

(2006) 08 GAU CK 0002

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 5888 of 2002

Union of India

APPELLANT

Vs

Tapan Kumar Chakraborty and Anr.

RESPONDENT

Date of Decision : 08-08-2006

Acts Referred:

Citation : (2008) 1 GLR 819

Hon'ble Judges : B.Sudershan Reddy, C.J. and T.Nanda Kumar Singh, J

Bench : Division Bench

Advocate : I.A.Talukdar, J.Singh, S.C.Biswas, S.Dutta, Advocates appearing for Parties

Judgement

T. Nandakumar, J.—In the present writ petition filed by the Union of India/ respondent No. 1 in O.A. No. 166 of 2001 of the Central Administrative Tribunal, Guwahati Bench, the relief sought for is for quashing the judgment and order of the Administrative Tribunal dated 1.5.2002 allowing the O.A. No. 166 of 2001 filed by the present respondent No. 1 challenging the order of the Deputy Commissioner (Finance), Kendriya Vidyalaya Sangathan dated 29.1.2001 denying the claim of the respondent No. 1 (i.e., applicant of the O.A. No. 166 of 2001) for double H.R.A.(House Rent Allowance) under Appendix24 of the Accounts Code for the Kendriya Vidyalayas.

2. Heard Mr. J. Singh, learned senior counsel assisted by Mr. S.C. Biswas, learned counsel for the petitioner as well as Mr. S. Dutta, learned counsel for the respondent/applicant of the O.A. No. 166 of 2001 of the Central Administrative Tribunal, Guwahati Bench.

3. The seed of the present case having a chequered history is the transfer and posting order issued by the competent authority dated 5.1.1990 transferring the respondent/applicant of O.A. No. 166 of 2001 from Calcutta to Patna and writ petition challenging the transfer order dated a 5.1.1990 could have been nibbed in bud, had the accepted principle of law on the power of judicial review of the

transfer and posting order of the competent authority been taken into consideration in the right perspective at the very beginning.

4. Neglecting all the details but the precise facts which culminates to the filing of A.O. No. 166 of 2001 is that the respondent/applicant of O.A. No.166 of 2001 was initially appointed as a Lower Division Clerk (i.e. for short "LDC") in Kendriya Vidyalaya Sangathan ("KVS") and posted at Calcutta Regional Office of the KVS. By an order dated 5.1.1990 of the competent authority the respondent/applicant of the O.A. No. 166 of 2001 c was transferred to Patna R.O. of the KVS. Admittedly the respondent/ applicant was not transferred under the said order of the competent authority dated 5.1.1990 to a lower post and it was not absolutely in violation of the service rules governing the respondent/applicant.

5. The Apex Court in a catena of cases had discussed the power of judicial review of the order of the competent authority for transferring the employee holding the transferable post.

(a) The Apex court (C/B), in a landmark decision, in *E.P. Royappa v. State of Tamil Nadu & Ors.*, (1974) DSLR 497: (1974) 4 SCC3 held that the Government has, in view of the larger interest of administration, to make best possible choice to find out suitable officers/employees for transfer for exigency of administration. The Apex Court (C/B) in the case of *E.P. Royappa (supra)*, further, held that it is always a difficult problem for the Government to find out suitable officers for the specialized post. There are not ordinarily many officers who answers the requirement of such specialized post.

When in exercise of this choice, the Government transfers an officer from one post to another, the officer may feel unhappy because the new post does not give him the same amplitude of powers which he had when he had holding the old post. But that does not make the transfer arbitrary so long as the transfer is made on account of the exigency of administration and is not from higher post to a lower post with discriminatory preference of a junior for the higher post, which will be valid and not open to attack under Articles 14 and 16 of the Constitution of India. The Apex Court in *E.P. Royappa (supra)* further held that the burden of establishing mala fides in issuing the transfer and posting order issued by the competent authority is on the person who alleges the court would be slow to draw inference from incomplete facts particularly when imputations are made against a person having high responsibilities.

(b) The Apex Court in *B. Varadha Rao v. State of Karnataka & Ors.* (1986) 4 SCC 131 held that transfer of a government servant who is appointed to a particular cadre of transferable posts from one place to another is an ordinary incident of service. No Government servant can claim to retain to a particular post or in a particular place of posting unless his appointment itself is to a specified, nontransferable post. Therefore, a transfer order per se made in the exigency of service does not result any alteration of any of the condition of service, express or implied, to the disadvantage of the concerned government servant. Further, a

transfer order which is a mala fide and not made in public interest but made for collateral purpose with oblique motive and in colorable exercise of powers is vitiated by abuse power and is open to challenge before court being wholly illegal and void.

(c) The Apex Court in *State Bank of India v. Anjan Sanyal & Ors.* (2001) 5 SCC 508 held that an order of transfer of an employee is a part of the service condition and such order of transfer is not required to be interfered with lightly by a court of law in exercise of its discretionary jurisdiction unless the court finds that either the order is mala fide or that the service rule prohibits such transfer or that the authorities, who issue the order, had not the competence to pass the order.

6. It is, now, fairly wellsettled that the judicial review of the transfer order is circumscribed. The circumstances under which the power of judicial review of the transfer order of a Government employee holding the transferable post could be exercised are broadly summed up as follows:

- (i) the transfer order is from a higher post to a lower post with discretionary preference of a junior for the higher post;
- (ii) transfer order 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 had not the competence to pass the transfer order ;
- (vi) transfer order is not issued in the public interest but it was issued for an alien purpose, such as for accommodating an employee of the choice of the authority to a particular post for an unholy purpose, as a punishment of the employee, repeatedly transfer on political influence or/on the instigation of a higher authority not concerned h with the transfer order of the concerned employee.

7. As stated above, the root cause of the present case is the transfer order dated 5.1.1990 transferring the respondent/applicant in O.A. No.166 of 2001 from Calcutta Regional Office of the KVS to the Regional Office of the KVS, Patna.

8. The said transfer order dated 5.1.1990 was challenged by the respondent by filing a writ petition being C.O. No. 2687(W) of 1990 before the Calcutta High Court. The hon"ble Calcutta High Court by an order dated 15.3.1990 exposed of the C.O. No. 2687(W) of 1990 with the direction that the respondent would file representation before the authorities and authorities would pass reasoned orders upon sympathetic consideration of the same and until such disposal, the transfer order would remain in abeyance,

9. As the authority did not accept the joining report of the respondent to his office at Calcutta after the Calcutta High Court passed the said order dated 15.3.1990, the respondent filed a contempt petition along with an application for modification of the earlier order of the Calcutta High Court dated 15.3.1990 passed in C.O. No. 2687(W) of 1990 before the Hon'ble Calcutta High Court. The Calcutta High Court by passing the final order dated 12.7.1995 had dismissed the contempt petition with the observation that:

"affidavit in opposition has been filed on behalf of the alleged contemners, explaining the grounds on which petitioner (present respondent) had been transferred and the alleged contemner was the appropriate authority to pass such order of transfer. Whether such authority transferred the petitioner (present respondent) or whether, instead of transfer, terminated him was his discretion and the court cannot interfere with that. The application is dismissed."

10. After the writ petition C.O. No. 2687/W/90 challenging the transfer order dated 5.1.1990 and also the contempt petition had been rejected by the Calcutta High Court under the order dated 12.7.1995, the respondent approached the concerned authority for allowing him to join the post of Assistant to which he was promoted under an order dated 15.9.1995 and posted at R.O. KVA, Silchar. As the respondent had already been transferred to R.O., KVS, Patna, he could not be released by the authorities from the R.O., KVS, Calcutta ; and for joining on his promotion to the post of Assistant of R.O., KVS, Silchar, he was to be released from R.O., KVS, Patna. Accordingly, the Assistant Commissioner (Offg.), Kendriya Vidyalaya Sangathan, Calcutta issued a memorandum dated 29.9.1995 to the effect that the respondent had to join the Regional Office, Kendriya Vidyalaya Sangathan, Patna for releasing him to join the Regional Office, Kendriya Vidyalaya Sangathan, Silchar. Accordingly the respondent joined the Regional Office, Kendriya Vidyalaya Sangathan, Patna on 5.10.1995 and after 20 (twenty) days he had been released from Regional Office, Kendriya Vidyalaya Sangathan, Patna to join the Regional Office, Kendriya Vidyalaya Sangathan, Silchar. Admittedly, the last posting of the respondent before joining to his new posting at Regional Office, Kendriya Vidyalaya Sangathan, Silchar was the Regional Office, Kendriya Vidyalaya Sangathan, Patna. It is also an admitted fact that the respondent never shifted his family from Regional Office, Kendriya Vidyalaya Sangathan/Calcutta to Regional Office, Kendriya Vidyalaya Sangathan, Patna from where he had been released to join his posting at Regional Office, Kendriya Vidyalaya Sangathan, Silchar.

11. According to policy decision indicated in para 11 of Appendix 24 of the Accounts Code for the Kendriya Vidyalayas pertaining to special allowance and facilities for service in North Eastern Region, there is a provision for enjoyment of the benefits of double HRA (House Rent c Allowance) of the Sangathan employees. Para 11 of the Appendix 24 reads as follows :

"A Benefit of double HRA

Sangathan employees posted to the specified States/Union Territories from outside the N.E. Region to another State/Union Territory of the N.E. Region, and who are keeping their families in rented houses or in their own houses at the last place of posting will be entitled to HRA admissible to them at the old station, and also at the rates admissible at the new place of posting in case they live in hired private accommodation irrespective of whether they have claimed transfer TA. for family or not e subject to the condition that hired private accommodation or owned house at the last station of posting in put to bona fide use of the members of the family. These concessions are admissible also to those posted to Andaman and Nicobar Islands.

Those employees who have not been posted to the N.E. .Region from outside the N.E. Region are not entitled to this benefit

B. Retention of allotment of alternate Government accommodation.

The facility of retention of Government official accommodation will continue to be available. Licence Fee will be charged at normal rates if the accommodation is below the entitled type and at one and a half times the applicable normal rates if the entitled type is retained. The facility of retention will be admissible for three years beyond the normal permissible period of retention.

Note :

(i) The benefit will not be admissible to those employees who shift their families to a station other than last place of posting or bring their families to the place of their transfer/posting.

(ii) The quantum of HRA at the last station where the family continues to stay will not change till the employees remains posted in that area and the family continues to stay at that station."

12. From the bare perusal of para 11, i.e., benefit of douhlo HRA, it is crystal clear that the Sangathan employees posted to the specified States/Union Territories from outside the N.E. Region to another State/ Union Territory of the N.E. Region, and who are keeping their families in rented houses or in their own houses at the last place of posting will be entitled to HRA admissible to them at the old station and such benefit of double HRA will not be admissible to those employees who shift their families to a station other than the last place of posting or bring their families to the place of their transfer/posting. In the case of the respondent, as stated above, he never shifted his family from Regional Office, Kendriya Vidyalaya Sangathan, Calcutta to Regional Office, Kendriya Vidyalaya Sangathan, Patna after he had been transferred from Regional Office, Kendriya Vidyalaya Sangathan, Calcutta to Regional Office, Kendriya Vidyalaya Sangathan, Patna from where he had been released to join his new posting at Regional Office, Kendriya Vidyalaya Sangathan, Silchar. As the respondent is not entitled to get the benefit of double HRA under Appendix24 of the Accounts Code for the Kendriya Vidyalas, his representation dated 15.7.1997 for enjoyment of

double HRA, after he joined Regional Office, Kendriya Vidyalaya Sangathan, Silchar, was rejected by issuing memorandum dated 29.1.2001 by the Deputy Commissioner (Finance), Kendriya Vidyalaya Sangathan, New Delhi. Ultimately, the respondent approached the Central Administrative Tribunal, Gauhati Bench by filing O.A. No. 166 of 2001 against the present writ petitioner and others for quashing the said impugned memorandum dated 29.1.2001 rejecting the claim of the respondent for grant of double HRA and also for a direction to the present writ petitioner and others to pay the double HRA to the respondent/applicant with effect from October 1995. The learned Central Administrative Tribunal by passing the final judgment and order dated 1.5.2002 allowed the O.A. No.166 of 2001. Under the said final order of the learned Tribunal dated 1.5.2002 passed in O.A. No. 166 of 2001, the learned Tribunal had not only quashed the said impugned memorandum dated 29.1.2001 and the impugned order dated 15.7.1997 for denying the double HRA to the respondent but also directed the present writ petitioner and others to give double HRA to the respondent w.e.f. October 1995 with all arrears.

13. Writ petitioner filed the present writ petition challenging the said final judgment and order of the learned Tribunal dated 1.5.2002 passed in O.A. No. 166 of 2001. It is so clear from Appendix 24 of the Accounts Code for the Kendriya Vidyalayas for payment of double HRA that the benefit of double HRA will not be admissible to those employees who shift their families to a station other than the last place of posting or bring their families to the place of their transfer and posting. It is clear from the admitted fact that the respondent had joined the Regional Office, Kendriya Vidyalaya Sangathan, Patna after his writ petition and contempt petition challenging the transfer order dated 5.10.1990 had been rejected by the Calcutta High Court by passing the final judgment and order dated 12.7.1995 and he stayed at Regional Office, Kendriya Vidyalaya Sangathan, Patna for 21 days and he never shifted his families to Regional Office, Kendriya Vidyalaya Sangathan, Patna from where he had been released to join his posting at Regional Office, Kendriya Vidyalaya Sangathan, Silchar. The learned Tribunal had lost sight of the admitted fact that the respondent joined the Regional Office, Kendriya Vidyalaya Sangathan, Patna after his writ petition challenging the transfer order dated 5.1.1990 had been rejected by the Calcutta High Court and also he never shifted his families from Regional Office, Kendriya Vidyalaya Sangathan, Calcutta to Regional Office, Kendriya Vidyalaya Sangathan, Patna while passing the impugned judgment and order dated 1.5.2002 in O.A. No. 166 of 2001. We may recall here the decision of the Apex Court in *Shiv Sagar Tiwari v. Union of India & Ors.*, (1997) 1 SCC 444 that the trust which is reposed on the high public functionaries would be discharged only to advance the object of providing a suitable condition of work to the Government employees so that the Government is run on even keel and a specified bureaucracy is as much as necessary as good political leaderships to deliver the goods.

14. The respondent, as discussed above, had approached the court to get favourable verdict by taking recourse to objectionable means. The Apex Court in

Chandra Shashi v. Anil Kumar Verma, (1995) 1 SCC 421 observed that the increasing tendency of taking recourse to objectionable means to get a favourable verdict in the court has to be viewed gravely to deter the large number of persons approaching courts from doing so. Such a tendency is required to be curbed, which requires somewhat deterrent sentence. The court also requires to see as to whether the applicant/petitioner approached the court with clean hand and also whether his conduct is blameworthy. The Apex Court through Justice N. Venkatachala (as then he was) in State of Maharashtra v. Digambar, (1995) 4 SCC 683 observed that "Power of the High Court to be exercised under article 226 of the Constitution, if is discretionary, its exercise must be judicious and reasonable, admits of no controversy, It is for that reason, a person's entitlement for relief from a High Court under article 226 of the Constitution, be it against the State or anybody else, even if is founded on the allegation of infringement of his legal right, has to necessarily depend upon on blameworthy conduct of the person seeking relief, and the court refuses to grant the discretionary a relief to such person in exercise of such power, when he approaches it with unclean hands or blameworthy conduct". The Apex Court is of the same view in J.H. Patel v. Subfian Khan, (1996) 5 SCC 312 that a party which does not come to court with clean hands cannot seek a remedy from the court.

15. For what have been discussed above, we are of the considered view that O.A, No. 166 of 2001 filed by the respondent before the Central Administrative Tribunal, Gauhati Bench is fallacious, accordingly the impugned judgment and order of the learned Tribunal dated 1.5.2002 allowing the O.A. No. 166 of 2001 is required to be interfered with. Hence, the impugned judgment and order dated 1.5.2002 of the learned Tribunal is set aside, writ petition is allowed.

16. Keeping in view of the ratio decidendi in Digambar (supra), Chandra Shashi (supra) and J.H. Patel (supra), it is further directed that the respondent shall refund the benefit of double HRA (house rent allowance) if he enjoyed under the impugned judgment and order of the learned Tribunal dated 1.5.2002 within three months from today.

17. Writ petition is allowed. Parties are to bear their own costs.