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UNION OF INDIA & ANR.

v.

MURALIDHARA MENON & ANR.

(Civil Appeal No. 5079 of 2009)

AUGUST 4, 2009

B

[S.B. SINHA AND CYRIAC JOSEPH, JJ]

Service Law:

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Transfer – Held: Is an incident of service – An employee has no right to be posted at a particular place – He cannot exercise his option to be posted in his home State unless there exists any statute or statutory rule governing the field.

D

Transfer – Respondents-employees voluntarily agreed for reversion from post of UDC to post of LDC in order to get transferred from 'Gujarat charge' to 'Kerala charge' – Transfer orders issued on basis of specific undertaking filed by respondents – Challenge to – Circular letter issued by CBDT dated 14-5-1990 in relation to inter-charge transfer –

E

Interpretation and/or application of – Held: Respondents did not have any legal right to be transferred from one charge to another – Having given an undertaking and having opted to be transferred on post of LDC, respondents could not have resiled therefrom – They could not approbate and reprobate

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at the same time – If an order was passed on their representations, they were bound thereby particularly when the circular letter itself suggested that the order of transfer passed would be final and no order for retransfer could be passed – Principle of 'estoppel' was clearly applicable – However,

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directions issued under Article 142 of the Constitution – Doctrines – Doctrine of "estoppel" – Constitution of India, 1950 – Article 142.

Constitution of India, 1950 -- Article 14 -- Equality clause

H

UNION OF INDIA & ANR. v. MURALIDHARA MENON 541
& ANR.

– Held: Is a positive concept in terms whereof, equals, subject to certain exceptions, are to be treated equally and unequals cannot be treated equally.

Respondents voluntarily agreed for reversion from the post of UDC to the post of LDC in order to get transferred from 'Gujarat charge' to 'Kerala charge'. Transfer orders were issued on basis of specific undertaking filed by the respondents in this behalf. However, the said transfer orders were subsequently challenged by the Respondents. In view of the said challenge, interpretation and/or application of circular letter issued by the Central Board of Direct Taxes (CBDT) dated 14-5-1990 in relation to inter-charge transfer came up for consideration in the present appeal.

Allowing the appeal, the Court

HELD: 1. Respondents did not have any legal right to be transferred from one charge to another. Indisputably, the seniority of the LDCs and UDCs was maintained chargewise. It is evident that the Board considered the matter carefully and found that there had been no vacancy of UDC in 'Kerala Charge' so as to enable the authorities to accommodate them on the basis of inter charge transfer. However, it was found that the vacancies in the posts of LDC were available. Only on that basis, the respondents volunteered to be transferred to the posts of LDC. It was at their request as also undertakings furnished by them, the order of transfers was passed. [Paras 11, 12 and 13] [548-B; 548-E-F; 548-G]

2. Article 14 of the Constitution providing for the equality clause is a positive concept in terms whereof, the equals, subject to certain exceptions, are to be treated equally and unequals cannot be treated equally. If a relaxation has been granted in case of one employee on

A the basis of the materials available before the Board, the same by itself may not be treated to be a binding precedent so as to enable the Tribunal or High Court to issue a writ of or in the nature of mandamus. A writ of mandamus can be issued, provided there exists a legal

B right in the applicant and a corresponding legal duty in the respondent. Even otherwise a Superior Court having a limited jurisdiction in this behalf would not interfere with the discretionary jurisdiction exercised by the statutory authorities unless a clear case for interference

C is made out subject of course to just exceptions. The attention of this Court was not drawn to any provision under the aforementioned circular or otherwise that the Chief Commissioner of Income Tax had any power of relaxation. If there are no vacancies, orders of transfer

D could not be made. In absence of any power of relaxation, the respondents could not have been accommodated on the post of UDCs and they could be transferred only on the post of LDCs which were vacant at the relevant time. [Paras 14 and 15] [548-G-H; 549-A-B; 549-B-D; 549-D-E]

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3. Respondents furthermore having given an undertaking and having opted to be transferred on the post of LDC could not have resiled therefrom. They could not approbate and reprobate at the same time. If an order

F was passed on their representations, they were bound thereby particularly when the circular letter itself suggested that the order of transfer passed would be final and no order for retransfer could be passed. The principle of 'estoppel' would, therefore, clearly be

G applicable. [Para 16] [549-F-G]

4. It is not a case where the service conditions of the first respondent is governed by any statute or statutory rules. Transfer is an incident of service. An employee has no right to be posted at a particular place. He, in law,

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UNION OF INDIA & ANR. v. MURALIDHARA MENON 543
& ANR.

cannot exercise his option to be posted in his home State unless there exists any statute or statutory rule governing the field. Some policy decision was required to be taken presumably because a large number of requests were being received from the concerned employees. It has not been contended that the said policy decision was illegal. Even if the said policy decision was illegal, first respondent cannot continue to remain posted in the State of Kerala. He may be asked to go back to his original posting, namely at some place which forms part of Gujarat Charge. However, in exercise of jurisdiction under Article 142 of the Constitution, it is directed that in view of the fact that the first respondent has been working for a long time in the post of U.D.C., he may not be reverted to the post of L.D.C. but his seniority shall be counted from the date on which he has joined in the said post. [Para 17 and 18] [549-H; 550-A-C; 550-D-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5079 of 2009.

From the Judgment & Order dated 14.10.2005 of the High Court of Kerala at Ernakulam in Writ Petition (Civil) No. 25155 of 2003 and 27568 of 2003.

R. Radhakrishnan, B.V. Balaram Das, for the Appellants.

Anupam Lal Das, Amit Sharma, S. Mohanty, for the Respondents.

The Judgment of the Court was delivered by

S.B. SINHA, J. 1. Leave granted.

2. Interpretation and/or application of circular letters issued by the Central Board of Direct Taxes (CBDT) dated 14.5.1990 is in question in this appeal which arises out of a judgment and order dated 14.10.2005 passed by a Division Bench of the

A High Court of Kerala at Ernakulam in Writ Petition No.25155 of 2003 allowing the writ petition filed by the respondents herein from a judgment and order dated 10.10.2002 passed by the Central Administrative Tribunal, Ernakulam in OA Nos.728 of 2000 and 782 of 2000.

B 3. The basic fact of the matter is not in dispute.

Respondents herein were working in different States. They filed an application for their transfer to the State of 'Kerala Charge' from 'Gujarat Charge' on or about 14.5.1990.

C Indisputably the Board has the requisite power to regulate 'inter-charge' transfers wherefor it issues guidelines from time to time. One of such circulars was issued on 14.5.1990, the relevant portion whereof read as under:

D "(d) A person who seeks transfer, should apply to the head of the department, chief commissioner director general under whom he is working, who will, on being satisfied, take up the matter with his head of the department in the charge to which the employee seeks transfer. The latter head of the department will examine the request on merits and pass necessary orders for absorption of the person seeking transfer. Such request shall be considered and conceded only against a clear vacancy. His decision in the matter shall be final. No request for re-transfer shall be entertained under any circumstances.

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G (e) The direct recruits coming on transfers will be shown against direct recruitment quota and promotees against the promotion quota."

H 4. On the respondents' application for transfer, it was found that there did not exist any vacancy in the cadre of UDC in direct recruit quota in Kerala Charge so as to enable it to accommodate the respondents on inter-charge transfer.

UNION OF INDIA & ANR. v. MURALIDHARA MENON 545
& ANR. [S.B. SINHA, J.]

However, indication was given to the respondents by the Chief Commissioner of Income Tax that in case they were willing for transfer to the post of LDC, they may opt therefor. Respondents agreed thereto voluntarily to their reversion from the post of UDC to the post of LDC in order to get them transferred from Gujarat Charge to Kerala Charge. They filed a specific undertaking in this behalf. Relying on or on the basis thereof, the order of transfer was issued.

5. Respondents thereafter filed representations. The request made therein was not acceded to. They filed original applications before the Central Administrative Tribunal. It may be placed on record that one of the employees, Sri Nair, had filed a similar representation which was allowed by the Chief Commissioner of Income Tax. Other employees who had been transferred made similar representations. Their representations having been rejected, Original Applications were filed which by reason of various judgments were allowed.

6. However, the Tribunal so far as the case of the respondent is concerned, directed the respondent to consider his representation dated 8.5.1997.

The said representation was rejected by an order dated 17.1.2000, holding that they had voluntarily agreed for reversion and, thus, there has been no vacancy in the 'Kerala Charge' to accommodate them.

7. Central Administrative Tribunal was approached again by the respondents which was marked as OA No.728 of 2000 and 782 of 2000. By reason of a judgment and order dated 10.10.2002, the Tribunal dismissed the said application holding that the cases of other persons who had applied for relaxation and obtained the same were clearly different from the cases of the respondents who had accepted the condition of reversion and the orders passed only on the basis of their willingness expressed in that behalf.

A The Tribunal furthermore noted that despite the objections raised in the Original Applications, those persons who would be adversely affected, if the order of the Tribunal is implemented, had not been impleaded as parties.

B 8. Respondents filed writ applications thereagainst which by reason of the impugned judgment have been allowed by the High Court, holding :

C "We feel that the tribunal ought to have examined the matter more critically, as patently it was a case of hostile discrimination. Although the Asst. Solicitor General had vehemently submitted that after obtaining a transfer on request and after almost a decade, it would have been impermissible on the part of the applicants to agitate the claims to unsettle the seniority of other, we find extreme difficulty to accept this argument. When transfer benefits are recognized as admissible, of course, with certain restrictions, it has to be extended with fairness. Government is not expected to pick and choose persons who had applied for transfer directly to the CBDT, as the procedure followed is contrary to the guidelines. We have to note that this had turned out as a sensitive issue. Recording requests for transfers, inter-regional registers are maintained by every region and normally the transfer application are considered at the Commissioner's level. F The Board had a duty to oversee that fairness was always practiced."

G The High Court furthermore opined that the guidelines dated 14.5.1990 do not speak of any reversion as a pre-condition for an inter-regional transfer. As regards the power of relaxation, it was observed:

H "Further, the submission that relaxation was to be there, itself is a misnomer since as referred to earlier, the norms do not provide for a reversion at all and a relaxation was not at all necessary on this count. Perhaps minimum

UNION OF INDIA & ANR. v. MURALIDHARA MENON 547
& ANR. [S.B. SINHA, J.]

incumbency in the post was relevant, but that is not the objection that was highlighted. Even though the norms provide for accommodation of candidates coming from direct recruitment quota against the direct recruitment vacancy, and the promotees were to occupy only posts against promotion quota, we see that in the cases where preference had been granted, such persons had been accommodated against direct recruitment quota so as to avoid any confrontation with the claims of departmental hands."

The High Court, without referring to any material brought before it, held:

"The proximity of dates relating other transfers sufficiently discloses that there were indeed vacancies. We can postulate the difficulties of the petitioners, viz. that after having worked for a number of years as UDC, against their will they had to give a declaration that they are prepared to opt for reversion and then get a transfer and get bottom seniority, among the LDCs. Further, authorities ensured that they were to get a declaration from time that such steps will not be subjected to challenge. This, we feel, ought not have been practiced by the department to the prejudice and detriment of the serving employee. We find little merit in the objection raised."

9. Mr. R. Radhakrishnan, learned senior counsel appearing on behalf of the appellant, would submit that keeping in view the fact that the respondents had expressed their willingness to be transferred to a lower post, they were estopped and precluded from contending contra.

10. Mr. Anupam Lal Das, learned counsel appearing on behalf of the respondents, on the other hand, urged that having regard to the fact that the persons similarly situated had been accommodated to the posts of UDC from other Charge to 'Kerala Charge', there was absolutely no reason as to why the

A respondents should have been discriminated against. Our attention was drawn to the fact that the respondents have already been working against the post of UDC in terms of an order dated 4.12.2006 pursuant to the impugned judgment of the High Court.

B 11. Respondents did not have any legal right to be transferred from one charge to another. Indisputably, the seniority of the LDCs and UDCs are maintained chargewise. Vacancies in the posts of UDCs are filled up from two sources, namely, by direct recruitment and promotion. As the Service
C Rules provide for two different sources of recruitment and vacancies could be identified on the basis thereof, the CBDT, having a supervisory jurisdiction, could issue circulars from time to time. It has not been disputed that the said circular letters are binding on all the authorities of the department. The circular
D letter dated 14.5.1990 clearly provides for imputation of certain conditions laid down therein.

12. The procedures laid down, thus, were required to be complied with. A request made in that behalf could be
E considered only when there existed a clear vacancy. From a perusal of the memorandum dated 17.1.2000, it is evident that the Board considered the matter carefully and found that there had been no vacancy of UDC in direct recruit quota in 'Kerala Charge' so as to enable the authorities to accommodate them
F on the basis of inter charge transfer.

13. However, it was found that the vacancies in the posts of LDC were available. Only on that basis, the respondents herein volunteered to be transferred to the posts of LDC. It was at their request as also undertakings furnished by them, the
G order of transfers was passed.

14. Article 14 of the Constitution of India providing for the equality clause is a positive concept in terms whereof, the equals, subject to certain exceptions, are to be treated equally
H and unequals cannot be treated equally. If a relaxation has been

UNION OF INDIA & ANR. v. MURALIDHARA MENON 549
& ANR. [S.B. SINHA, J.]

granted in case of one employee on the basis of the materials available before the Board, the same by itself may not be treated to be a binding precedent so as to enable the Tribunal or High Court to issue a writ of or in the nature of mandamus. Our attention has not been drawn to any provision under the aforementioned circular or otherwise that the Chief Commissioner of Income Tax had any power of relaxation. If there are no vacancies, orders of transfer could not be made. Even if no vacancy existed in respect of the direct recruit quota, the respondents could not have been transferred. In absence of any power of relaxation, the respondents could not have been accommodated on the post of UDCs and they could be transferred only on the post of LDCs which were vacant at the relevant time. In our opinion, relying on or on the basis of the case of Sri Nair only, the impugned judgment could not have been passed.

15. The fact situation obtaining in case of Sri Nair has not been brought on record. A writ of mandamus can be issued, provided there exists a legal right in the applicant and a corresponding legal duty in the respondent. Even otherwise a Superior Court having a limited jurisdiction in this behalf would not interfere with the discretionary jurisdiction exercised by the statutory authorities unless a clear case for interference is made out subject of course to just exceptions.

16. Respondents furthermore having given an undertaking and having opted to be transferred on the post of LDC could not have resiled therefrom. They could not approbate and reprobate at the same time. If an order was passed on their representations, they were bound thereby particularly when the circular letter itself suggested that an order of transfer had been passed would be final and no order for retransfer could be passed. The principle of 'estoppel' would, therefore, clearly be applicable.

17. It is not a case where the service conditions of the first respondent is governed by any statute or statutory rules.

- A Transfer as is well known is an incident of service. An employee has no right to be posted at a particular place. He, in law, cannot exercise his option to be posted in his home State unless there exists any statute or statutory rule governing the field. Some policy decision was required to be taken presumably because
- B a large number of requests were being received from the concerned employees. It has not been contended that the said policy decision was illegal. Even if the said policy decision was illegal, first respondent cannot continue to remain posted in the State of Kerala. He may be asked to go back to his original
- C posting, namely at some place which forms part of Gujarat Charge.

18. For the reasons aforementioned, the impugned judgment cannot be sustained, which is set aside accordingly. The appeal is allowed. However, we, in exercise of our

D jurisdiction under Article 142 of the Constitution of India, direct that in view of the fact that the first respondent has been working for a long time in the post of U.D.C., he may not be reverted to the post of L.D.C. but his seniority shall be counted from the date on which he has joined in the said post. No cost.

E B.B.B. Appeal allowed.