posting of the employees of BSNL. A letter dated 4th June, 2004 has been issued by the Assistant Legal Adviser, Government of India, Ministry of Telecommunications, Legal Cell to all the Heads of Telecom Circle/Administrative Units/Projects of BSNL to get deletion the name of Union of India, through Secretary, Department of Telecommunications/Chairman, Telecom Commission from the list of party/ parties on the first occasion/hearing, A copy of such letter dated 4th June, 2004 is annexed with the affidavit of respondent nos. 2, 3 and 5 dated 3rd October, 2005. By a further affidavit dated 1st September, 2005 the respondent nos. 2, 3 and 5 contended as follows:

Sri P.K. Srivastava will automatically assume the charge of GMTD Allahabad on 30-10-2005 (A/N).

On 25th May, 2005 Joint Deputy Director General (Pers.) issued a letter to the Chief General Manager, U.P. East Telecom Circle BSNL, Lucknow restricted posting of the petitioner in the post of General Manager (Operation) after 30th October, 2005. He will report directly to the COM, U.P., East Circle and will automatically assume the charge of the post of GMTD, Allahabad on 30th October, 2005. In earlier paragraph the post of respondent no. 4 was restricted as GMTD, Allahabad is also restricted upto 30th October, 2005.

10. The petitioner contended that even during the pendency of the Writ Petition the respondent no. 4 invoked the jurisdiction of the Central Administrative Tribunal and obtained an order of status quo as regards posting on 27th October, 2005. It has been further contended by the petitioner that the proceeding is numbered as O.A. No. 1271 of 2005 (Radhey Shyam v. U.O.I. and Ors.). The petitioner, being respondent no. 4 therein filed an affidavit on 9th November, 2005 explaining the position of the Writ Petition before this High Court and its direction apart from the verbal submission in this respect. Surprisingly, sole

Administrative Member hearing the proceeding taken note of entire submission in the order but without expressing his mind and making observation passed the order of status quo. Therefore, according to the petitioner, submission of the respondent No. 4 to treat the Writ Petition as infructuous after expiry of 30th October, 2005 is a tactical approach to get an escape from the High Court and enjoy the benefit of the order passed by the Central Administrative Tribunal.

11. We have carefully considered the arguments advance by the contesting parties. According to us, before discussing the merit of the case we have to consider the point of maintainability of the Writ Petition. It is well known that if one is directly under the Central Government Service, he has a recourse of relief before the Central Administrative Tribunal u/s 14 of the Administrative Tribunal Act, 1985. But if one is not directly under the Central Government service but under other authorities as per Article 12 of the Constitution of India he has a right to invoke the writ jurisdiction directly. The controversy here is that the petitioner and the respondent No. 4 both are under the Central Government service but on deputation under the BSNL. Such deputation, is not a temporary deputation within the control of the Central Government, The deputation continues with an option of permanent absorption by the BSNL. So far as the transfer, posting and other administrative exigencies are concerned, the BSNL authorities are empowered to take independent decision without any interference of the Central Government unlike in the cases of temporary deputationists. There is nothing to prevent a governmental authority i.e. BSNL from issuing administrative instructions on matters if statutory rules are silent or unavailable. Therefore the question is in such circumstances how the Court will determine the forum for adjudication ? The answer is the same will be understood only on the basis of the order impugned under challenge. If the impugned order is passed by the BSNL authorities touching or concerning the service of the employee, obviously the Writ Court will be the appropriate forum. But if the impugned order is passed by the Central Government authorities touching or concerning the service of the employee, obviously Central Administrative Tribunal will be the appropriate forum. In the instant case the impugned order is passed by the BSNL authorities concerning the posting of the petitioner viz a viz the respondent No. 4 herein, therefore, the Writ jurisdiction of the High Court is the appropriate forum for adjudication. This is far more clear from the letter of the legal advisor of the Central Government of India who advised its Advocates to take steps for deletion of the names of the Government of India in respect of a dispute between an employee and the employer of the BSNL. The position of the earlier Writ Petition in which both the petitioner and the respondent No. 4 are the party petitioners before the Central Administrative Tribunal is totally different. There they have challenged the order dated 24th March, 2005 passed by the Joint Secretary (Administration), Ministry of Communication & Information Technology, Government of India, but not the BSNL. Therefore, the jurisdiction of the Central Administrative Tribunal was properly invoked. Both the cases can not be similarly placed.

12. So far as the merit is concerned the action of keeping the respondent No. 4 in Allahabad is sheer outcome of highhandedness against all established norms of the service jurisprudence. Admittedly the respondent No. 4 handed over the charge of the Allahabad posting to an officer on 18th April, 2005. Only thereafter on 25th April, 2005 the petitioner was relieved from the erstwhile posting and thereafter joined in the post on 25th April, 2005. Any change thereafter to accommodate the respondent No. 4 ignoring the right of the petitioner in respect of his posting is obviously a malafide and arbitrary action. The superior authorities had no business to shift the petitioner in a temporary created post to accommodate the respondent No. 4 in a permanent post taking plea of his seniority in service. Such submission on the part of the respondents is absolutely frivolous. Regular can not be overridden by irregular. Seniority cannot regulate such controversy of posting. Highhandedness was so glaring that a post of far away place at Palakkad, Kerala was temporarily made available at Allahabad to accommodate the respondent No. 4 in the regular post by shifting the petitioner in such temporary post. The allegation of outside influence cannot be said to be bare allegation in the facts and circumstances of this case.

13. Secondly, the approach of the respondent no. 4 is totally unclean in nature. In one hand he has taken stand before the Court that the Writ Petition become infructuous in view of the expiry of the 30th October, 2005 but on the other hand he invoked the jurisdiction of the Tribunal and inspite of all defence taken by the petitioner, successfully obtained an order on 27th October, 2005 in the nature of status quo in his service. Therefore, the tactical ploy is that once the Writ Court will dismiss the Writ Petition as infructuous the order of the status quo as passed by the Tribunal will be operative to gain the respondent no. 4. This is sheer abuse of process of Court of Law which should not be encouraged. We are also surprised in observing the attitude of the Administrative Member of the Central Administrative Tribunal in passing the order when the similar issue is pending in the Division Bench of Writ jurisdiction of the High Court, Propriety demands at least adjournment of hearing till the decision of the High Court. We are not aware whether the Tribunal considered question of its jurisdiction or not. It could have forwarded the matter to a two members Bench one of which is a Judicial Member, in case of any doubt following the Principle of Section 5(2) and (6) of the Administrative Tribunals Act, 1985 and ratio of L. Chandra Kumar (Supra).

14. Under the circumstances, totality of the matter prescribes to pass following orders:

The orders dated 5th May, 2005 passed by the Deputy Director General (Personnel), Respondent No. 4 and Deputy General Manager (Administration), Respondent No. 5 being Annexures 5 & 6 are malafide and arbitrary exercise of power and liable to be quashed. Accordingly, such orders are quashed hereunder. We declare that the petitioner's posting as General Manager, Telecommunication, Allahabad from 27th April, 2005 is justified and his service on such post is treated to be continuous from 27th April, 2005 till 4th May, 2005 actually and

from 5th May, 2005 till 30th October, 2005 as nationally and thereafter again from 1st November, 2005 actually for the purpose of all service benefits. The posting of the respondent No. 4 on 5th May, 2004 in the post of General Manager, Telecommunication, Allahabad till his release from such post is declared as void posting. It is further declared that if the authorities want to consider the representation of the respondent No. 4 for giving him accommodation at Allahabad for any further period due to his personnel difficulties, in that case the same may be accommodated but without disturbing the any existing right of the petitioner in connection with his regular posting in the post of General Manager, Telecommunication, Allahabad. This order is treated to be passed in supersession of any order passed by the authority or Tribunal. In further the Court directs the Vigilance Cell of the Central Government to enquire and investigate the matter in view of the facts and circumstances of the case and furnish a report to the appropriate Ministry for necessary action against appropriate person or persons responsible for the cause. In case the Central Vigilance Cell finds any non-cooperation within the Ministry because of any further influence, they are at liberty to place the entire matter directly to the Prime Minister's Office for necessary action under the strength of the order.

15. Thus, the Writ Petition stands allowed

16. No order is passed as to costs.