

(2003) 05 DEL CK 0012

In the Delhi High Court

Case No : C.M. No's. 4713 and 5972 of 2003 in Civil Writ Petition No. 6411 of 1998

Sh. S.P. Yadav

APPELLANT

Vs

National Thermal Power Corporation Ltd. and Others

RESPONDENT

Date of Decision : 28-05-2003

Acts Referred:

Citation : (2003) 4 AD 505 : (2003) 108 DLT 34 : (2004) 2 SLJ 325

Hon'ble Judges : Dr. M.K. Sharma, J

Bench : Single Bench

Advocate : Richa Kapoor, for the Appellant; S.K.Taneja Shailash Kapoor and Amit Kumar, for the Respondent

Judgement

Dr. Mukundakam Sharma, J.—This order would dispose of the application registered as CM No. 4713/2003, which is filed by the respondents praying for review and/or modification of the order dated 30.3.2001 and also the application registered as CM No. 5972/2003 which is filed by the petitioner praying for postponement of the hearing of the aforesaid application registered as CM No. 4713/2003 until the contempt proceeding drawn up against the respondent registered as CCP No. 234/2003 is decided by this Court.

2. The petitioner, who is a stenographer working with the respondent company - NTPC filed the aforesaid writ petition in this Court praying for quashing the orders of transfer dated 22.7.1996 and 25.9.1996 and also for a further direction directing the respondents to post the petitioner at NOIDA Construction Group and not to uproot the petitioner from his accommodation at NOIDA till the disposal of the writ petition and other ancillary reliefs thereto. Along with the said writ petition an interim application was filed praying for grant of an ex parte order restraining the respondents from dispossessing the petitioner from the accommodation at NOIDA with a direction to the respondents to allot an accommodation of "B" type quarter to the petitioner at NOIDA township.

3. Notice was issued on the said petition on 11.12.1998 and an interim order was

passed directing the respondents not to dispossess the petitioner till the next date. The contentions of the petitioner are recorded in the said order that within a span of one and half years the petitioner had been transferred thrice and that the said order is punitive in nature. The interim application was listed for further consideration along with the writ petition on 30.3.2001. On the aforesaid date, it was ordered by this Court that the writ petition would be listed for arguments and disposal on 27.8.2001. The interim application was also taken up for consideration by this Court on the same day when the counsel for the parties were heard. This Court noted the contention of the counsel appearing for the petitioner that in a span of 11/2 years the petitioner had been transferred three times, and Therefore, the orders of transfer were punitive in nature in view of the circular of the respondent. This Court also noted the fact that the petitioner is posted at Badarpur where he is working as stenographer since October 1996. The submission of the counsel for the respondent was also recorded to the effect that no further order had been passed in respect of the petitioner changing his posting and that there was no likelihood of the petitioner being transferred out immediately to any other place unless there was some exigency of service.

4. In the context of the aforesaid submissions, this Court passed an order that the petitioner would continue to be in the said posting at Badarpur until disposal of the writ petition. It was also ordered that in view of the aforesaid position, the petitioner should be allotted a residential accommodation according to his entitlement in terms of the existing rules and on such allotment, the petitioner would move out and vacate the residential accommodation provided by the respondent at NOIDA within six weeks from the date of allotment. Even in spite of the said order, the petitioner did not vacate the quarter even after allotment of quarter in BTPS Township on the ground that the petitioner should be allotted type "B" accommodation even at Badarpur. Accordingly, a further order came to be passed by this Court on 25.5.2001 wherein it was observed by this Court that the petitioner was not entitled to be allotted with a type "B" accommodation even at Badarpur and the said application filed by the petitioner seeking for allotment of type "B" at Badarpur was rejected. It was also observed in the said order that the issue as to whether or not an appropriate action in accordance with law should be initiated against the petitioner for non-compliance of the order of this Court, would be considered on the next date. It is an admitted position that subsequent thereto the petitioner vacated the official residential accommodation which was given to him.

5. The writ petition, however, could not be taken up for consideration and disposal on 27.8.2001. Thereafter for one reason or the other, the matter could not be taken up and on 13.11.2002 rule was issued in the writ petition directing it to be listed in the category of "regular matters" on 24.2.2003.

6. The records disclose that an order dated 5.3.2003 was passed by the respondents transferring the petitioner to Koldam Hydel Power Project and by order dated 6.3.2003 he was released from Badarpur Thermal Power Station to

enable him to join Koldam Hydel Power Project. In that view of the matter, an application was filed by the petitioner in this Court praying for stay of the operation of the said order of transfer as also the release order. The said application was registered and numbered as CM No. 4036/2003. While issuing notice on the said application, this Court ordered for stay of the aforesaid two orders with a further direction that the petitioner would not be posted out of Badarpur Thermal Power Station. While passing the aforesaid order, this Court referred to the order dated 30.3.2001 wherein this Court had observed that the petitioner would continue to be posted at Badarpur until disposal of the writ petition. Accordingly, this application was immediately filed thereafter by the respondent praying for review/modification of the order dated 30.3.2001.

7. In the meantime the petitioner also filed a contempt petition which was registered as CCP No. 234/2003 wherein the petitioner has contended that the respondents in contempt of the order dated 30.3.2001 had effected transfer of the petitioner by orders dated 5.3.2003 and 6.3.2003 out of Badarpur Thermal Power Station. The said application is pending for consideration of this Court.

8. In the light of the aforesaid facts of the case, I have heard the counsel appearing for the parties. Counsel appearing for the petitioner has raised two preliminary objections regarding the maintainability of the present application filed by the respondents. The first contention is that since on 10.4.2003 an order of stay has been passed by this Court staying the operation of the orders of transfer dated 5.3.2003 and the release order dated 6.3.2003, the order dated 30.3.2001 has now merged with the order dated 10.4.2003 and, Therefore, this Court has no power and jurisdiction to pass any order of review or modification. The second preliminary objection raised is that since a contempt petition has been filed by the petitioner against the respondent and notice is issued in the said application, this Court cannot pass any order in the review application in respect of the order dated 30.3.2001 so long as the respondents get themselves purged of the contempt proceedings.

9. I have carefully considered the aforesaid submissions made by the counsel appearing for the petitioner regarding the maintainability of the review application. In my considered opinion, none of the aforesaid contentions has any merit. The order dated 10.4.2003 was passed by this Court in respect of the transfer order dated 5.3.2003 and release order dated 6.3.2003. While issuing notice and passing the interim order of staying the operation of the said two orders, this Court had referred to the order dated 30.3.2001 while passing the order dated 10.4.2003. As reference was made to the order dated 30.3.2001 while passing the order dated 10.4.2003, it cannot be said that the said order got merged in the order dated 10.4.2003. Both the orders were passed in the context of two different orders. The first order which was passed by this Court was order dated 30.3.2001 and the subsequent order which was passed was in the context of subsequent development after the order dated 30.3.2001. Therefore, in my considered opinion this Court retains the power and jurisdiction

to review the order dated 30.3.2001, which was passed in the context of the averments made in the writ petition and the stay application. So far the order dated 10.4.2003 is concerned, the same was passed in the context of subsequent development. Merely because a reference is made in the order dated 10.4.2003 to the earlier order dated 30.3.2001, it cannot be said that the same got merged in the subsequent order.

10. So far the other contention of the petitioner with respect to the maintainability of the application is concerned, this Court passed an order on 30.3.2001 that the petitioner would continue to be in the said posting at Badarpur until disposal of the writ petition. The respondents had passed an order dated 5.3.2003 transferring the petitioner to Koldam Hydel Power Project with immediate effect. The petitioner has filed a contempt petition alleging willful disobedience of the said order passed by this Court. Even if the respondents have committed contempt of this Court by issuing the order of transfer dated 5.3.2003, they have already committed the said contempt of this Court, which is being examined by this Court. The same cannot create any fetter in the jurisdiction of this Court to exercise the power of review and/or modification of the order dated 30.3.2001. Both the aforesaid objections, Therefore, stand rejected.

11. Now, coming to the contents of the application filed by the respondents praying for review, it was submitted by the counsel appearing for the respondents that the aforesaid interim order dated 30.3.2001 was passed by this Court with the assumption and belief that the writ petition would be taken up for consideration immediately but as the writ petition is now being listed for final hearing in the list of regular matters, there is no immediate prospect of hearing of the writ petition and, Therefore, the order dated 30.3.2001 should be reviewed in view of the fact that the respondents have unfettered right of passing an order of transfer in respect of the petitioner in the exigencies of service. It was also submitted that there was no prayer for stay of any order of transfer in the said application and, Therefore, the said order which was passed by this Court on 30.3.2001 went beyond the prayer of the petitioner in the said application and, Therefore, the said order should be reviewed. Counsel appearing for the petitioner, however, has refuted the aforesaid contention and submitted that the legality of the two orders of transfer passed in the year 1996 are under challenge in the writ petition and, Therefore, the said orders of transfer are under scrutiny of this Court and, Therefore, the order dated 30.3.2001 cannot be said to have been passed without jurisdiction.

12. In the light of the aforesaid submission, let me now proceed to decide and give my decision as to whether or not the order passed on 30.3.2001 requires review/modification. The challenge is made in the writ petition to the order dated 22.7.1996 and to the order dated 25.9.1996. The petitioner was appointed as a Steno Typist on 8.3.1988 and his initial place of posting was made at NTPC, Auraiya Gas Project. In his very letter of appointment it was stipulated that the

services of the petitioner were transferable at the discretion of the NTPC. In view of the aforesaid clause, the petitioner could be transferred in the exigencies of service. Exercising the said power, the petitioner was transferred for the first time from Auraiya to NTPC, NOIDA Construction Group on administrative exigencies. It is the case of the respondents that that NOIDA Construction Group was a temporary group formed for construction of NTPC Engineering office complex and the aforesaid construction work was completed. It is also the stand of the respondent that consequent thereto all persons posted at NOIDA Construction Group were relocated, transferred or adjusted in other projects of NTPC. On 22.7.1996, an order of transfer was made transferring the petitioner to Moradnagar Earth Station. However, by a subsequent order dated 25.9.1996 the earlier order of transfer dated 22.7.1996 transferring the petitioner from NOIDA to Moradnagar Earth Station was modified and the same was changed to Badarpur Thermal Power Station. The aforesaid change was also brought about in view of the representations submitted by the petitioner. The petitioner is trying to project that the aforesaid order dated 25.9.1996 is a third transfer order, which is without jurisdiction in view of the circular of the respondents. Since the order of transfer dated 25.9.1996 is an order modifying the earlier order of transfer dated 22.7.1996 and as he was released from NOIDA directing to report to Badarpur, Therefore, the order dated 25.9.1996 prima facie cannot be said to be a third order of transfer and in fact it is a follow up of the second order of transfer and, Therefore, the contention of the petitioner that the same is a third transfer order issued in violation of any circular of the respondents prima facie cannot be accepted.

13. There cannot be any dispute to the fact that transfer is an incidence of service. So far as the petitioner is concerned, it is a part and parcel of his service conditions. An employee can always be transferred by the employer in accordance with the provisions of the statutory rules and also in exigencies of service. No fetter could be put to the aforesaid power of the employer in transferring an employee, which is an incidence of service. In case of exigency of service an employee can be transferred by the employer in accordance with the terms and conditions of the appointment. The order dated 30.3.2001 was passed by this Court on the assumption that the writ petition would be taken up for consideration immediately, which is also reflected and would be apparent on a bare reading of the order dated 30.3.2001. It was not the intention of the Court to put a fetter that the petitioner cannot be transferred out of Badarpur by the employer even in exigencies of service. If and when an exigency of service so requires, the petitioner could be transferred although it is true that such a transfer cannot be made in violation of the statutory rules. This application seeking for modification is filed by the respondents on the ground that the order dated 30.3.2001 creates a fetter on the power of the respondents in transferring an employee even on exigencies of service. As stated herein above the aforesaid order dated 30.3.2001 was passed with a direction that the petitioner should be allowed to continue in the posting at Badarpur until disposal of the writ petition

as because it was stated by the counsel appearing for the respondents that there is no likelihood of the petitioner being transferred out immediately to any other place unless there is some exigencies of service and also on the assumption that the writ would be heard early. Since the writ petition is not being heard and disposed of even after two years of the said order, I deem it appropriate to review/ modify my order whereby it was directed that the petitioner would continue to be in the said posting until disposal of the writ petition. The said review/modification is passed in consonance with the established principles of law that a fetter cannot be created on the right of the employer to transfer an employee in accordance with the statutory rules and in administrative exigencies of service.

14. In this connection reference may be made to the decision of the Supreme Court in the case of Union of India and Others Vs. H.N. Kirtania, where the Supreme Court had occasion to consider a similar point and the Supreme Court in that regard observed as under:

"After hearing the counsel appearing for the parties we do not find any valid justification for the High Court for entertaining a writ petition against the order of transfer made against an employee of the Central Government holding transferable post. Further there was no valid justification for issuing injunction order against the Central Government. The respondent being a Central Government employee held a transferable post and he was liable to be transferred from one place to the other in the country; he has no legal right to insist for his posting at Calcutta or at any other place of his choice. We do not approve of the cavalier manner in which the impugned orders have been issued without considering the correct legal position. 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. There was no good ground for interfering with the respondent's transfer."

15. In case of Shilpi Bose (Mrs.) and others v. State of Bihar and others (1991) 2 Supp. 659 the Supreme Court observed as follows"

"In our opinion, the courts should not interfere with a transfer order which is made in public interest and for administrative reasons unless the transfer orders are made in violation of any mandatory statutory rule or on the ground of mala fide. A government servant holding a transferable post has no vested right to remain posted at one place or the other, he is liable to be transferred from one place to the other. Transfer orders issued by the competent authority do not violate any of his legal rights. Even if a transfer order is passed in violation of executive instructions or orders, the courts ordinarily should not interfere with the order and instead affected party should approach the higher authorities in the department. If the courts continue to interfere with day-to-day transfer orders issued by the government and its subordinate authorities, there will be complete chaos in the administration which would not be conducive to public

interest. The High Court overlooked these aspects in interfering with the transfer orders. "

16. In the case of Union of India and Others Vs. S.L. Abbas, , the Supreme Court held thus:

"Unless the order of transfer is vitiated by mala fides or is made in violation of any statutory provisions, the Court cannot interfere with it. While ordering the transfer, there is no doubt, the authority must keep in mind the guidelines issued by the Government on the subject. Similarly, if a person makes any representation with respect to his transfer, the appropriate authority must consider the same having regard to the exigencies of administration."

17. In my considered opinion, the ratio of the aforesaid decisions is applicable also in the facts of the present case. Accordingly, I review my order and pass an order reviewing my order dated 30.3.2001 directing that the petitioner would continue to be in the posting at Badarpur unless and until an order of transfer in his case is passed by the respondents transferring him in accordance with the provisions of his service conditions, relevant rules and in exigencies of service.

18. With the aforesaid review/modification of the order dated 30.3.2001, the application seeking for review stands disposed of.

19. Let the matter be listed before the appropriate Bench on 9th July, 2003, the date already fixed in the matter.