

(2010) 07 CAL CK 0079
In the Calcutta High Court
Case No : WPCT No. 1144 of 2010

Union of India (UOI) and Others

APPELLANT

Vs

Dr. R. Thulasidasan

RESPONDENT

Date of Decision : 19-07-2010

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2011) 2 CALLT 585 : (2011) 5 CHN 88

Hon'ble Judges : Tapan Kumar Dutt, J;Prasenjit Mandal, J

Bench : Division Bench

Advocate : Anjili Nag, for the Appellant;S. Samanta, for the Respondent

Final Decision : Allowed

Judgement

Prasenjit Mandal, J.—This application is at the instance of the Respondents and is directed. against the order dated 16 04.2010 passed by learned Central Administrative Tribunal in connection with OA 105/AN/2009 and OA 28/AN/2009 thereby setting aside the orders dated 26.08.2008 and 04.12.2008 passed by the Commissioner-cum-Secretary (Health). The learned Tribunal also quashed the order of treating the period from 26.08.2008 to 17.12.2008 as EOL. At the same time the learned tribunal passed orders treating period from 26.08.2006 to 04.12.2008 as waiting for posting and for the remaining period the request for grant of leave should be reconsidered having regard to what had been discussed in the judgment.

2. The Respondent herein filed the said two applications. The facts in brief are mentioned below.

(i) The Respondent was appointed as GDMO and in course of service, he was posted as Deputy Director (HE & HIC) with effect from January, 2006 at G.B. Pant Hospital, Port Blair. By an order dated 29.10.2007, he was appointed as GDMO at Urban Health Centre, Delanipur in place of Dr. E.P. Sharfuddin, who was to retire from his service on superannuation on 31.10.2007.

(ii) On getting such order of transfer, the Respondent filed one application bearing No. 159/AN/2007 before the tribunal for setting aside the order of transfer. The learned tribunal dismissed that application on 02.07.2008. Thereafter, the Respondent preferred an application under Article 226 before the Circuit Bench, A&N Islands and that application was numbered as COCT No. 11 of 2008. By an order dated 06.08.2008, the Division Bench directed the Respondent to file a fresh representation within two weeks from date and if such representation was made, the Respondent concerned namely the Commissioner-cum-Secretary (Health) would consider the same on its merits by giving the applicant/Respondent herein a reasonable and fair opportunity of hearing within the period of two weeks from the date of making representation.

(iii) The Hon''ble Division Bench also observed that wholly without prejudiced to the rights and contentions of the Respondents, for a period of four weeks, the Petitioner will be entitled to be on medical leave as he is at the moment. However, if for any reason, he applies for extension of medical leave to the authority concerned, the authority concerned will be at liberty to consider the same in accordance with the service rules of the Petitioner/Respondent herein.

(iv) Pursuant to that order, the Respondent submitted a representation dated 12.08.2008 raising objection against such transfer. Thereafter the Commissioner-cum-Secretary(Health) passed an order on 26.08.2008 stating inter alia that the insistence of the Respondent to continue his present posting was not tenable at all and that his place of posting was not far away from his residence and such transfer was effected with the approval of the competent authority (i.e. the Hon''ble Lt. Governor). The Commissioner-cum-Secretary (Health) also observed that the Respondent has been working in Port Blair in one or the other capacity for a long period since January, 1997. He could not be allowed to work as Deputy Director (HE & HIC) for a particular period as he was recruited as GDMO and not as a Deputy Director (HE & HIC).

(v) Thereafter on 22.09.2008, the Respondent issued a legal notice upon the applicant.

(vi) The Respondent then submitted another representation dated 20.11.2008 stating inter alia that no order of posting was passed in his favour in terms of the order dated 26.08.2008. He might be permitted to join the post of Deputy Director (HE & HIC) which was still vacant.

(vii) On 04.12.2008, the Commissioner-cum-Secretary (Health) issued another order stating inter alia that the posting of the Respondent to Urban Health Centre, Delanipur could not be changed. The Respondent was accordingly directed to report to the Urban Health Centre, Delanipur forthwith.

(viii) On 05.12.2008, the Respondent left the islands to go to mainland after issuing a letter addressed to the Director of Health Services.

(ix) On return from the mainland, when he found that two notices were affixed

on the door of his residence, he joined UHC, Delanipur as GDMO on 18.12.2008.

(x) Subsequently, the Respondent was transferred from the UHC, Delanipur to RPH Hospital, Mayabunder by an order dated 03.02.2009. 24 other doctors were also transferred by that order dated 03.02.2009. Being aggrieved, by aforesaid two orders, the Respondent filed two OA applications before the Central Administrative Tribunal, Circuit Bench at Port Blair. By the impugned judgment, the two applications were disposed of. Being aggrieved, this application has been preferred by the Respondent.

3. The Respondent authorities/applicants herein have contested the applications by filing affidavits-in-opposition denying all material allegations made in the applications. They have stated that the transfer of the Respondent to UHC, Delanipur was made in the interest of public, when Dr. E.P. Sharfuddin retired from service on superannuation. The representation of the Respondent dated 12.08.2008 was disposed of by an order dated 26.08.2008, it was observed that the Respondent could not claim his right to continue as Deputy Director (HE & HIC) for a particular period, since he was recruited as GDMO and not as Deputy Director (HE & HIC). The Respondent ought to have joined at Delanipur UHC, as soon as the speaking order dated 26.08.2008 was issued by the Commissioner-cum-Secretary (Health). All the GDMOs are required to serve in all Health Institutions in Andaman and Nicobar Administration. After serving for about 10 years at G.B. Pant Hospital, Port Blair, the Respondent was transferred to Delanipur UHC, which is at a distance of 2 kilometers only from his residence. Subsequently, he was sent to Mayabunder Hospital because there was no Pathologist at that hospital and the Respondent also prayed for appointment as Pathologist because he was qualified for that post. Therefore, there was no illegality in the matter of transfer of the Respondent, so the applications should be dismissed.

4. Mrs. Nag, learned advocate, appearing on behalf of the applicants submits that the Respondent has been serving at the G.B. Pant Hospital since January, 1997 in different capacity and he was appointed as Deputy Director (HE & HIC) since January, 2006, thereby serving in such capacity of the last one and a half years. But, in fact, he was serving at the G.B. Pant Hospital, Port Blair for more than ten years. For the administrative reasons, he was transferred to UHC, Delanipur as GDMO. In fact, his appointment is not as Deputy Director (HE & HIC) at all but as GDMO and that is why he was posted at Delanipur in the said capacity. The tribunal has rightly observed in the early OA Case No. 159/AN/2007. While disposing of that OA, the learned tribunal observed that the new place of posting of the Respondent is only two kilometers away from the present residence of the Respondent. His headquarter remains the same. There is no chance that the education of the children of the Respondent would be affected or that his seniority would be affected, no mala fide intention has been proved, so the application was dismissed. At the time of filing the OA application, he prayed for interim order and it was granted. After disposal of the writ application arising

out of dismissal of that OA case, the Respondent filed a representation dated 12.08.2008. The Respondent was heard in person on 25.08.2008. Thereafter the Commissioner-cum-Secretary (Health) passed the appropriate order dated 26.08.2008. By an order dated 04.12.2008, the Commissioner-cum-Secretary (Health) asked the Respondent to report to the UHC, Delanipur forthwith but he did not join. According to his defence, he left for Kolkata on 06.12.2008. The order dated 04.12.2008 could not be served upon the Respondent and as such it was affixed at the residence of the Respondent/applicant. So there is no illegality or malafide intention in the steps taken by the applicants. The Respondent also cannot adhere to any particular post for a particular period. He could not have any right to hold the post of Deputy Director (HE & HIC) at all. Therefore, his contention cannot be accepted. Ultimately, he joined at UHC, Delanipur on 18.12.2008. But the learned tribunal has set aside the order dated 26.8.2008 and 04.12.2008 without any basis. Similarly, the learned tribunal was not justified in quashing the order of treating the period of absence of the Respondent from 26.08.2008 to 17.12.2008 as extra ordinary leave. Similarly, the period from 26.08.2008 to 04.12.2008 on waiting for posting is not also justified. Thus, she submits that order of the tribunal is not justified and it must be set aside.

5. On the other hand, Mr. Samanta, learned advocate, appearing on behalf of the Respondent, submits that the administrative authority had taken mala fide attitude toward the Respondent. The transfer of Respondent from G.B. Pant Hospital at Port Blair to UHC, Delanipur cannot be said to be bonafide at all. It was also not done in the interest of the public. In fact, the order of transfer of the Respondent from Port Blair to Delanipur originated by a note of Director of Health Services, Port Blair dated 07.08.2007, wherein he clearly stated that the Respondent has been staying Port Blair Hospital since 1997. He was not performing his duties properly. He amassed huge wealth and he has been misusing the government vehicles, etc. So the transfer order could not be stated bonafide at all. He also submits that in fact, one criminal case under the provision of Prevention of Corruption Act was initiated against the Respondent. Ultimately, police submitted final report against him and so there is nothing as to the allegation made against the Respondent by the Director of Health Services.

6. Mr. Samanta also contends that initially the order of transfer was made on 29.10.2007 and his client filed the OA No. 159/AN/2007 before the tribunal and got interim order. On the basis of that interim order, the Respondent was staying at Port Blair Hospital. In the meantime his application was dismissed. He preferred a writ application before the Division Bench and that was also disposed of. He filed two representations. He also issued a legal notice upon the applicants. Thereafter he filed a representation dated 12.08.2008 in view of the order of the Division Bench in COCT No. 11 of 2008. His application was considered by the Commissioner-cum-Secretary (Health) in the Order dated 26.08.2008. The Respondent went to the mainland upon giving intimation to the applicant on 05.12. 2008. Thereafter, on return, he found that two notices were

affixed on the residence of his house as if the Respondent was absconding. Therefore, the conduct of the applicants is such that they have taken mala fide attitude towards the Respondent. Moreover, within two months, the Respondent was again transferred to R.P. Hospital, Mayabunder. So everything proves that a mala fide intention was adopted towards the Respondent by administrative authority. So the tribunal was right in setting aside the two orders and regularizing the period in the manner indicated in the impugned order of the tribunal.

7. Upon hearing, the submission of Learned Counsel of both the parties, the following points emerged for decision in this application.

(i) Whether the learned tribunal was justified in interfering with the order of transfer of the Respondent, and

(ii) Whether the learned tribunal was justified in regularizing the period of absence of the Respondent in the manner as prayed for by the Respondent.

8. After hearing Learned Counsel for both the parties and after perusing the materials available in the record, I find that admittedly the Respondent had been serving as GDMO in one or other capacity in the G.B. Pant Hospital, Port Blair since January, 1997. Admittedly, he was appointed as Deputy Director (HE & HIC) in the G.B. Pant Hospital since January, 2006. Admittedly, Dr. E.P. Sharfuddin, CMO (NFSG) UHC, Delanipur was likely to retire from service on superannuation with effect from 31.10.2007 and by an order No. 4118 dated 29.10.2007, the Respondent was transferred to UHC, Delanipur to hold the charge of Medical Officer Incharge. Admittedly, the basic post of the Respondent is GDMO and he was holding the post of Deputy Director (HE & HIC), G.B. Pant Hospital, Port Blair. When he was transferred, the Respondent filed OA No. 159/AN/2007 before the learned tribunal and got an interim order to keep the transfer order in abeyance. Ultimately, OA application was dismissed by the order dated 02.07.2008 and vacated the interim order granted earlier. At the time of disposal of the said OA application, the learned tribunal observed inter alia as follows:

7) In the present case it is important to note that the new place of posting is only two kilometers away from the present location of the applicant. His headquarter remains the same. There is no reduction in his grade. There is no contention that education of children is adversely affected. The applicant's seniority is not affected. No mala fide has been established. Considering all these facts and the dictum laid by the Hon'ble Supreme Court, we do not consider that this is a fit case for intervention by the Tribunal.

9. By the order dated 06.08.2008, the Division Bench disposed of the application bearing No. COCT. 11 of 2008 filed by the Respondent holding inter alia as follows:

The Petitioner will be at liberty to make afresh representation positively within

two weeks from date and if such representation is made, the Respondents concerned, namely the Commissioner-cum-Secretary (Health) of the Andaman Nicobar Administration will consider the same on its merits by affording the Petitioner a reasonable and fair opportunity of hearing within a period of two weeks from the date of making the representation.

The decision taken on the representation of the Petitioner will be communicated by the concerned Respondent to the Petitioner positively within a week from the date of making the decision or passing the order thereon as the case may be.

Wholly without prejudice to rights and contentions of the Respondents, for a period of four weeks, the Petitioner will be entitled to be on medical leave as he is at the moment. However, if for any reason he applies for extension for medical leave to the authority concerned, the authority concerned will be at liberty to consider the same in accordance with the service rules of the Petitioner.

10. Admittedly, in view of the order of the Division Bench, the Commissioner-cum-Secretary (Finance), though not empowered to deal with the matters, passed the order dated 26.08.2008 holding inter alia as follows:

I have heard Dr. R. Thulasidasan in person on 25/8/08 at 4.00 PM in the office and have also gone through the representation dated 12/8/08 submitted by him and other record available in the file. It is seen that he has worked at different places in the A&N Islands from time to time. He has been working in the Port Blair in one or the other capacity for a long time i.e. since January, 1997. His argument that he has completed only 11/2 years as Deputy Director (HE & HIC) and his insistence to continue in the said post is not tenable in view of the fact that one can not claim to have a right to continue as a Dy. Director (HE & HIC) for a particular period as he was recruited as a GDMO and not as a Dy. Director (HE & HIC). Further, it is also relevant to point out that even after posting to Urban Health Centre, Delanipur, he would continue to be within the Port Blair area. Moreover, he was transferred to UHC, Delanipur with the approval of the Competent Authority (i.e. Hon."ble L.G.).

However, there could be a case for examining all such cases of Doctors who are placed in the similar circumstances as that of Dr. R. Thulasidasan and consider them for posting out of their present places where they have been serving for a longer period. All such cases are to be placed before the Competent Authority along with the facts for taking appropriate decision on merit in each case. His contention to utilize his expertise as a Specialist (Pathology) could also be considered and placed before the Competent Authority (i.e. Hon."ble L.G.) for taking appropriate decision where such facilities are available/could be further upgraded. This is all the more necessary in view of the fact that there is shortage of Specialists Doctors in the Health Department of the A&N Administration.

11. Thereafter, the Commissioner-cum-Secretary (Health) passed an order dated 04.12.2008 holding inter alia as follows:

As per the present practice, GDMOs are liable to be posted at various level in the Public Health Care Delivery System, including Urban Health Centres, Primary Health Centres and Community Health Centres. CMO (NFSG) level officers have been posted in Urban Health Centres in the past and continue to work in Urban Health Centres. Dr. Thulasidasan belongs to the GDMO sub cadre and not to the Specialists sub cadre.

Under the circumstances, after careful consideration, it has been decided that the posting of Dr. R. Thulasidasan to UHC Delanipur cannot be changed. Dr. R. Thulasidasan is accordingly directed to report to the Urban Health Centre, Delanipur forthwith.

This issues with the approval of Lt. Governor.

12. By the two applications namely OA No. 105/AN/2009 and OA No. 28/AN/2009, the Respondent has prayed, inter alia, for setting aside and or quashing the orders dated 26.08.2008 and 04.12.2008, cancelling or withdrawing the order of transfer dated 29.10.2007, cancelling the order of transfer dated 03.02.2009, directing the authorities to treat the period of absence of the Respondent from 26.08.2008 to 05.12.2008 as the period waiting for posting as the time spent on duty and to regularize the service from 17.07.2008 to 17.12.2008, grant salary and allowances together with all consequences. In the subsequent OA application, the Respondent also prayed for treating the substantive prayer(b) and interim prayer(d) of OA No. 28/AN/2009 as withdrawn, for quashing the purported memorandum dated 02.05.2009, purported order dated 12.05.2009 and memo dated 27.07.2009, to treat the period from 17.07.2008 to 25.08.2008 as commuted leave on medical certificate, from 26.08.2008 to 05.12.2008 as on compulsory waiting for posting order period and spent on duty and from 06.12.2008 to 17.12.2008 as earned leave and thereupon to regularize the service of the Respondent from 17.07.2008 to 17.12.2008 and to grant salary and allowances for the said period together with all consequential benefits.

13. As regards medical leave, by the order dated 06.08 2008, the Division Bench observed that the Respondent would be entitled to be on medical leave as he is at present for a period of four weeks. The applicant was granted medical leave up to 25.08.2008. As the order of Division Bench is not set aside, we are of opinion that the period of absence up to 25.08.2008 on medical leave shall remain unaltered. Then the Respondent was free to join at UHC, Delanipur on 26.08.2008 because on that very day, the order of transfer at Delanipur subsisted and there was no change or bar in joining the post as GDMO of Delanipur on 26.08.2008. But the Respondent did not do so. So, his contention that he was waiting for appropriate orders of posting in terms of the said reasoned order dated 26.08.2008 passed by the Commissioner-cum-Secretary (Health) cannot be accepted at all. He was supposed to join at Delanipur on 26.08.2008 but he did not do so at his own whims, though he was holding a responsible job of examining patients. Thereafter, on 04.12.2008, the

Commissioner-cum-Secretary (Health) passed orders that the GDMOs are liable to be posted at various level in the Public Health Care Delivery System including Urban Health Centres, Primary Health Centres and Community Health Centres. The Respondent holding the post of GDMO was, therefore, liable to be posted anywhere including the UHCs. His place of posting was about 2 kms from his residence at Port Blair as observed by the tribunal in the order dated 02.07.2008. We are of the view that the learned tribunal rightly observed the remarks as noted earlier. Therefore, there is no illegality or infirmity or biasness in shifting the Respondent from Port Blair Hospital to Delanipur Health Centre.

14. It is not out of place to mention that in his representation, the Respondent contended that not only he, many other doctors having 10 year posting at Port Blair are also continuing in the same post but he was transferred to Delanipur with malafide intention. When such fact was brought to the notice of the Commissioner-cum-Secretary (Health), he passed the impugned order dated 26.08.2008 directing to take necessary steps for transfer of other medical officers who are staying at G.B. Pant Hospital for long period. Accordingly, 24 doctors were transferred from Port Blair to Mayabunder. The Respondent is a specialist in Pathology and as per materials on record, there is another pathologist at Port Blair Hospital. But there is no pathologist at Mayabunder Hospital. In such a situation, the Respondent was transferred to Mayabunder Hospital along with other doctors. It may be that he was transferred within 2/3 months from the date of his joining at Delanipur. The service to patients is the essential consideration for transfer of the doctor and for that reason according to the exigency, a doctor of the GDMO category may be transferred anywhere in these islands in the interest of public. In consideration of the fact that the Respondent was staying for a long period at Port Blair, his transfer at Mayabunder cannot said to be unreasonable and mala fide but for the interest of public.

15. Though, Mr. Samanta vehemently argues that since there was no order of posting in the order dated 26.08.2008, the Respondent could not join, we cannot agree to such submission. After disposal of the OA application bearing No. 159/AN/2007 and writ application arising there from on 06.08.2008, the Respondent was free to join at Delanipur on any day after 06.08.2008. But the Division Bench observed that subject to rights and contentions of the parties, Respondent will be entitled to be on medical leave for a period of four weeks. As the Respondent attended the Commissioner-cum-Secretary (Health) on 25.08.2008 and there is no material to prove that he was ill at that time, we are of opinion that the Respondent was absolutely free to join to his place of transfer on any day with effect from 26.08.2008 but he joined UHC, Delanipur only on 18.12.2008, that too, under compelling circumstances when he was forced to join that post.

16. As regards the period from 05.12.2008 to 17.12.2008, Mr. Samanta contends that under the compelling circumstances, the Respondent had to leave the

islands on 06.12.2008. We are of view that this submission of Mr. Samanta, cannot be accepted because the letter dated 05.12.2008 of the Respondent does not specifically state why he was leaving the islands without seeking any permission in writing from the appointing authority. Leading of a letter for the Director of Health Services is not enough compliance to proceed on leave. Had the Respondent contacted with the D.H. Son 05.12.2008 before leaving the islands on 06.12.2008, he would have known the order dated 04.12.2008 passed by the Commissioner-cum-Secretary (Health).

17. With regard to leaving the Hospital, particularly for a responsible doctor, the Respondent is claiming that he is a pathologist and holding the post of the President of the Health Association of A&N Islands and other higher posts. So his action does not commensurate with the steps taken by him to leave the islands.

18. So, we are of the view that he left these islands on 06.12.2008 without caring for the norms and rules relating to leaving the islands by a responsible doctor. So, such period of absence cannot in any circumstances be treated as EL as claimed by the Respondent. There is no material to show that the Respondent ever prayed for leave from 26.08.2008 to 17.12.2008. But he filed the application before the tribunal for regularization of the period of absence.

19. In order to maintain discipline in the service particularly with regard to a person who is holding a responsible position like the Respondent, the appointing authority is required to take, sometimes, strong action or attitude against the delinquents. Upon due consideration of the entire circumstances, we are of the view that the concerned authority has rightly dealt with the period of absence from 26.08.2008 to 17.12.2008 of the Respondent as unauthorized leave and rightly treated the said period as EOL without any pay. Consequently, the order dated 12.05.2009 passed by the competent authority treating the period from 26.08.2008 to 17.12.2008 as EOL without pay cannot be said to be unreasonable and without justification. (Annexure P-4 page 225)

20. We like to mention that as per materials on record whenever the order of transfer was made, the highest authority i.e. the Hon'ble Lt. Governor approved of the said order of transfer after following the rules of transfer.

21. Mr. Samanta contends that previously adverse entry was recorded in the ACR of the Respondent for the year 2005/06 and those adverse remarks were expunged subsequently. Corruption charges were leveled against him and ultimately it was found that the allegation was false. All such facts prove that there was biasness on the part of the administration against the Respondent. This submission of Mr. Samanta, we hold, cannot be accepted. Entries of adverse remarks in the service record might be an incident of service, and if it was recorded wrongly, it could be expunged/rectified subsequently, if the situation demands. Similarly, if any allegation of corruption made, an enquiry might be held and ultimately the person concerned might be exonerated from the charge. For that reason, the administrative authority cannot be leveled with the stigma of

biasness and enmity towards the Respondent.

22. In the judgment dated 02.07.2008, the learned tribunal has observed that there is nothing wrong in sending a note to the competent authority recommending the transfer of the Respondent and holding a subordinate post. Such transfer was made with the knowledge and approval of the Commissioner-cum-Secretary (Health) and the Lt. Governor. No allegation of mala fide has been leveled against the Lt. Governor or the Commissioner-cum-Secretary (Health). In that view, the learned tribunal was unable to accept the contention of the Respondent that his transfer was a mala fide action. Against such order of the learned tribunal, the Respondent preferred a writ application and the Division Bench passed the order dated 06.08.2008 directing the Respondent to file a representation to the administrative authority. But the judgment of Division Bench is silent about the finding and conclusion of the learned tribunal. Mr. Samanta contends that when the writ application was disposed of, the doctrine of merger would apply. So, the observation and conclusion of the learned tribunal should not be taken into consideration. But the judgment dated 06.08.2008 of the Division Bench does not indicate that the finding and conclusion of the learned tribunal have been set aside.

23. The learned tribunal has discussed the decision in the case of State of Bihar and Another Vs. P.P. Sharma, IAS and Another, to decide mala fide on the part of the administrative authority. For convenience, I am quoting the said portion of the order of the tribunal.

26. The Apex Court in State of Bihar and Another Vs. P.P. Sharma, IAS and Another, has held as under:

"Mala fides" means want of good faith, personal bias, grudge, oblique or improper motive or ulterior purpose. The administrative action must be said to be done in good faith. If it is in fact done honestly, whether it is done negligently or not. An act done honestly is deemed to have been done in good faith. An administrative authority must, therefore, act in a bona fide manner and should never act for an improper motive or ulterior purposes or contrary to the requirements of the statute, or the basis of the circumstances contemplated by law, or improperly exercised discretion to achieve some ulterior purpose. The determination of a plea of mala fides involves two questions, namely (i) whether there is a personal bias or an oblique motive, and (ii) whether the administrative action is contrary to the objects, requirements and conditions of a valid exercise of administrative power.

24. 24 doctors including the Respondent have been transferred to Mayabunder, that too, when the attention of the administrative authority was drawn by the Respondent. The need of posting of a Pathologist at Mayabunder has been justified as per the materials on record. So in consideration of the above facts and circumstances and the decision reported in Shri P.P. Sharma case (supra), we are of the view that the Respondent has failed to prove the malafide action on

the part of the administrative authority with regard to his transfer either at Delanipur or subsequently at Mayabunder.

25. We like to mention here that the transfer of an employee is an incident of service. Whenever any transfer is made owing to exigency of service, the tribunal or the Court would not interfere particularly when the Respondent's transfer was not a malafide exercise of power. Such findings get the support from the decision of Tushar D. Bhatt Vs. State of Gujarat and Another, and Gujarat Electricity Board and Another Vs. Atmaram Sungomal Poshani, So, the Respondent was bound to follow the decisions of the Administrative authority relating to his transfer.

26. It may be mentioned that the appointing authority is the competent person to grant or reject the leave and not the tribunal sue motto. The learned tribunal had no authority at all to grant or treat the period from 26.08.2008 to 04.12.2008 as waiting for posting. Actually, as per norms of service, waiting for posting is some times granted when, on transfer, the employee is unable to join a particular post to which he has been transferred, beyond his control and under compelling circumstances, he was to wait for that period. In the instance case, there was no such situation at all. The Respondent was free to join at UHC, Delanipur on any day from 26.08.2008 onwards as observed above, far to speak from 31.10.2007. Therefore, we are of the view that the tribunal exceeded its jurisdiction in quashing the order of treating the period from 26.08.2008 to 17.12.2008 as EOL as well as treating the period from 26.08.2008 to 04.12.2008 as waiting for posting.

27. If the reliefs as sought for in the two applications are granted as done by the learned tribunal, we are of the view that it will be nothing but to allow the wrong doer to proceed according to his own whims and without caring the higher authorities or to defy the rules of the service applicable to him. The actions of the Respondent cannot be supported at all. Even after expiry of the medical leave as granted by the Division Bench, the Respondent failed to join his duty. Even he did not apply for extension of leave. In the circumstances, there was no other alternative way but to treat the period of absence from 26.08.2008 to 17.12.2008 as Extra Ordinary Leave, without pay. Therefore, the learned tribunal was not justified in interfering with the order of transfer and regularization of the period of absence of the Respondent.

28. Therefore, the impugned order of the tribunal is not sustainable at all. The two points raised are thus answered. In the circumstances, the application is allowed. The order dated 16.04.2010 passed by the learned tribunal in OA No. 105/AN/2009 and OA No. 28/AN/2009 stands quashed and set aside. All interim orders are hereby vacated.

29. Considering the circumstances, there will be no order as to costs. Urgent Xerox certified copy of this judgment be supplied to the parties, if applied for, on usual undertakings.