

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

+ **LPA No. 168/2010**

% **Date of Decision: 11.03.2010**

M.K. BAINIWAL APPELLANT
Through Mr. Rakesh Dhingra, Advocate

Versus

UNION OF INDIA & ORS. RESPONDENTS
Through Mr. M.M. Sudan, Advocate for R-1/UOI
Mr. Jatan Singh, Advocate for R 2 to 6.

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MR. JUSTICE MOOL CHAND GARG

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the reporter or not? | No |
| 3. | Whether the judgment should be reported in the Digest? | No |

MOOL CHAND GARG, J.

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1. This order shall dispose of the LPA filed by the appellant who is aggrieved by the order passed by the learned Single Judge dismissing his Writ Petition (Civil) No. 14134/2009 whereby the petitioner assailed the order passed by the respondents transferring the services of the petitioner from Delhi to Hyderabad on account of administrative exigencies.

2. The appellant belongs to a reserved category and is employed as a General Manager with Project Equipment Corporation Limited, a Public Sector Enterprise (in short 'PEC'). At the time of the passing of the transfer order he was working in Delhi. Vide transfer order dated 04.12.2009 he was transferred from Delhi to Hyderabad and stands relieved w.e.f. 07.12.2009.

3. The appellant challenged the aforesaid order of transfer by alleging that it was not an order passed due to administrative exigencies but was punitive inasmuch as the appellant made allegations of Caste-based atrocities and harassment by the respondents prior to the impugned transfer. He also made several complaints against the respondents in this regard both before the National Commission for Scheduled Castes and also before the Police.

4. It is a matter of record that all those complaints were enquired into both by the National Commission for Scheduled Castes as well as by the Delhi Police and no substance was found in those complaints as noticed by the learned Single Judge in terms of the letter dated 6/7.08.2009 issued by the National Commission for Scheduled Caste. This is also the position qua the Police, as the investigation report of the Police in this regard which is Annexure R-2 to the counter affidavit of respondents No. 2 to 6 running at page 222-225 of the paper book filed before the learned Single Judge. The perusal of the order passed by the Commission goes to show that there was no substance in his complaint as there was no violation of rules of reservation and any other violation

of service safeguard provided to the SCs. The Police also during the course of investigation found that the complaint made by the appellant was without any merits inasmuch as both the applicant and other officials whose name were quoted as his witnesses to support the allegations of harassment were false inasmuch as all the 4 officials who were named as the witnesses of the petitioner were undergoing disciplinary proceedings under PEC Employees (Conduct and Disciplinary Appeal) Rules, 1975 and charges leveled were proved against them by the disciplinary authority.

5. It is also a matter of record that aggrieved by the transfer order the petitioner even filed a miscellaneous application for stay of transfer which was dismissed by the learned Single judge order dated 23.12.2009 and on 07.12.2009 he stood relieved from Delhi. Against the said order an LPA was also filed by the appellant which was also dismissed as withdrawn vide order dated 28.01.2010. Yet the appellant filed another application for stay of transfer being CM No. 1258/2010 which also stood dismissed vide order dated 29.01.2010.

6. According to the respondents, the transfer order dated 04.12.2009 has been affected due to administrative exigencies because a senior Manager at Hyderabad Branch was going to superannuate on 31.12.2009 and the petitioner being in a senior managerial position was found competent and to be in a better position to take charge of the Hyderabad region so that organization could have good opportunities to

develop business in that region also. The fact regarding retirement of a senior Manager of Hyderabad Unit was not disputed by the petitioner.

7. It is for that reason the learned Single Judge vide impugned order held that transfer of the appellant from Delhi to Hyderabad has been affected by the Employer because of administrative exigencies and cannot be interfered with by the Court in exercise of its discretionary writ jurisdiction under Article 226 of the Constitution of India. Reference has also been made to a judgment delivered by the Hon'ble Supreme Court in the case of Gujarat Electricity Board & Another Vs. Atmaram Sungomal Poshani, AIR 1989 SCC 1433 whereby the Apex Court has been pleased to hold that transfer of a Government servant appointed to a particular cadre of transferable post from one place to another is an incident of service. No Government servant or employee of public undertaking has legal right for being posted at any particular place. In the same judgment it has been held that whenever such an order is passed, the public servant must join the service at the transferred place and it is only then he should make representation to the competent authority for stay of notification or cancellation of the transfer order.

8. This is also the legal position as held by the Apex Court in the case of S.C. Saxena Vs. Union of India & Ors. (2006) 9 SCC 583 where again Hon'ble Supreme Court has been pleased to hold:

6. We have perused the record with the help of the learned counsel and heard the learned counsel very patiently. We find that no case for our interference

whatsoever has been made out. In the first place, a government servant cannot disobey a transfer order by not reporting at the place of posting and then go to a court to ventilate his grievances. It is his duty to first report for work where he is transferred and make a representation as to what may be his personal problems. This tendency of not reporting at the place of posting and indulging in litigation needs to be curbed. Apart therefrom, if the appellant really had some genuine difficulty in reporting for work at Tezpur, he could have reported for duty at Amritsar where he was so posted. We too decline to believe the story of his remaining sick. Assuming there was some sickness, we are not satisfied that it prevented him from joining duty either at Tezpur or at Amritsar. The medical certificate issued by Dr. Ram Manohar Lohia Hospital proves this point. In the circumstances, we too are of the opinion that the appellant was guilty of the misconduct of unauthorisedly remaining absent from duty.

9. The only point which has been addressed before us to assail the judgment passed by the learned Single Judge is that the transfer order is not on account of administrative exigencies inasmuch as the petitioner who was working as General Manager with the respondents at Delhi is sought to be transferred to Hyderabad to a lower position inasmuch as the post at which he will have to work is post of Manager. It is submitted that the observation made by the learned Single Judge that the transfer has been effected in administrative exigencies because a senior Manager at its Hyderabad Branch was going to superannuate on 31.12.2009 and that the petitioner was in the senior managerial position is not correct inasmuch as the person who is going to retire is not in the senior managerial grade but is only a Manager.

10. In so far as this aspect is concerned, the respondents have given the following reply:

Facts stated in Para 1 of the writ petition is wrong and denied. It is true to the extent that Shri M.K. Bainiwal, General Manager of this Corporation has been transferred on December 04, 2009 from New Delhi to PEC Hyderabad Branch since one Manager from Hyderabad branch was due for retirement on superannuation on 31.12.2009. Being senior manager he would be in charge of that region and there is a very good opportunity to develop further business from that region.

11. A rejoinder was filed by the appellant when he stated as under:

The justification of transfer of a GM to Hyderabad for replacement of a junior officer of Marketing Manager level is incorrect and based on pick and choose methods without any criteria. Respondents have mentioned as a senior manager which is incorrect since the petitioner is GM not senior manager and there is a no post of senior manager in PEC. This is mentioned by them only to confuse the matter. Also they have not mentioned any work & business held by Hyderabad branch which prove that there is no exigency of significant work for which only petitioner is qualified and petitioner is transferred without any work requirement for his level and hence harassment motives behind the transfer. Respondents have hidden that Hyderabad branch's strength has fallen to one or two employees at present and it is operating from a small residential flat. This proves that there is no requirement of GM in Hyderabad branch and reason of transfer is only harassment motivation. Their justification of all India service liability is not correct since respondents do not apply this condition to general category senior officers in practice.

12. A perusal of the rejoinder filed by the petitioner only goes to show that no comparison has been given by the appellant regarding pay-scale of the post at which the appellant is sought to be transferred. The entire emphasis of the petitioner is based upon his grievance that he is

being discriminated on account of his being SC/ST officer. As stated above, these allegations have not been found to be correct either by the National Commission for Scheduled Caste or by the Police. Thus, the allegations made by the appellant are only a pretext to stay in Delhi which he is trying to do for a period of more than 2 years despite the transfer order. In any case, there is nothing in the transfer order which may reflect to any such bias as alleged by the petitioner. Moreover, if somebody has grudge in his mind that because of his making complaints which have found to be incorrect by the competent authorities he cannot take it as the pretext to avoid his transfer. In the alternative, if this kind of a plea is allowed to be taken, anyone who files complaints which are found to be false after an enquiry, would then never be allowed to be transferred because that allegations that he made complaints would always be on record irrespective of the fact that the complaints were right or wrong.

13. As regards the plea taken by the respondents that his services were not transferable all over the country, it would be sufficient to observe that it is one of the conditions of the appointment letter "that he can be posted anywhere in India or abroad". It is well settled that a Government servant is liable for transfer from one place to another and also from one post to another. It is competent for Government/appointing authority in the case of a public sector undertaking to transfer a civil servant from one post to another or to another equivalent post. The only exception is that such transfer cannot be

accepted except when (i) penalty imposed for mis-conduct, (ii) on a written request, and further a Government servant cannot be transferred to a post carrying a lower pay-scale. However, if these conditions are not there then the order of transfer cannot be challenged. The Government servant has no right to insist that he should not be transferred in public interest. The authority competent to transfer can even take note of the complaints made by the members of the public or the legislators against him but such cognizance would not mean that transfer is by way of punishment.

14. The issue of punitive transfer has also been scrutinized by the Apex Court in number of judgments. In Union of India and Ors. Vs. Janardhan Debanath and Anr. (2004) 4 SCC 245 where the transfer order was justified to ensure discipline in the employees after the respondent had misbehaved with a senior lady officer with a view to force her to withdraw the charge-sheet against a particular employee. The Apex Court held that:

12. That brings us to the other question as to whether the use of the expression 'undesirable' warranted an enquiry before the transfer. Strong reliance was placed by learned counsel for the respondents on a decision of this Court in *Jagdish Mitter v. The Union of India* to contend that whenever there is a use of the word 'undesirable' it casts a stigma and it cannot be done without holding a regular enquiry. The submission is clearly without substance. The said case relates to use of the expression 'undesirable' in an order affecting the continuance in service by way of discharge. The decision has therefore no application to the facts

of the present case. The manner, nature and extent of exercise to be undertaken by Courts/Tribunals in a case to adjudge whether it casts a stigma or constitutes one by way of punishment would also very much depend upon the consequences flowing from the order and as to whether it adversely affected any service conditions - status, service prospects financially and same yardstick, norms or standards cannot be applied to all category of cases. Transfers unless they involve any such adverse impact or visits the persons concerned with any penal consequences, are not required to be subjected to same type of scrutiny, approach and assessment as in the case of dismissal, discharge, reversion or termination and utmost latitude should be left with the department concerned to enforce discipline, decency and decorum in public service which are indisputably essential to maintain quality of public service and meet untoward administrative exigencies to ensure smooth functioning of the administration.

15. In the case of State of U.P. & Anr. Vs. Siya Ram & Anr. (2004) 7 SCC 405, while reversing the judgment of the High Court of Allahabad in a case where the transfer order was set aside on account of the same having been passed after disciplinary proceedings were initiated against him as punitive, the Apex Court held that:

5. The High Court while exercising jurisdiction under Articles 226 and 227 of the Constitution of India, 1950 (in short the 'Constitution') had gone into the question as to whether the transfer was in the interest of public service. That would essentially require factual adjudication and invariably depend upon peculiar facts and circumstances of the case concerned. No government servant or employee of a public undertaking has any legal right to be posted forever at any one particular place or

place of his choice since transfer of a particular employee appointed to the class or category of transferable posts from one place to other is not only an incident, but a condition of service, necessary too in public interest and efficiency in the public administration. Unless an order of transfer is shown to be an outcome of mala fide exercise or stated to be in violation of statutory provisions prohibiting any such transfer, the courts or the tribunals normally cannot interfere with such orders as a matter of routine, as though they were the appellate authorities substituting their own decision for that of the employer/management, as against such orders passed in the interest of administrative exigencies of the service concerned. This position was highlighted by this Court in *National Hydroelectric Power Corporation Ltd. v. Shri Bhagwan and Anr.*

16. As observed earlier, in the present case the order of transfer has been passed by a competent authority taking into consideration that the term of appointment of the petitioner permits such transfer all over the country and even from one post to another. The only restriction is that it should not bring the petitioner to a post which is in a lower pay-scale. Such is not the allegation made by the petitioner. Rather he has been made in-charge of the region. If one go by the earlier correspondence made between the petitioner and the authorities, he was also aggrieved of the job responsibilities. Now that he would be the head of the region, he would be in a position to discharge his functions in a more proper manner. Thus, we do not find that it is a case where the transfer can be set aside on the ground that it is punitive or mala fide.

17. We, therefore, find no justifiable reason to interfere with the order passed by the learned Single Judge while deciding the writ petition under Article 226 of the Constitution of India. Accordingly, the appeal is dismissed with no orders as to costs.

MOOL CHAND GARG, J.

MARCH 11, 2010

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ANIL KUMAR, J.