

Urmila Ingale

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORIGINAL APPELLATE CIVIL JURISDICTION
WRIT PETITION NO. 807 OF 2016

Union of India and ors.	.. Petitioners
Vs.	
P. J. Joseph	.. Respondent

Mr.Vinod Joshi a/w Mr.V. S.Masurkar a/w Mr.S.G.Thakur, for the
Petitioners.
Mr. Vishal Kanade i/b Ruby Madhye, for Respondent.

**CORAM : SMT. V.K.TAHILRAMANI ACTING C.J.
AND M.S.KARNIK, J.**

DATE : 24th JANUARY, 2018

ORDER (PER M.S.KARNIK, J.) :

1. The challenge in this Petition by the petitioners – Union of India under Article 226 of the Constitution of India is to the order dated 18/01/2016 passed by the Central Administrative Tribunal, Mumbai Bench, Mumbai (for short 'Tribunal') in OA/666/2015.

2. The respondent who is presently working as a Senior

Private Secretary in Customs, Excise & Service Tax Appellate Tribunal (for short 'CESTAT'), Mumbai has challenged before the Tribunal the office order dated 06/11/2015 whereby he has been transferred from Mumbai to CESTAT, Chandigarh.

The brief facts of the case are thus :

3. The respondent was appointed on 01/11/2002 on deputation in the post of Senior Private Secretary, CESTAT, Mumbai. The vacancy was published in the Employment News dated 06/12/2001. It is the contention of respondent that though he was promoted and was to be posted at New Delhi in his parent department, he refused promotion as he was not willing to leave Mumbai. This was because of medical condition of his wife. His wife is working in Mumbai. The respondent was absorbed as a Senior Private Secretary in CESTAT, Mumbai on 09/02/2004. As on the date of the filing of OA, the respondent was working for 13 years without any promotion. According to respondent, out of 16 available posts of Senior Private Secretary, 6 posts are lying vacant at CESTAT, Mumbai. His wife is an employee of Nuclear Power Corporation of India

Limited (for short 'NPCIL'). By order impugned before the Tribunal dated 27/11/2015, he was transferred to Chandigarh where a new Bench has been established. According to the respondent his spouse is under treatment of a specialized doctor in BARC hospital for more than 25 years and has to go for frequent check ups at RMC, Tata Hospital, Mumbai. It is the case of respondent that his wife experiences difficulty in carrying out house work independently due to medical condition, therefore his presence is very much required at Mumbai.

4. Before the Tribunal, respondent relied upon the Office Memorandum (for short 'OM') dated 30/09/2009 issued by DOPT which provides that husband and wife should be posted in the same place. His wife is working as a Senior Assistant at NPCIL and the said organization has no office at Chandigarh. The respondent relied upon OM to contend that he is entitled to be retained at Mumbai on the basis of this OM.

5. It is the case of respondent that it is unfair to send him to Chandigarh in view of medical condition of his wife. Moreover, according to him there are several employees who are willing for transfer to Chandigarh. He relied upon representations dated 18/08/2005 and 10/11/2015 filed by Shri Rasheed Shaikh requesting his transfer from CESTAT, Mumbai to CESTAT, Chandigarh. He also relied upon the case of Smt.Kamla who was transferred to Allahabad from Mumbai despite her willingness to be transferred to Chandigarh. He further contended that there are several Senior Private Secretaries who have been transferred at Mumbai. It is the case of the respondent that he is retiring within 3 years at the time of filing O.A. Now he has just 1 year and a couple of months.

6. The petitioners filed reply before the Tribunal and contended that respondent was transferred for administrative exigencies. According to them even if transfer is in violation of executive instructions/orders, the Courts ordinarily do not interfere with such orders. The petitioners contend that the

order of transfer is not malafide or against any statutory rules. The representation of the respondent was duly considered and rejected by communication dated 23/11/2005.

7. It is pointed out by the petitioners that pursuant to the directions of various High Courts and its subsequent monitoring, the Government of India issued notification for establishment of 3 Benches at Chandigarh, Hyderabad and Allahabad and therefore the administrative exigencies arose to post some employees at these newly established Benches. Considering the respondent's length of service and seniority, he has been transferred to Chandigarh. In view of administrative exigencies, respondent had to be transferred. It is admitted by the petitioners that there are vacant posts in Mumbai, but the respondent had to be transferred to Chandigarh since he was a senior and experienced person.

8. The Tribunal considered OM dated 03/09/2009 regarding posting of husband and wife at the same station and

was of the opinion that the case of respondent and his spouse is covered by the consolidated guidelines. The Tribunal was of the opinion that as the respondent's wife is serving in NPCIL and the said organization does not have office at Chandigarh and as respondent is already posted in Mumbai, the Controlling Authority has to consider his posting in Mumbai. The Tribunal was of the opinion that having regard to the medical condition of spouse of respondent, the guidelines should be followed more scrupulously. The Tribunal was of the opinion that policy mentioned in the said OM regarding posting of husband and wife which states 'as far as possible' means that authorities should make all endeavour to post husband and wife in the same place and all the avenues should be explored not to displace or disrupt posting in the same place. The Tribunal while disposing of OA has given following directions :

“31. Having regard to the facts and law, as stated herein above, the respondents are directed to give a fresh look in the case of the applicant and pass a reasoned and speaking order in accordance with the relevant guidelines and in accordance with law after giving personal hearing to the applicant within two weeks from the date of receipt of a copy of the order. Till then the respondents shall not give effect or further effect to the order of transfer of the applicant from Mumbai to Chandigarh. Alternatively, in view of the observation of the

respondents in the impugned order of rejection of the representation of the applicant that the respondents shall consider retransfer of the applicant to Mumbai as and when alternate arrangement will be possible as there is urgent critical need for appointment of an experienced Sr.PS., the respondents may issue a time bound posting order of the applicant to Chandigarh Bench for a period not exceeding six months along with the order of his retransfer to Mumbai, to meet the imminent critical situation, as indicated in the impugned order as well as in the reply."

9. We have heard learned Counsel for the parties. By the interim order dated 24/11/2015, the Tribunal granted stay to the order of transfer dated 06/11/2015 and directed the petitioners to consider respondent No.1's representation and pass a reasoned order. The petitioners considered the representation of the respondent as under :

"Carefully considered the representation of the officer for retention in Mumbai. Due to administrative exigency and the critical need to start the Chandigarh Regional Bench the officer shall report to Chandigarh as per the transfer order. As and when alternative arrangements are possible, the case of the officer for re-transfer to Mumbai should be considered. He shall be relieved w.e.f. 24.11.2015 and to report by 01.12.2015."

10. The communication dated 27/11/2015 deciding the representation was challenged by amending OA.

11. The Tribunal was of the opinion that the OM regarding posting of husband and wife at the same place has to be scrupulously followed. The Tribunal further held that while so doing, the petitioners should consider every aspect in detail.

12. No doubt, OM provides for posting of husband and wife at same place as far as possible. Even the approach of the Tribunal that authorities should make all endeavour to post husband and wife in the same place is not unjustified. The Tribunal relied upon the decision of the Apex Court in the case of **Bank of India Vs. Jagjit Singh Mehta AIR 1992 Supreme Court 519**, para 5 of which reads thus :

“5. There can be no doubt that ordinarily and as far as practicable the husband and wife who are both employed should be posted at the same station even if their employers be different. The desirability of such a course is obvious. However, this does not mean that their place of posting should invariably be one of their choice, even though their preference may be taken into account while making the decision in accordance with the administrative needs. In the case of All-India Services, the hardship resulting from the two being posted at different stations may be unavoidable at times particularly when they belong to different services and one of them cannot be transferred to the place of the other's posting. While choosing the career and a particular service, the couple have to bear in mind this factor and be prepared to face such a hardship if the administrative needs and transfer policy do not permit

the posting of both at one place without sacrifice of the requirements of the administration and needs of other employees. In such a case the couple have to make their choice at the threshold between career prospects and family life. After giving preference to the career prospects by accepting such a promotion or any appointment in an All-India Service with the incident of transfer to any place in India, subordinating the need of the couple living together at one station, they cannot as of right claim to be relieved of the ordinary incidents of All-India Service and avoid transfer to a different place on the ground that the spouses thereby would be posted at different places. In addition, in the present case, the respondent voluntarily gave an undertaking that he was prepared to be posted at any place in India and on that basis got promotion from the clerical cadre to the Officers' grade and thereafter he seeks to be relieved of that necessary incident of All-India Service on the ground that his wife has to remain at Chandigarh. No doubt the guidelines require the two spouses to be posted at one place as far as practicable, but that does not enable any spouse to claim such a posting as of right if the departmental authorities do not consider it feasible. The only thing required is that the departmental authorities should consider this aspect along with the exigencies of administration and enable the two spouses to live together at one station if it is possible without any detriment to the administrative needs and the claim of other employees.”

13. The Tribunal also relied upon the decision of the Apex Court in the case of **Union of India & others Vs. S.L.Abbas** AIR 1993 Supreme Court 2444 wherein in paragraph 7, it is held thus :

“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, the husband and the wife must be posted at the same place. The said guidelines, however, does not confer upon the government employee a legally enforceable right.

The Hon'ble Supreme Court reiterated the judgment passed in **Bank of India** (*supra*). The relevant extract of the judgment is under :

“....No doubt the guideline requires the two spouses to be posted at one place as far as practicable, but that does not enable any spouse to claim such a posting as of right if the departmental authorities do not consider it feasible. The only thing required is that the departmental authorities should consider this aspect along with the exigencies of administration and enable the two spouses to live together at one station if it is possible without any detriment to the administrative need and the claim of other employee.”

14 The respondent has been working as a Private Secretary with CESTAT from 01/11/2002 and has been posted at Mumbai. The respondent whose parent department was Coast Guard requested for absorption in CESTAT (earlier termed as CEGAT) on completion of his deputation. The respondent was absorbed as a Senior Private Secretary in CEGAT, Mumbai on

09/02/2004.

15. The Government of India by issuance of notification established 3 new Benches of CESTAT at Chandigarh, Hyderabad and Allahabad. In view of administrative exigencies that arose, existing employees had to be posted at these Benches. Nothing has been brought on record to show that the respondent's posting at Mumbai is non transferable and he is not liable to be transferred out of Mumbai. In fact respondent himself has pleaded that several employees have been transferred at different Benches. The respondent's case however is that the some Private Secretaries are willing to go to Chandigarh despite which the petitioners are insisting posting the respondent only at Chandigarh.

16. The Tribunal during the pendency of the OA directed the respondent to submit a representation to the petitioners. The said representation as stated earlier was duly considered. The petitioners have clearly mentioned that due to

administrative exigency and critical need to start the Chandigarh Regional Bench, the officer shall report to Chandigarh as per transfer order. It is further mentioned that as and when alternative arrangements are possible, the case for re-transfer to Mumbai should be considered.

17. Insofar as policy of posting two spouses at one place is concerned, the Apex Court has clearly held that there can be no doubt the guideline requires the two spouses to be posted at one place as far as practicable, but that does not enable any spouse to claim such a posting as of right if the departmental authorities do not consider it feasible. The only thing required is that the departmental authorities should consider this aspect along with the exigencies of administration and enable two spouses to live together at one station if it is possible without any detriment to the administrative needs and the claim of other employees. It has thus been held that guidelines do not confer upon the government employees a legally enforceable right.

18. In our opinion, if in the light of the law laid down by the Apex Court the respondent having made a representation with respect to his transfer, it is for the authority to consider the same having regard to the exigencies of administration which has been duly considered.

19. Learned Counsel for respondent pointed out that there are couple of Senior Private Secretaries who are willing to go to Chandigarh. Learned Counsel urged that having regard to illness of his spouse, it is absolutely essential that respondent should be retained in Mumbai. The respondent refused promotion only because he wanted to remain in Mumbai so as to make himself available for his wife's illness. Learned Counsel pointed out that one Shri Mahesh Senior Private Secretary who was working at Delhi has been posted at Chandigarh. Learned Counsel for the petitioners pointed out that stenos who had given option for transfer to Chandigarh are Hindi stenos and they cannot be posted in the Bench at Chandigarh as the orders of the Tribunal are passed in English. Learned Counsel for the

petitioner further pointed out that several Private Secretaries including ladies staff were also transferred to new Benches. In respect of Shri Mahesh who was transferred from Delhi to Chandigarh, the same was an alternate arrangement made in view of respondent not having joined at Chandigarh.

20. Be that as it may, it is well settled that it is prerogative of the petitioners to post/transfer employees as per demands of administrative exigencies. The petitioners having considered the representation made by respondent and rejected the same after recording reasons, in our opinion, in the facts of the present case and in the light of law laid down by the Apex Court regarding policy of posting spouse at one place, no further directions by the Tribunal were necessary.

21. No doubt, respondent's wife needs medical attention. The respondent's wife is working as a Senior Assistant at NPCIL at Mumbai. The petitioners have categorically stated that having regard to the setting up of new Bench at Chandigarh, an

experienced Senior Private Secretary viz. the petitioner was required to be posted on transfer at Chandigarh. While deciding the representation, the petitioners have clearly mentioned that as and when alternate arrangements are possible, the case of the officer for re-transfer to Mumbai should be considered. The respondent is always at a liberty to make a representation to the petitioners for transferring him to Mumbai after he joins at Chandigarh. If a representation is so made we have no manner of doubt that the petitioners would consider the same sympathetically.

22. We find that the transfer of respondent is neither malafide nor against the statutory rules. In our opinion, having regard to the facts and circumstances of the present case, directions issued by the Tribunal were not warranted. The order passed by the Tribunal is therefore quashed and set aside. Writ Petition is allowed with no order as to costs.

23. Learned Counsel for the respondent prayed for stay

of this order. Request is opposed by the learned Counsel for the petitioners. In the interest of justice, we are inclined to stay operation of this order for a period of 4 weeks from today.

(M.S.KARNIK, J.)

(ACTING CHIEF JUSTICE)