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

Decided on : 21.07.2014

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W.P.(C) 1710/2013

SMT. R. JAYASHREE

..... Petitioner

Through : Sh. C. Hari Shankar and Sh.
Jagdish. N., Advocates.

versus

UNION OF INDIA AND ORS.

..... Respondents

Through : Sh. R.V. Sinha, Sh. R.N. Singh
and Sh. A.S. Singh, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE VIPIN SANGHI

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. This writ petitioner challenges the judgment of the Central Administrative Tribunal ("CAT") dated 14.8.2012, which rejected her application O.A. 462/2012 and upheld her repatriation, by the second respondent, to Chennai. The petitioner's grievance is that the CAT's judgment focuses unduly on the question of maintenance of seniority consequent to transfer, an issue that she had conceded before the CAT, while the actual issue for consideration was the validity of her transfer to Chennai. The first respondent is the Union of India, through the Secretary, Ministry of Finance, while the second respondent is the Commissioner of Central Excise (DZ). The third respondent is Devender Kumar Singh (Superintendent).

2. By way of Office Memoranda dated 3.4.1986, 12.6.1997, and 30.9.09, the Department of Personnel and Training (“DoPT”) stipulated that spouses were to be ordinarily posted at the same station. By way of a circular by the Central Board of Excise and Customs (“CBEC”) dated 19.2.2004 (“the 2004 circular”), no Inter-Commissionerate Transfer (“ICT”) was to be allowed for any Group B, C and D employees from the date of entry into force of the circular. The circular stipulated that in exceptional circumstances where acceptance of such a transfer request was necessitated on compassionate grounds, such transfer would be on deputation basis for a period of 3 years, extendible by a further period of 2 years. By another CBEC circular dated 27.3.2009 (“the 2009 circular”), the 2004 circular’s instructions were partially relaxed, to facilitate the posting of husband and wife in line with the instruction in the OM of 3.4.1986. As a consequence, even Group B, C and D officers were to be permitted ICT, without loss of seniority. This circular was further clarified in another circular of 7.8.2009 by the CBEC, stating that a request for ICT on the spouse ground without loss of seniority could also be considered against the promotion quota vacancies, as in some cadres, like that of Superintendents, only such vacancies were available.

3. The petitioner was working as Inspector of Customs and Central Excise. She was promoted by order of 27.3.2008 to Superintendent of Customs and Central Excise, which post she joined on 2.4.2008. The petitioner was allowed an ICT to Delhi, without loss of seniority, by

establishment order of 30.9.09, which posting she commenced on 7.10.2009. Nothing in this order indicated that the transfer was on deputation basis, nor was there any period of deputation mentioned in the order. The Ernakulam bench of the CAT, in a challenge to the relaxation on spouse grounds, of the ban on ICTs in Groups B, C and D, and particularly the no loss of seniority rule, by order of 16.5.2011 (“the May 2011 CAT order”) quashed the 2009 circular, insofar as it allowed transfer without loss of seniority. The May 2011 CAT order reasoned that retention of seniority was ordinarily only when the transfer was in public interest and transfers on request, like those on spouse grounds, resulted in loss of seniority. Under the Allocation of Business Rules, policy decisions regarding seniority in the services were within the exclusive jurisdiction of the DoPT. Consequently, other departments such as the CBEC in this case, were not permitted to take separate decisions in this regard without consulting the DoPT.

4. Another OA 3305/2010 challenging the 2009 circular (in which the petitioner was arrayed as a respondent) was dismissed by the Principal Bench of the CAT by order of 13.7.2011 (“the July 2011 CAT order”) on the ground that the May 2011 order of applied squarely to this OA. This order was unsuccessfully appealed before this Court, which by order of 23.8.2011, held that there was no decision on merits in the judgments of either the Ernakulum or the Principal bench of the CAT i.e. on the question of whether the transfer on spouse grounds is in public interest. The matter was left to be decided by the competent authority; should there be an adverse

decision to the appellant, he was allowed the liberty to approach the CAT to challenge the same.

5. On 27.10.2011, by another CBEC circular (“the 2011 circular”), the 2004 circular’s ban on ICTs of Group B, C and D employees was lifted entirely, subject to the transferee losing seniority on ICT. In other words, the transferee would be placed below/ junior to all officers appointed regularly to that post/grade to which he/she was transferred, on the date of his/her appointment. However, the transferee would retain eligibility in the parent Commissionerate for promotion. The seniority of officers, who were allowed ICT by the 2009 circular, *inter alia*, was to be fixed in accordance with this circular. Officers who were on deputation at other Commissionerates would have to revert to the parent Commissionerates first and apply for ICT, afresh.

6. On 3.2.2012, purportedly in accordance with the July 2011 CAT order, the order of this Court and the 2011 circular lifting the ban on ICTs, the second respondent repatriated the petitioner from Delhi back to the Commissionerate, Chennai and her ICT (issued by the order of 30.9.2009) was cancelled, by Establishment Order no. 29/2012 issued on 3.2.2012 by an order dated 3.2.2012 (“repatriation order”). She was also informed that the period during which she served in Delhi would be treated as on deputation basis. The CBEC also issued a circular dated 15.2.2012 clarified that its 2011 circular which lifted the ban on ICTs was applicable only to Group B (non-Gazetted), Group C and D employees alone. Group B (Gazetted)

employees were excluded. The post of Superintendent is a Group B (Gazetted) post.

7. This repatriation order was challenged by the petitioner and two other applicants in OA 462/2012 on the ground that *first*, the 2011 circular dealt with seniority and did not stipulate that the applicants could be relieved, that too with retrospective effect, to the parent zone, *second*, this order was contrary to the order of the DoPT of 3.4.1986, mandating that spouses should be posted in the same station, *third*, in any event, the second respondent lacked the jurisdiction to treat the period spent by her at Delhi as deputation, *finally*, there was no consultation with the DoPT before the repatriation order was issued, despite directions to that effect in the May 2011 and July 2011 CAT orders, as well as the order of the Delhi High Court. The CAT stayed the order of repatriation. However, despite this, the petitioner and the other two applicants were not permitted to resume their posts in Delhi on the ground that the CAT had stayed the operation of an order that has already been executed, and had not directed restoration to *status quo ante*. The salaries due to the petitioner and applicants from the date of the repatriation order were also not disbursed on the ground that they had been relieved from their posts in Delhi. The CAT dismissed the OA 462/2012 by order of 14.8.2012 (“the impugned order”). The petitioner’s spouse and children are at Delhi, and consequently, she later applied for deputation in the Directorate of Audit; her application was allowed commencing from 10.12.2012, for a period of 3 years, after which she will be repatriated to Chennai.

8. The petitioner challenges the CAT's order on the ground that it does not address the primary controversies before it, i.e. first, whether her repatriation of the petitioner and the cancellation of the ICT was lawful, and second, whether treating the period spent by the petitioner in Delhi could have validly been treated as on deputation basis. The order focuses on the argument on seniority, which the petitioner had conceded in the hearings, as noted in paragraph 33 of this judgment. On the point of the transfer's validity, the CAT addressed this issue very briefly, and did so on the erroneous premise that the petitioner was on deputation, and thus liable to be repatriated to her parent zone. Pertinently, that the petitioner was on deputation was not even the case of the respondent before the CAT. The petitioner also submits that a deputation can be allowed, by first principles, only when the lending and the borrowing departments consent to the same, and along with an entitlement to deputation allowance. The order must specifically state that the transfer is on deputation basis and must specify the period at the end of which the deputationist is to be repatriated to the parent cadre. Deputations, moreover, do not require any discussion on retention of lien in the order, whereas the petitioner's order of ICT of 30.9.2009 states that she retains her lien in the old charge for a period of 2 years from her transfer, after which she will have no right to be repatriated to her old charge.

9. The petitioners contend that there is no legal basis for the repatriation order, and that it is contrary to the DoPT OM of 3.4.1986. Moreover, the repatriation order violated both the July 2011 CAT

order as well as the order of the Delhi High Court in that the CBEC did not consult the DoPT. Finally, the petitioner submits that the repatriation order was premature in that the issue was pending before the DoPT and the CBEC pursuant to the orders of the CAT and the Delhi High Court. The petitioner ever had made a representation on 8.2.2012 to the CBEC that the repatriation order be withdrawn, on this basis.

10. The respondents, on the other hand, submit that the circular of 15.2.2012 clarifies that the 2011 circular lifting the ban on ICTs only applies to non-Gazetted Group B posts and not to Gazetted Group B posts. The post of Superintendent, was a Group B Gazetted post, and hence, the petitioner was validly repatriated back to Chennai.

11. It is apparent from the above narrative that the rigors of the policy decision embodied in the 2004 circular, to ban ICTs altogether, was relieved somewhat, by the two CBEC circulars in 2009. These were objected to by the officials in the Ernakulam Bench of the CAT. The CAT held that the protection given to seniority was unwarranted. However, it allowed the respondents, especially the CBEC to take a policy decision in consultation with the DoPT. The reasoning of the Ernakulam Bench was on specific lines, i.e. that the individual department could frame general policies but those which tended to have universal impact, such as seniority, had to be necessarily taken after consultation with the DoPT. That ruling was followed by the Principal Bench of the CAT.

12. The CBEC's 2011 circular reiterated its policy permitting ICTs, but this time, it consciously stated that there would be no protection of seniority. In other words, officials seeking transfer had to face the prospect of loss of seniority. By this time, the petitioner had already been transferred on 30.09.2009. It is clear that this transfer was made pursuant to the CBEC's policy permitting ICTs on spouse grounds prevailing since the 2009 circular. In the pretext of a later circular dated 15.02.2012, which merely clarified that the 2011 circular did not apply to Group-B gazetted officers, the petitioner was sought to be sent back to Chennai Commissionerate.

13. The respondent's argument which found favour with the CAT that the CBEC circular dated 15.02.2012 ought to prevail since it was clarificatory and in fact merged with the 2011 circular, in our opinion, cannot be accepted. There is no dispute that the petitioner stood transferred on 30.09.2009. In the course of the proceedings, it was expressly stated that the terms of the prevailing 2011 circular would apply and that there would be no protection of seniority. Having regard to these circumstances, the settled position, therefore, was that the transfer of the petitioner made as far back as in September 2009 attained finality, save and except for the issue of seniority. The terms of the transfer order, especially paras 2 and 3 even clarified that she would lose her lien in the original post, i.e. the Commissionerate at Chennai after two years of service in the place of her transfer and that any request for repatriation beyond two years, to Chennai would not be entertained.

14. In such circumstances, the CAT's impugned order, based upon its logic that the subsequent clarification dated 15.02.2012 (limiting the applicability of the 2011 circular to non-gazetted Group B employees) merged with the 2011 circular, is untenable, to put it mildly. There is not and cannot be any dispute that at the time of ICT of the petitioner, way back in 2009, no such restriction prevailed. The only controversy which engaged the attention of the Ernakulam Bench and subsequently of the Principal Bench of the CAT was with respect to seniority, i.e. whether the transferred employee would carry the seniority in the previous charge to the place of posting. That issue was settled on the ground that the DoPT was to decide the issue on a principle basis, and the CBEC was to consult the DoPT on decisions regarding seniority. The CBEC's authority to frame guidelines remains in all other aspects, i.e. all aspects except the question of carrying the seniority in the event of ICT of spouses. There is no dispute that the petitioner's transfer in 2009 was in accordance with the existing CBEC guidelines. The only rationale of the impugned decision is that a subsequent clarification issued in 2012 merges with the conditions of the 2011 circular. This Court finds that the appropriateness of such finding would depend on the context. It is clear that the decision which the CAT relied upon i.e. *S.B. Bhattacharjee v. S.D. Majumdar and ors.* (2007) 10 SCC 513, pertained to selection and promotion of an officer and the applicability of later clarifications with respect to qualifications to be held. At the relevant point of time in such facts, unlike in this case, no kind of right can be said to vest in an officer or employee. However, it is clear that

after a right vests in an employee (here, by way of the 2009 order directing the petitioner's transfer to Delhi), a subsequent clarificatory circular issued in 2012 cannot retrospectively snatch away her right.

15. As observed earlier, save and except the plea of seniority, which affected the aggrieved employees of the Ernakulam Commissionerate (an issue which was to be finally settled by the DoPT), there was no question of any cloud on the CBEC's authority to frame policies. There is also no dispute that in terms of the 2009 circular, the petitioner was transferred to Delhi; the circular issued in 2011 clarified that she would not secure any seniority. Given these circumstances, the findings of the CAT cannot be sustained. There cannot be any quarrel with the general proposition that in matters of transfer, judicial intervention is ordinarily not called for. At the same time, the Courts have underlined that wherever existing rules or regulations having statutory force are involved, the right of the employee to be considered in the context of those rules has to prevail. Similarly, where guidelines exist, the Courts have insisted that such guidelines should be ordinarily adhered to (*UOI v. S. L. Abbas*, (1993) 4 SCC 357). In the present case, the 2009 circular as well as the subsequent 2011 circular, in between which the petitioner was transferred to Delhi, did not disqualify her from seeking an ICT. A subsequent circular dated 15.02.2012, almost three years after her joining of service, barring gazetted Group-B officers from seeking such ICT, could not, therefore, be a valid reason to repatriate her, in effect, a denial of a right that vested in her in 2009.

16. For the foregoing reasons, the impugned order of the CAT in the petitioner's application is hereby set-aside. Consequently, the order transferring the petitioner back to Chennai dated 03.12.2012 is hereby quashed. The writ petition is allowed in the above terms.

**S. RAVINDRA BHAT
(JUDGE)**

**VIPIN SANGHI
(JUDGE)**

JULY 21, 2014

