

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: February 20, 2014

Judgment pronounced on: February 21, 2014

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W.P.(C) 4631/2013

M/S NORTH DELHI POWER LIMITED NOW TATA POWER
DELHI DISTRIBUTION LTD. Petitioner

Represented by Mr.Sudhir Nandrajog, Sr. Advocate
with Mr.Sujit Kr. Singh, Advocate

versus

TILAK RAJ Respondent

Represented by Mr.Salim Inamdar, Advocate with
Mr.Vibhor Kush, Advocate

CORAM:

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

1. The challenge by the petitioner is to the award of the Labour Court dated May 23, 2013 in I.D No.529/2010 whereby the Tribunal has set aside the transfer of the respondent from Keshav Puram to Karala, District Bawana, Delhi vide order dated October 14, 2009 as mala fide, illegal and unjustified with a further direction to transfer the respondent back to his original place of posting.

2. The respondent at the relevant time while working as Junior Engineer was transferred vide order dated October 14, 2009 from Keshav Puram to Karala, District Bawana, Delhi. Pursuant thereto he made representations to the authorities against the said order. That apart the Delhi State Electricity Workers Union also took up the issue of transfer of

the respondent to Karala, District Bawana. Thereafter he raised an industrial dispute which was referred to the Industrial Tribunal by the appropriate government.

3. It was the case of the respondent in his claim petition that he was promoted to the post of Junior Engineer from the post of Fitter. After the privatization he became the employee of New Delhi Power Ltd (NDPL). As per the tripartite agreement between the Govt. of NCT of Delhi and various Unions on October 28, 2000, as notified in the Gazette the service conditions and benefits which were being availed by the employees shall remain unaltered and continue to remain same in respect of the employees who were transferred to new entity i.e. NDPL.

4. According to him the petitioner started victimizing the workmen by transferring them to distant places from their place and by taking disciplinary action. He would further state that the petitioner had filed a suit against the union and succeeded in obtaining ex-parte orders restraining the union from staging dharna within 300 meters. It is because of the fact that he sat in dharna for genuine demands of the union, the transfer was effected with ulterior motive to a place which is 50 kms away from his residence. As per the office order dated January 21, 2000 passed by the erstwhile Delhi Vidyut Board, employees could not to be transferred beyond 15 kms from their residence. He prayed for setting aside the transfer order dated October 14, 2009.

5. The case of the petitioner before the Industrial Tribunal was that the dispute is barred by delay and laches. The petitioner would further state that the challenge to the transfer order dated October 14, 2009 has been accepted by the respondent as he has joined the place of posting. The petitioner's further case is that the transfer is not a condition of service and

an employee has no right to seek a posting at a particular place.

6. Three issues were framed by the Tribunal: the first one being whether the present dispute is an industrial dispute as defined in Section 2(k) of the Industrial Disputes Act; the second one being whether the claim is not maintainable on the ground of laches/belated stage; the third one being as per terms of reference.

7. On the issue No.1, the Industrial Tribunal held that the dispute raised by the union on behalf of the respondent is an industrial dispute. The second issue was also decided in favour of the respondent holding that the claim is not barred by laches/belated stage. On issue No.3 the Industrial Tribunal has come to a conclusion that the petitioner could not have transferred the respondent beyond a period of 15 kms from his residence. Further it was also the conclusion that his transfer was effected because of his trade union activities. The relevant portion of the Tribunal's order is reproduced as under:

"Since, admittedly, there is guideline that employee cannot be transferred beyond 15 kms and any other Jr. Engineer could perform the work of claimant Sh. Tilak Raj, I find no justification in transfer of workman from Keshavpuram to Karala, Bawana, which may be admittedly 40 kms away from the residence of workman. As the plea of MW 1 that the said guidelines are not mandatory to be followed, in my considered opinion, management was required to give specific reason as to why said guideline was not followed while transferring the workman to Karala. When there is specific guideline not to transfer the workman beyond 15 kms from his residence, management should have given sound and firm reason in the transfer order as to why the said guideline has not been followed. However, no such reason has been given in the transfer order. Moreover, it has not been denied for management that workman participated in Dharna on 6.09.09 and that he is member of the union.

The above facts and circumstances show that the workman has been transferred from Keshavpuram to Karala, Bawana, due to his trade union activities, and thus, the management has adopted unfair labour practice. Accordingly, it is held that transfer of workman from Keshav Puram to Karala, Distt Bawana, Delhi by the management vide order dated 14.10.2009 is malafide, illegal and unjustified and is also in violation of office order dated 21.1.2000. Hence, management is directed to transfer back the workman Sh. Tilak Raj from Karala, Distt Bawana to Keshavpuram, Delhi within 15 days of the award coming into force. No other specific relief has been claim for workman. Award is passed accordingly and reference is answered in these terms."

8. Mr.Sudhir Nandrajog, learned Senior Counsel appearing for the petitioner has drawn my attention to page 68 of the paper book to submit that the only allegations worth if any, of mala fides in the claim petition have been made in para No.11 and 12 of the same wherein the respondent inter-alia has stated that he is an active member of the union and taken active part in the demonstration of the union for the redressel of the demands of the union/workman and further the action of the petitioner is with ulterior motive. According to him, these allegations are very general in nature and cannot be construed to as effective allegations of mala fide for the Tribunal to take any cognizance. According to him, the transfer has been effected keeping in view the operational requirements of the petitioner. It is not a case where all those persons who have participated in the dharna have been transferred. He would state that the order dated January 21, 2000 referred to by the respondent was issued by the erstwhile DVB when it was catering the needs of Delhi city as a whole. In view of the changed scenario these guidelines have lost its relevance. The petitioner caters to a very limited area of city of Delhi. He would also state

that the order dated January 21, 2000 is only in the nature of a guideline to be considered by the authority while transferring a person. The conditions laid down therein are directory not mandatory. He would vehemently deny that the transfer has been effected because of the union activities. He rely upon the judgment of this Court reported as 62 (1996) DLT 438 G.S.Puri vs. Indian Oil Corporation & Ors. In the last he would submit that the Tribunal has not even considered the judgments relied upon by the petitioner including the case of G.S.Puri (supra).

9. On the other hand, learned counsel for the respondent would submit that the circumstantial evidence would show that the transfer has been effected for mala fide reasons in view of the union activities as the respondent who had participated in the dharna for which the petitioner had to file a suit seeking a restraint order. That apart he would state that the transfer beyond the distance of 15 kms is clearly in violation of the order dated January 21, 2000. He would further submit, no reason of administrative exigency has been explained by the petitioner in its reply to the claim petition. He has taken me to the cross examination of MW1 to contend that the witness who had appeared for the petitioner had no personal knowledge about the case. He would further state that the said witness had stated that he had no personal knowledge regarding transfers and postings of the employees. He has also drawn my attention to the statement of said witness that there were many persons working as Junior Engineers like a respondent. It is his case that the respondent was singled out for such transfer.

10. Having considered the rival submissions made on behalf of the parties, it is nobody's case that the respondent is not liable to be transferred. The case of the respondent is that the transfer order dated

October 14, 2009 is mala fide, violative of order dated January 21, 2000 and not in administrative exigency. Insofar as the ground for mala fide is concerned, I note that the respondent has made general averments without impleading the authority who had transferred him from Keshav Puram to Karala, District Bawana. It is a settled law that the allegations of mala fide have to be directed against the officer who had issued the order. In the absence of the officer being a party, the Court cannot look/consider those allegations. That apart the person against whom the allegations are made, need to file an affidavit answering the allegations so made. Further for proving mala fide a heavy burden lies on the person making such allegations based on credible evidence. In the present case, no such material has been placed by the respondent to support of his case of mala fide. His case of mala fide is the proximity in the date of dharna and the date of transfer. Such proximity would not establish that the transfer which has been effected is a mala fide exercise of power. In E.P. Royappa Vs. State of Tamin Nadu, 1974 (1) LLJ (SC), the Supreme Court held that burden of establishing mala fide is very heavy on the person who alleges it and that the seriousness of such allegation demand proof of high order of credibility. In the case in hand, the respondent has failed to place on record evidence of high credibility in support of the allegations. Further, the conclusion, of the Tribunal that the respondent was transferred due to his trade union activities, appears to have been drawn by the Tribunal only for the reason that the transfer was beyond 15 kms. Such conclusion is totally erroneous and moreover perverse. The allegation of mala fide because of union activities is purely an issue of fact which is not related to an allegation that the transfer is contrary to an office order which would be primarily an allegation of malice, in law. I note that insofar as the

allegation that the transfer has been effected by union activities is concerned, the petitioner is not able to place any statutory provision containing an absolute bar against transfer of the union office bearers. On a specific query whether the respondent is a protected workman in terms of any Labour Enactment, the answer was in the negative. I note that in G.S.Puri's case (supra) the Division Bench of this Court has in para No.5 and 16 to 19 has held as under:

"5. The scope of right of the employer to transfer the employees from one station to another and also the scope of the jurisdiction of the High Court or any other Tribunal to interfere in the matters of transfer has been considered in a number of judicial pronouncements. In Union of India and Others v. S.L. Abbas, 1993 (4) SCC 357: 37 1993(3) SC 678, it has been observed that in case of All India Services transfer is an incidence of service and an employee is transferable any where in India. Who should be transferred where, is a matter for the appropriate authority to decide. Unless the order of transfer is vitiated by malafides 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. The guidennes say that as far as

possible, husband and wife must be posted at the same place. The said guideline, however, does not confer upon the Government employee a legally enforceable right. Executive instructions are in the nature of guidelines. They do not have statutory force.

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16. Then it is contended that the petitioner was an office bearer of the worker's Union of the Corporation and in that capacity he was a protected workman under the Industrial Disputes Act, 1947, so he could not be transferred without his consent and also consent of the Union. Such a mandate against transfer is denied by the respondent. During arguments no such statutory provisions containing absolute bar against transfer of union office bearers were brought to our notice.

17. In the case of an active worker or office bearer of the Union, the rules and principles governing the transfer would not be different. In his case also the same principle will apply and unless it can be said that the transfer is motivated by some ulterior consideration no exception can be made in his case. As already noticed the general rule is that the employer has the right to transfer any employee which would obviously include an active worker or the office bearer of the union in the interest and exigencies of the business and the right of the employer to transfer is not

taken away simply because the employee is an active worker or office bearer of the Union.

18. In *Kishori Lal Verma v. Hindustan Zinc Ltd. & Anr.*, 1995 (11)LLJ 35 (Raj.) a Division Bench of Rajasthan High Court has observed as under:

"10. Transfer of a Trade Union leader does not ipso facto imply that the transfer is an act of victimisation. Trade Union activities performed by the office bearers of the Union are solely for the benefit and welfare of the workmen and not connected with the establishment itself or the members of the public whose interest the establishments are intended to serve. The duties rendered by the office-bearers to the Union are not part of the duties rendered to the establishment. The establishment can function without the Union but the Union cannot function without the establishment. The prime duty of the employee is to serve the establishment and then only the Union. No doubt, Trade Union activity has won universal recognition and it has a twin objective, viz., safeguarding the interests of the workers and ushering industrial peace. For whatever reason the management may have deemed it fit or conducive to grant duty relief the legal status of that act is only that of a concession and not a matter pertaining to the condition of service."

19. Thus the petitioner as active worker of the Union has no special rights against transfer so long as his

transfer is not motivated.”

11. Further the transfer being in violation of the office order dated January 21, 2000 is also without any merit inasmuch as a perusal of the relevant clause which is reproduced as under would show that as far as possible the administration shall make efforts to transfer an employee within 15 k.ms of his residence. That does not preclude the administration to transfer an employee beyond 15 k.ms.

“Assistant Engineers/Juniors Engineers shall normally be posted in different districts. As far as possible the Administration shall make effort that transfer of Officers/Employees be done within 15 kilometres of their residence. However, in the event of sufficient posts not being available within the radius of 15 kms, an employee can be posted even beyond 15 kms.”

12. Even otherwise such a clause would not give any enforceable right in favour of an employee. The order dated January 21, 2000 is in the nature of the guideline and the transfer order cannot be invalidated being contrary to the said order.

13. That apart on the ground of administrative exigency, I find that the transfer order itself has been issued in consideration of the organization requirements. That apart the petitioner in reply to the claim petition has also averred, the organization requirements as the ground for transferring the respondent from Keshav Puram to Karala, District Bawana. It is a settled law that the organizational requirements have to be seen from the perspective of the employer. The Court and the Tribunals shall not sit over the decision of an employer and substitute the decision of the employer by their own decision. I find that the transfer has been effected within the city of Delhi and not to a far of place for the respondent to have a grievance,

more so when he is occupying a transferable post. Further the Tribunal could not have given direction to transfer the respondent to Keshav Puram from Karala, District Bawana. Such directions surely are not in the realm of Judicial review.

14. I note for benefit, the following Judgments of the Supreme Court:-

In the matter reported as (1995) 2 SCC 532, Chief General Manager, (Telecom) N.E. Telecom Circle v. Rajendra Ch. Bhattacharjee, the Supreme Court has held that:

"7. It is needless to emphasise that a government employee or any servant of a Public Undertaking has no legal right to insist for being posted at any particular place. It cannot be disputed that the respondent holds a transferable post and unless specifically provided in his service conditions, he has no choice in the matter of posting. Since the respondent has no legal or statutory right to claim his posting at Agartala, therefore, there was no justification for the Tribunal to set aside the respondent's transfer to Dimapur."

In the matter reported as (1993) 4 SCC 357, Union of India v. S.L. Abbas, the Supreme Court has held that:

"7. Who should be transferred where, is a matter for the appropriate authority to decide. 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. The guidelines say that as far as possible, husband and wife must be posted at the same place. The said guideline however does not confer upon the Government employee a legally enforceable right."

8. *The jurisdiction of the Central Administrative Tribunal is akin to the jurisdiction of the High Court under Article 226 of the Constitution of India in service matters. This is evident from a perusal of Article 323-A of the Constitution. The constraints and norms which the High Court observes while exercising the said jurisdiction apply equally to the Tribunal created under Article 323-A. (We find it all the more surprising that the learned Single Member who passed the impugned order is a former Judge of the High Court and is thus aware of the norms and constraints of the writ jurisdiction.) The Administrative Tribunal is not an appellate authority sitting in judgment over the orders of transfer. It cannot substitute its own judgment for that of the authority competent to transfer. In this case the Tribunal has clearly exceeded its jurisdiction in interfering with the order of transfer. The order of the Tribunal reads as if it were sitting in appeal over the order of transfer made by the Senior Administrative Officer (competent authority)."*

15. In terms of the conclusion above, I am of the view that the Tribunal has clearly erred in interfering with the transfer order dated October 14, 2009. I set aside the order dated May 23, 2013 passed by the Industrial Tribunal in I.D No.529/2010. The writ petition is allowed without any order as to costs.

CM No. 10614/2013

In view of the order in the writ petition, the application is disposed of as infructuous.

**(V.KAMESWAR RAO)
JUDGE**

FEBRUARY 21, 2014
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