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

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Date of Decision: 19.08.2019

% **W.P.(C.) No. 8895/2019**

ROHIT JAIN & ORS.

..... Petitioners

Through: Mr. Yelamanchili Shiva Santosh
Kumar & Mr. Rudrajit Ghosh,
Advocates.

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. Ravi Prakash, CGSC and
Mr. Jatin Puniyani & Mr. Farman Ali,
Advocates.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE RAJNISH BHATNAGAR

VIPIN SANGHI, J. (ORAL)

CM APPL. 36681/2019

1. Exemption allowed, subject to all just exceptions.
2. The application stands disposed of.

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3. The petitioners have preferred the present writ petition to assail the order dated 01.05.2019 passed by the Central Administrative Tribunal (CAT/ Tribunal) in O.A. Nos. 3932/2018 & 3933/2018. The petitioners also

assail the circular dated 20.09.2018 issued by the Central Board of Indirect Taxes and Customs, Department of Revenue, Ministry of Finance, Government of India, wherein the respondents have taken the stand that under the Central Excise and Customs Commissionerates Inspector (Central Excise, Preventive Officer and Examiner), Group 'B' Posts Recruitment Rules, 2016 (Rules of 2016), there is no provision for recruitment by absorption and, accordingly, no Inter-Commissionerate Transfer application can be considered after coming into force of the Rules of 2016. The respondents have also stated in the impugned communication, that the office orders for Inter-Commissionerate Transfer in the Grade of Inspectors, issued on or after 26.12.2016 (i.e. from the date of enactment of Recruitment Rules of 2016), will be non-est and, accordingly, any officer who has joined another zone in pursuance of such order shall be treated as a deemed case on loan basis w.e.f. 26.12.2016 till 31.03.2019. Thereafter, they shall stand relieved and be reverted to their parent zones.

4. The petitioners also seek a direction to the respondents to consider and dispose of their applications for Inter-Commissionerate Transfer in accordance with circular dated 27.10.2011.

5. The case of the petitioners is that the Customs Department (Group 'C') Recruitment Rules 1979 were modified vide Central Excise and Land Customs Department Inspector (Group 'C' posts) Recruitment Rules, 2002 (Rules of 2002) vide notification dated 29.11.2002, wherein vide Rule 4(1) it was provided that each Commissionerate shall have its own separate cadre unless otherwise directed by the Central Board of Excise and Customs. Despite there being a separate cadre in respect of each Commissionerate,

sub-Rule (2) of Rule 4 of the Rules of 2002 provided:

“(2) Notwithstanding anything contained in sub-rule (1), the jurisdictional Chief Commissioner of Central Excise may, if he considers to be necessary or expedient in the public interest so to do and subject to such conditions as he may determine having regard to the circumstances of the case and for reasons to be recorded in writing, order any post in the Commissionerate of Central Excise to be filled by absorption of persons holding the same or comparable posts but belonging to the cadre of another Commissionerate of Directorate under the Central Board of Excise and Customs.” (emphasis supplied)

6. Thus, Inter-Commissionerate Transfers were facilitated by Sub-Rule (2), even though each commissionerate constituted a separate cadre. The submission of the petitioners is that Inter-Commissionerate Transfers were not necessarily governed by the Rules of 2002, and there were circulars issued for that purpose, including the circular/ letter dated 27.10.2011. The circular/ letter dated 27.10.2011, inter alia, provided, in supersession of the earlier circulars and communications, as follows:

“2. On consideration of all aspects in the matter of ICT, it has been decided by the Board now to lift the ban on ICT with immediate effect. Accordingly, any willing Group 'B', 'C' employee and the erstwhile Group 'D' employee may apply for transfer from the jurisdiction of one Cadre Controlling Authority (CCA) to another CCA subject to availability of vacancy and on the following terms & conditions:

(i) The concerned two Cadre Controlling Authorities should agree to the transfer.

(ii) The transferee will be placed below all officers appointed regularly to that post/grade on the date of his/her appointment on transfer basis in terms of Para 3.5 of DOP&T's O.M. dated 03.07.1986. In other words, such a transferee will be junior to

those regularly appointed officers prior to his/her transfer. However, such transferred officer will retain his/her eligibility of the parent Commissionerate for his/her promotion to the next higher grade, etc,

(iii) On transfer he/she will not be considered for promotion in the old Commissionerate.

(iv) He/she will not be entitled to any joining time and transfer traveling allowance;

(v) Under no circumstances, request for ICT should be entertained till the officer appointed in a particular Commissionerate /post completes the prescribed probation period.

(vi) The seniority of the officers who were allowed ICT earlier by the various Cadre Controlling Authorities on the basis of Board's letters F.No.A.22015/19/2006-Ad.III.A dated 27.03.2009; F.No, A. 22015/11/2008-Ad .III.A dated 29.07.2009 and FNo. A.22015/15/2010- Ad.III.A dated 09.02.2011 shall be fixed as per the present instructions.

(vii) Officers who are presently working on deputation basis from their parent Commissionerate to any other Commissionerate/ Directorate and are willing to avail of the ICT in future will have to revert back to their parent Commissionerates first and apply afresh for ICT. The officers who have been continuously on deputation and have been absorbed on ICT during the interim period from 19.02.2004 (i.e. the date from which the ban became effective) till date, their seniority will be fixed from the date of their joining on deputation in the transferred Zone/Commissionerate.

(viii) A written undertaking (in the enclosed format) to abide by the requisite terms and conditions will be obtained from the officers before the transfers are actually effected.

(ix) All pending Court Cases where seniority protection/ICT has been challenged may be handled appropriately in terms of

these instructions and necessary compliance furnished to the Board in due course.” (emphasis supplied)

7. The petitioners claim that they made their respective applications for Inter-Commissionerate Transfers prior to coming into force of the Rules of 2016. Those applications were not decided. The respondents issued the Rules of 2016, wherein Rule 5 reads as follows:

“5. Special provision. – Each Cadre Controlling Authority (CCA) shall have its own separate cadre, unless otherwise directed by the Central Board of Excise and Customs.”

8. The submission of the petitioners is that the said Rules nowhere prohibit Inter-Commissionerate Transfers, which is an aspect governed by administrative instructions, i.e. letters and circulars, and not by the Rules.

9. Learned counsel for the petitioners has sought to place reliance on the decision of the Supreme Court in ***Prabir Banerjee Vs. Union of India & Others***, (2007) 8 SCC 793, and in particular on paragraph 22 thereof, which reads as follows:

“22. No doubt transfer is an incident of service in an all-India service and under the Central Service Rules the controlling authority was competent to transfer the petitioner to any place in India, where it considered expedient to do so. But apart from the above, we also have to take into consideration the decision of the Central Board of Excise and Customs in its communication dated 24-8-1984 by which pending decision on the demand for bifurcation of Group ‘B’ and ‘C’ cadres relating to Nagpur and Indore Collectorates the Board took a decision that cadre control of the said two Collectorates would be distributed between the two Collectors as indicated in the said communication. As mentioned hereinabove, while the Collector of Central Excise, Nagpur, was made the Cadre

Controlling Authority of Group 'B' and 'C' ministerial cadres, the Collector of Central Excise, Indore was made the Cadre Controlling Authority of executive cadres of Group 'B' and 'C'. We are alive to the fact that the decision taken by the Board was an administrative decision, but in the absence of any direct rule relating to transfer between two Collectorates under the Central Board of Excise and Customs, the said administrative instruction would have to be implemented insofar as inter-Collectorate transfers between the Nagpur and Indore Collectorates was concerned. In fact, by subsequent Circular dated 16-1-2003 the Board further declared that the Chief Commissioner of Central Excise/Customs in a Commissionerate would be the Cadre Controlling Authority up to Group 'B'-level staff, and its functions would include monitoring the implementation of the Board's instructions with regard to the transfers and equitable distribution of manpower and material resources between the Commissionerates/zones." (emphasis supplied)

10. The aforesaid extract is relied upon to submit that even the Rules of 2002 had no bearing on Inter-Commissionerate Transfers.

11. We may deal with this submission here and now itself. Pertinently, the decision in ***Prabir Banerjee*** (supra) shows that Rule 4 of the Rules of 2002 were not placed before the Supreme Court, and it did not notice that Inter-Commissionerate Transfers are facilitated by Rule 4(2) of the Rules of 2002. The scope and effect of Rule 4(2) of the Rules of 2002 was not considered by the Supreme Court in this decision. Thus, in our view, reliance placed on the decision of ***Prabir Banerjee*** (supra) is completely misplaced.

12. The next submission of learned counsel for the petitioners is premised on the decision in ***General Officer Commanding-in-Chief & Another Vs.***

Dr. Subhash Chandra Yadav & Another, (1988) 2 SCC 351, and in particular on paragraph 10 thereof, which reads as follows:

“10. It is apparent that before the amendment, clause (c) did not confer on the Central Government power to frame rules regarding conditions of service which necessarily include transfer of the employees of the Boards. Rule 5-C, which was inserted in the Rules by a notification dated 23-11-1972 providing for the transfer of the employees of the Cantonment Boards, is on the face of it contrary to the rule-making power of the Central Government, as it stood before the amendment of the Act in 1983.”

13. Reliance placed on this decision, in our view, is completely misplaced. In this decision, the Supreme Court held that one autonomous body cannot transfer its employees to another autonomous body even within the same State, unless the services of the employees of these two bodies are under a centralized or a State level service. The Supreme Court held that the Central Government will not be entitled to frame rules for transfer of an employee from one Cantonment Board to another within the State, for the reason that the Cantonment Boards are autonomous bodies; the service under the Cantonment Board is neither a centralized service, nor is it a service at the State level, and; any such transfer of an employee will mean termination of service of the employee in the Cantonment Board from where he is transferred, and a fresh appointment by the Cantonment Board which he joins on such transfer.

14. We fail to appreciate as to how this decision is of any relevance to the present case when we are dealing with a situation where both – the Rules of 2002, as well as the Rules of 2016 have been framed by the President under

Proviso to Article 309 of the Constitution of India and they relate to the same service.

15. Learned counsel for the petitioners has also sought to place reliance on the decision of the Supreme Court in ***Y.V. Rangaiah & Others Vs. J. Sreenivasa Rao & Others***, (1983) 3 SCC 284, to submit that since the petitioners had made their applications for Inter-Commissionerate Transfer before coming into force of the Rules of 2016, such applications had to be considered and decided on application of Rules of 2002, and those applications could not be rejected by placing reliance on the Rules of 2016. The submission is that Rules of 2016 cannot be given retrospective effect to deal with the applications which were pending consideration when the Rules of 2002 were in vogue.

16. The further submission is that Rule 4(2) of the Rules of 2002 do not deal with the aspect of transfer, and they only deal with the aspect of absorption of a person belonging to one cadre of the Commissionerate into the cadre of another Commissionerate.

17. Learned counsel for the petitioners also places reliance on ***Canara Bank & Another Vs. M. Mahesh Kumar***, (2015) 7 SCC 412, and in particular on paragraphs 17 and 22 thereof, which read as follows:

“17. Applying these principles to the case in hand, as discussed earlier, the respondent's father died on 10-10-1998 while he was serving as a clerk in the appellant Bank and the respondent applied timely for compassionate appointment as per the scheme “Dying in Harness Scheme” dated 8-5-1993 which was in force at that time. The appellant Bank rejected the respondent's claim on 30-6-1999 recording that there are no

indigent circumstances for providing employment to the respondent. Again on 7-11-2001, the appellant Bank sought for particulars in connection with the issue of the respondent's employment. In the light of the principles laid down in the above decisions, the cause of action to be considered for compassionate appointment arose when Circular No. 154 of 1993 dated 8-5-1993 was in force. Thus, as per the judgment referred in Jaspal Kaur case [(2007) 9 SCC 571 : (2007) 2 SCC (L&S) 578] , the claim cannot be decided as per 2005 Scheme providing for ex gratia payment. The Circular dated 14-2-2005 being an administrative or executive order cannot have retrospective effect so as to take away the right accrued to the respondent as per Circular of 1993.

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22. Considering the scope of the scheme “Dying in Harness Scheme 1993” then in force and the facts and circumstances of the case, the High Court rightly directed the appellant Bank to reconsider the claim of the respondent for compassionate appointment in accordance with law and as per the Scheme (1993) then in existence. We do not find any reason warranting interference.”

18. Relying on the said decision, learned counsel submits that in this case the Supreme Court has held that an application for compassionate appointment has to be considered in accordance with Rules which were prevailing when such application is made, and not the Rules which were prevailing at the time of consideration of the application.

19. We have heard learned counsel for the petitioners and perused the impugned order. In our view, there is no merit in the petitioners’ submission and the impugned order passed by the Tribunal – which is premised on a decision of the Bench of the Kerala High Court, does not call for interference.

20. The submission of learned counsel for the petitioners that Inter-Commissionerate Transfers were not governed by the Rules of 2002 and that they were governed by executive instructions fails to notice that executive instructions for carrying out Inter-Commissionerate Transfers could be issued, only on account of such Inter-Commissionerate/ Inter-Cadre Transfers being permitted by Rule 4(2) of Rules of 2002. In the absence of Rule 4(2), as contained in the Rules of 2002, Inter-Commissionerate Transfers would not have been possible, since such transfers would tantamount to Inter-Cadre Transfers. Such transfers, between different cadres would go against the very concept of a “Cadre”. The whole purpose of forming separate cadres, is to insulate the employees within that cadre from intermingling with others, who do not form part of the same cadre by way of transfer. A cadre is a closed ecosystem and, unless the Rules so provide, they cannot be porous – permitting employees to walk-in and walk-out of the cadre on transfer.

21. We may refer to the decision of the Bombay High Court in ***Prakash R. Borker Vs. Union of India and Ors.***, 1983 SCC OnLine Bom 238, wherein the Division Bench held:

“9. The importance of the concept of cadre arises on account of several reasons. A person when appointed to a particular post in a cadre has the future career before him charted in one sense. He knows what is the strength of the cadre in which he has been appointed; he knows the post to which he can reasonably aspire in due course of time and the prospects of the aforesaid vertical promotion on the basis of the list of seniority prepared from time to time. The rules of appointment to the said cadre will also tell him as to how many people will be entering the cadre from different sources, if appointments from different sources are Provided for in the rules. If he is

transferred from one department to another in the same cadre he is not deprived of the benefits which he has acquired till such transfer by service in the same cadre. He will also not lose his place in the seniority list which will invariably be prepared on the basis of the cadre. A person cannot be transferred from one cadre to another because such a transfer will necessarily affect the other persons in the seniority list.

x x x x x x x x x x

11. The question whether a Government servant who is recruited to a particular cadre can be compelled to serve outside the cadre fell for determination before a single Judge of the Delhi High Court in Prem Parveen v. Union of India [(1975) 2 S.L.R. 659]. It was held by the learned single Judge of the Delhi High Court that normally it is to be expected that the Government employee who joins a particular cadre would have the range of their transferability determined within the cadre. Therefore, it did not stand to reason that a person who is recruited to a particular cadre should be compelled against his wishes to serve outside the cadre even when the permanent post to which he holds a lien exists within that cadre. According to the said judgment, all that Fundamental Rule 15 means is that even if a Government employee holds a lien on a particular post he has no vested right to continue to remain in one particular post all the time and could be transferred to another post, of course within the same cadre, because his lien is only the title to hold substantively a permanent post to which he has been appointed substantively.

12. This question was more elaborately considered by D.A. Desai, J. (as he then was), of the Gujarat High Court in Bhagwati Prasad v. State of Gujarat [(1979) 3 S.L.R. 805]. Before the Gujarat High Court the question was whether the petitioner who was a Police Inspector, could be, without his consent, deputed to the Civil Defence Organisation. The broad question was: Can a person holding a civil post be sent on deputation outside the cadre of the parent department to which

he belongs without his consent? After discussing all the incidents of Government service it was observed as follows:

“The person holding a civil post or being in civil service of the State is entitled to certain conditions of service prescribed for that post. If he is in a cadre or post he continues to be in that cadre or in post unless promoted or any penalty of dismissal or removal from service is imposed upon him. In the absence of imposition of such a penalty, such holder of a civil post is entitled to serve the Government till the date of superannuation, or till the date when he can be compulsorily retired under the relevant rules. That is too obvious to be mentioned and it is a guarantee which flows from Art. 16 and Part XIV of the Constitution.”

The fact that in the case of a Member of the Indian Administrative Service a transfer could be effected only after satisfying a condition precedent did not escape the attention of the learned Judge in Bhagwati Prasad case (vide supra). It was also noticed that when a person is transferred from one cadre to another he is sent on deputation and always with his consent and even in such a case extra allowances as the deputation allowances are given to the concerned Government employee. The learned Judge also noticed that the Government of Gujarat while appointing the Second Pay Commission had directed the Commission to inquire into and make recommendations about the deputation allowance. Thereafter it was mentioned as follows:

“Probably deputation allowance has its origin in an inducement that may be offered to the employee to give his consent so as to serve outside the parent department outside the cadre. Therefore, it is inconceivable that deputation can be ordered without the consent of the concerned employee.”

The learned Judge, then of Gujarat High Court, referred to the judgment of the Delhi High Court in Prem Parveen case [(1975) 2 S.L.R. 659] (vide supra), and agreed with the same. Concluding the judgment, the learned Judge observed as follows:

“Thus, on principle and authority, it appears clear that a person belonging to a cadre cannot be deputed or transferred outside the parent department and outside the cadre. He can be sent on deputation but that too with his consent. Deputation cannot be without the consent of the person to be deputed.””

22. In **V. Jagannadha Rao and Ors Vs. State of A.P. and Ors.**, AIR 2002 SC 77, the Supreme Court, inter alia, observed:

“.....Though definitions may differ and in many cases transfer is conceived in wider terms as a movement to any other place or branch of the organization, transfer essentially is to a similar post in the same cadre as observed by this Court in B. Varadha Rao v. State of Karnataka [(1986) 4 SCC 624 : (1986) 1 ATC 763 : AIR 1987 SC 287] . It is now well settled that a government servant is liable to be transferred to a similar post in the same cadre which is a normal feature and incidence of government service and no government servant can claim to remain in a particular place or in a particular post unless, of course, his appointment itself is to a specified non-transferable post. No transfer is made to a post higher than what a government servant is holding. In other words, it is generally a lateral and not vertical movement within the employer's organization.”

23. Since the Rules of 2002 were replaced by the Rules of 2016, which deleted Rule 4(2) of the pre-existing Rules of 2002 and retained, in substance, Rule 4(1) in the form of Rule 5 under the Rules of 2016, Inter-

Commissionerate Transfers post the bringing into force of Rules of 2016, could not be made. Thus, reliance placed by the petitioners on the circular/ letter dated 27.10.2011 – which was issued when Rule 4(2) of the Rules of 2002 held sway, is completely misplaced. The said circular/ letter – which is an executive instruction, cannot be given effect to, in view of the material change brought about by the Rules of 2016, as taken note of hereinabove since the said circular/ letter goes contrary to the Statutory Rule contained in Rule 5 of the Rules of 2016.

24. Reliance placed on *Y.V. Rangaiah* (supra) is misplaced in the present context. A perusal of the said decision would show that the Rules statutorily prescribed yearly preparation of panel for promotion. It was in the aforesaid background that the Supreme Court held that the promotion to a vacancy which arose prior to the bringing into force of the amended Rules, had to be filled by application of the unamended Rules. The decision in *Y.V. Rangaiah* (supra) is an exception to the general Rule that the candidates have to meet the eligibility norm as prevailing when their case is considered for promotion. The same principle cannot be invoked in the facts of the present case. There is no executive instruction, much less, Rule brought to our notice by learned counsel for the petitioners, which requires the respondents to deal with the applications made by the officers for Inter-Commissionerate Transfers in a time bound manner. In fact, even the letter dated 27.10.2011 squarely provided that the concerned two Cadre Controlling Authorities should agree to the transfer. There was no vested right in any employee or officer to demand Inter-Commissionerate Transfer, as a matter of right. Thus, there was no obligation on the part of the

respondents to consider and deal with the petitioners applications for Inter-Commissionerate Transfers in any specified length of time, or before the Rules of 2016 came into force.

25. The submission that Rule 4(2) did not deal with the aspect of Inter-Commissionerate Transfers, and that it only dealt with the aspect of absorption of a person belonging to one cadre of the Commissionerate into the cadre of another Commissionerate, is also completely meritless. Absorption of an officer belonging to one cadre of the Commissionerate, into another cadre of the Commissionerate is nothing but transfer, since it is permanent and upon such absorption, the officer does not retain a lien in his parent cadre of the Commissionerate. This is what makes absorption upon transfer distinct from deputation simpliciter.

26. Reliance placed on *Canara Bank* (supra) is also misplaced. This is for the reason that the whole basis of grant of compassionate appointment is to enable the family of the deceased Government servant, who dies in harness, to tide over the emergent financial crisis in which the family is plunged due to such untimely demise. It goes without saying that all applications for compassionate appointment should be dealt with and considered without any delay. It is in this context that the Court held that an application for compassionate appointment is required to be dealt with under the Rules/ policy which prevailed at the time of making of the application. This analogy cannot be adopted for consideration of an application for Inter-Commissionerate Transfer, since there is no grave and pressing urgency to deal with such applications.

27. For all the aforesaid reasons, we find absolutely no merit in this petition and dismiss the same.

VIPIN SANGHI, J.

RAJNISH BHATNAGAR, J.

AUGUST 19, 2019

B.S. Rohella

