

(2023) 10 CAT CK 0004

In the Central Administrative Tribunal

Case No : Original Application No. 180, 135 Of 2022

Sathyanarayanan K, S/o Late Govindan Nair K

APPELLANT

Vs

Union Of India Represented By Its Secretary To The
Government Of India, Ministry Of Defence New Delhi- 110001
& Ors

RESPONDENT

Date of Decision : 04-10-2023

Acts Referred:

Citation : (2023) 10 CAT CK 0004

Hon'ble Judges : K. Haripal, Member (J)

Bench : Single Bench

Advocate : R. Sreeraj, S. Ramesh

Final Decision : Allowed

Judgement

K. Haripal, Member J

1. Applicant is a Junior Administrative Assistant, JAA for short, (Lower Division Clerk) in the office of the 5th respondent. He is an Ex-Serviceman posted as JAA on 13.11.2015 under the G.E., Thirunelveli, a tenure station; after completion of 2½ years he was transferred to Ezhimala, the present station, where he has completed 3½ years. While so, by Annexure-A1 order dated 24.11.2021, he stands transferred to Pune, which has caused him considerable heartburn and difficulties. According to him, the said order of transfer is vitiated by malafides, incompetency and transgression of professed norms. Therefore, he seeks to quash Annexure-A1 and direct the respondents to permit him to continue under the 5th respondent, to declare that Annexure-A2 transfer policy to the extent it delegates the power of transfer to the 3rd respondent is contrary to the mandate of statutory rules and in violation of the principle of delegatus non-potest delegare.

2. At the time of admission, on 29.03.2022, an order of status quo as regards the applicant was passed, which continues. In other words, the applicant is

continuing in Ezhimala.

3. According to the applicant, by virtue of FR 15, power to transfer a Government servant vests with the President. By FR 6(b), Central Government has delegated the power and on the strength of Appendix-3 to the FR the power has been delegated to the Head of the Department, who is the 2nd respondent. But Annexure-A1 has been issued by the 3rd respondent, who is incompetent. The power vested with the 2nd respondent could not have been delegated to the 3rd respondent.

4. Prior to the appointment as JAA he was serving Military, except during the last 1½ years he had been serving outside his hometown. Even after re-employment as JAA, on 13.11.2015 he was posted away in Thirunelveli for 2½ years. Now he is again ordered to be transferred. There are 5 civilian JAAs and 1 Military JAA in Ezhimala. Among the civilian JAAs, by March/April 2021, except the applicant none had worked in a tenure station. Among them, now, besides the applicant only one person namely, Smt.P.V.Sahana has been transferred and Sri.Satheesh K and Sri.Piyush Kumar, who are working there from 29.08.2008 and 26.02.2016 respectively, are allowed to continue, whereas the applicant has been transferred. The reason for retaining the said Satheesh and Piyush Kumar is not convincing. Carrying out surplus/deficiency posting for rationalising imbalances could be done only after effecting transfer tenure posting. Even though the warning list was attached to Annexure-A3, the applicant did not submit any choice station as he was well within the cadre satisfaction limit. That might have given the impression that he was volunteering for a transfer. But to his shocked surprise, he was ordered to be transferred excluding the said Piyush Kumar and Satheesh, who are the station seniors, from the purview of transfer on the ground of adjustment of surplus/deficiency, which is illegal. Even though he made a representation, he understands that, that has been rejected. According to the applicant, that is malicious, transfer of surplus/deficiency could have been carried out only after tenure postings were affected. Such an act of the respondents is sheer favouritism and discriminatory. Transfer has been affected arbitrarily, Annexure-A1 is vitiated by legal malice and arbitrariness.

5. At first the learned Standing Counsel had filed a counsel statement followed by a detailed reply was filed denying the contentions in the O.A. According to the respondents, based on Annexure-A2 guidelines, the 2nd respondent had to work out station holding surplus/deficiency in subordinate staff against common satisfaction level. Pune was found to be a critically deficient station, whereas Ezhimala a critically surplus station against common satisfaction level percentage. Accordingly, the 2nd respondent had circulated warning instructions to all MES units well in advance, who were holding man power beyond surplus (except beyond 10% common satisfaction level) and had cleared two or three years technical service before issuing a posting order. The applicant wilfully ignored the warning list and did not submit his choice station. The applicant had also completed more than 3½ years service from 04.06.2018 in the critically

surplus station. Therefore, the present contention alleging malafides, incompetency and transgression of professed norms are not acceptable. The 3rd respondent, Chief Engineer Head Quarters Southern Command is the appointing authority of a Junior Administrative Assistant. Therefore, all powers with respect to posting/transfer of JAAs are vested with Chief Engineer, Southern Command. The applicant has All India transfer liability.

6. Regarding the posting of Piyush Kumar, it is submitted that he was posted in Ezhimala on 26.02.2016 from other department to MES. In tenure turn over posting 2021 the 3rd respondent had posted only 3 senior most individuals at tenure station. Similarly, Satheesh was initially posted as Chowkidar on 29.08.2008 and become JAA only on 14.06.2016, after passing department competent examination. In his case also tenure turn over posting of 2021 was not done since only three senior most individuals were posted for want of vacancies. Then both Piyush Kumar and Satheesh were not considered for tenure posting. During 2020 and 2021 tenure turnover posting could not be effected due to difficulties caused by Covid pandemic. There is no justification in the applicant for not responding to the warning list and giving his choice station so that his contention that he was under the impression that he will be considered as volunteer, is incorrect. Regarding the posting of one Madhusoodanan it is pointed out that, that was done on compassionate grounds. Thus the application is sought to be dismissed.

7. The applicant filed a rejoinder contending that non-consideration of Piyush Kumar and Satheesh for transfer is too weak to sustain the test of law. `

8. The respondents filed an additional reply reiterating the earlier contentions and also produced Annexure-R1 order dated 21.12.2021, by which the said Madhusoodanan was posted in Ezhimala on compassionate grounds.

9. I heard the learned counsel on both sides. Respective contentions were reiterated.

10. According to the learned counsel for the applicant, even though specific guidelines have been framed by the respondents in the matter of transfer of employees, that has not been adhered to in Annexure-A1 as regards the applicant. There is no justification for transferring him in preference to the station seniors like Satheesh and Piyush Kumar, who are seniors to him in the station. Except the applicant none had worked in a tenure station. There is no justification in transferring out the applicant in preference to both Satheesh and Piyush Kumar. Referring to Annexure-R1 he said that the said Madhusoodanan could be brought in only if there was vacancy. After stating that Ezhimala is a critically excess unit, in the next month itself Annexure-R1 has been issued, which indicates colourable exercise of power. He has also submitted that the 3rd respondent is not competent to pass an order of transfer, the 2nd respondent alone could exercise such a power and therefore the order of transfer is illegal.

11. On the other hand, according to the learned Standing Counsel, the applicant

was transferred from Thirunelveli to Ezhimala by the order of the 3rd respondent and at that time he had no complaint that the 3rd respondent was not competent. Before issuing Annexure-A1 a warning list was published, without responding to the same, he is estopped from challenging the correctness of the same at a later point of time. According to the learned Standing Counsel, absolutely no valid grounds are urged to quash Annexure-A1.

12. As stated earlier, all possible grounds have been raised to challenge Annexure-A1. The first contention is regarding the competency of the 3rd respondent, the Chief Engineer, Head Quarters, Southern command in issuing Annexure-A1 transfer order. According to the applicant, the power of transfer vested in the President of India stands delegated to the 2nd respondent by virtue of Appendix- 3 to FR 6(b). Fundamental Rules are statutory in nature, since the power of delegation to the 2nd respondent stands illegally delegated to the 3rd respondent, Annexure-A1 is liable to be quashed on that ground alone.

13. Even though the argument seems attractive at the first blush, for two reasons it is liable to be rejected. Firstly, Annexure-A2 guidelines have been issued for the management of Group-B and C man power which rests with Chief Engineers of various Commands and thus guidelines issued by the Head Quarters have uniformly applied to the transfer and posting policy of employees. Secondly, and more importantly, it is the definite case of the respondents that the 3rd respondent Chief Engineer, Southern Command is the appointing authority of a Junior Administrative Assistant. This positive averment has not been touched in the rejoinder. It must be appreciated that transfer is only incidence of service. It is fallacious to say that an officer who has power of appointment does not have power of transfer. For that reason, power of transfer exercised by the 3rd respondent, the appointing authority, cannot validly be called in question. Such an argument is only to be rejected.

14. But after going through the materials and hearing counsel on both sides, there are reasons to think that the order transferring the applicant in preference to the said Satheesh and Piyush Kumar, on the face of it appears illegal. In my reading, plausible and convincing reasons are not forthcoming for transferring the applicant after retaining such station seniors in the place.

15. Annexure-A2, as stated earlier, is intended to rationalise imbalances caused due to tenure turn over postings and compassionate ground postings. It contemplates various types of postings. Annexure-A2 guidelines pre-supposes frequent cadre review strength and critical deficiency and surplus should be assessed. Clause G of Annexure-A2 reads thus:

"CRITICAL DEFICIENCY & CRITICAL SURPLUS

If the holding of particular category in a particular station/complex falls below 10% of Command satisfaction level derived in para 02, it will be taken as critical deficiency If the holding of particular category in a particular station/complex exceeds beyond 10% of Command satisfaction level, it will be taken as critical

surplus.”

Similarly, Clause-E also requires to be extracted E (1) to (4).

“(E) POSTING ON SURPLUS/DEFICIENCY:-

(i) Postings on surplus & deficiency grounds will be carried out to make good the imbalance created due to posting given in para 4 and also imbalances due to raising/disbandment of unit/formation within the command

(ii) After issuance of all postings 4 (i) to (iii) [4(vii), if applicable] command will work out the overall imbalances in held strength of various stations/complexes after taking into account the postings so issued

(iii) Deficiency below the critical deficiency will be filled by transferring the staff from different stations/complexes of command having holding beyond critical surplus level. Excessive staff beyond critical surplus will be posted to the deficient stations/complexes having deficiency below the critical deficiency

(iv) The volunteers will be asked from the stations/complexes having the satisfaction level (worked out at para 2) above critical surplus. In case of no volunteer is available senior most in stations/ complexes will be posted out & this posting will be considered as administrative posting. Individuals who thus posted out will be repatriated after completion of three years amongst the three choice stations/complexes. This repatriation will be considered after repatriation of tenure as per available vacancies.

.....”

16. It has come out that the applicant on being transferred from Thirunelveli, a tenure station, had joined duty in Ezhimala on 04.06.2018. Out of 5 Civilian JAAs, 3 are his seniors in the station. They are Satheesh K, Sahana P.V. and Piyush Kumar. It is seen that Smt.Sahana stands transferred vide Annexure-A1. The grievance of the applicant is that he has been transferred after retaining Satheesh and Piyush Kumar. According to him, they are working in Ezhimala from 29.08.2006 and 26.06.2016 respectively. But both are retained while the applicant is transferred to Pune. This has been tried to be justified by the respondents stating their service profile. According to them, Piyush Kumar was brought in Ezhimala as JAA only on 26.06.2016 from another department, whereas Satheesh Kumar was a Chowkidar and become a JAA only on 14.06.2016. Both were eligible to be transferred under the tenure turn over posting, but were not transferred owing to dearth of vacancies in 2021 or 2022. In my reading, such an argument does not stand to reason. The fact is that, despite being station seniors, they are not transferred. Even if there was no vacancy in tenure stations, it appears that they could have been transferred elsewhere considering the station seniority.

17. In fact, Annexure-A2 does not contemplate to trace the service history of an employee, whether he had obtained posting by transfer from another department

or become JAA by promotion/passing department test etc. The fact that both of them are station seniors to the applicant is not disputed; therefore there is no justification in allowing them to continue in the station while the applicant who came to the station on 04.06.2018 alone, has been picked up for transfer.

18. Annexure-R1 is also capable of driving a wedge in the case of the respondents. Of course, the said Madhusoodanan may be an eligible candidate to be considered under the compassionate ground. But that could be considered only if there was vacancy. While the respondents found that Ezhimala is a critically surplus station for one purpose, there is no justification in retaining seniors and also transferring some on compassionate grounds. All these expose the arbitrary way in which transfer has been effected.

19. As extracted supra, as a prelude to postings on surplus/deficiency, all postings under clauses 4(i) to (iii) and clause 4(vii) should have been done for working out the over all imbalance. Here, two persons, seniors to the applicant in the station have been allowed to continue on the ground of dearth of vacancy, which does not sound reasonable.

20. In my assessment, there is no justification for the respondents in picking up the applicant and transferring him while two station seniors were allowed to continue there in one pretext or the other. Therefore, Annexure-A1 is vitiated to that extent and is quashed as regards the transfer of the applicant is concerned.

Original Application is allowed to the above extent. No costs.

(Dated, this the 4th October, 2023)