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Madras High Court

Case No: Writ Petition No''s. 11352 and 17393 of 2009

K.M. Elumalai	APPELLANT
Vs	
The Additional Director General of Police and Director General of Prisons and The Superintendent of Prisons	RESPONDENT

Date of Decision: Oct. 8, 2009

Acts Referred:

- Constitution of India, 1950 - Article 226
- Mines and Minerals (Development and Regulation) Act, 1957 - Section 15(1), 23C

Hon'ble Judges: M.M. Sundresh, J

Bench: Single Bench

Advocate: P. Rajendran, for the Appellant; Lita Srinivasan, Government Advocate, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

M.M. Sundresh, J.
The issue to be decided in the writ petitions is as to whether an order of transfer based upon a discreet enquiry, dispensing with the departmental proceedings on public interest is liable to be set aside on the ground of violation of principles of natural justice or not.

2. The brief facts in a nutshell are as follows:

The petitioner herein joined the Prison Department on 05.07.1985 as Grade-II Warder and posted to Central Prison, Chennai. After serving in various places he lastly served at Sub Jail, Tiruvallur from 10.04.2007 to 21.05.2009.

The petitioner"s name was included in the Panel for regular Grade-I Warder for the year 2008-09 and it was approved by the first respondent in his proceedings dated 30.04.2009. Accordingly, he was transferred from Sub Jail, Tiruvallur to Central Prison, Puzhal by the Deputy Inspector General of Prisons, Chennai in his proceedings dated 18.05.2009. The petitioner was relieved from Sub-Jail, Tiruvallur on 21.05.2009 and he reported for duty at Central Prison, Puzhal on 29.05.2009.

An order of transfer was passed by the second respondent on adverse grounds dated 20.06.2009 stating that the petitioner is transferred from Central Prison-II, Puzhal and posted to Central Prison, Salem. The petitioner was asked to report for duty the very next day to the place to which he was transferred. The said order did not indicate about the order passed by the first respondent. Challenging the said order, the petitioner filed a writ petition in W.P. No. 11352 of 2009. During the arguments the learned Government Advocate submitted that the order impugned in W.P. No. 11352 of 2009 is only a consequential order which has been passed in pursuant to the order passed by the first respondent dated 19.06.2009. Thereafter, the petitioner was served with the proceedings of the first respondent dated 19.06.2009 which states that the order of transfer has been effected on public interest. Challenging the same the subsequent writ petition has been filed in W.P. No. 17393 of 2009.

The impugned order of transfer dated 19.06.2009 and the consequential order dated 20.06.2009 have been passed on the ground that there was a complaint by way of pseudonymous petition made to the first respondent alleging that in the Sub Jail, Tiruvallur, non vegetarian food, liqour and cell phone are allowed. The said complaint was enquired on 30.05.2009 at Sub Jail, Tiruvallur, in which the staff and the prisoners have stated that the petitioner wanted to retain him at Sub Jail, Tiruvallur itself as Grade-I Warder and on his failure to do so he said that the others would be shunted out of the Sub Jail, Tiruvallur to more than 300 kilometres within three days. Therefore based upon the said statement it was concluded in the discreet enquiry that the pseudonymous petition must have been sent by the petitioner alone. However, it has been decided by the respondents not to conduct any enquiry since it is not possible to prove the same. Hence the impugned orders of transfer have been passed against the petitioner by the respondents.

3. The learned Counsel for the petitioner submitted that the impugned orders are punity in nature and hence they are liable to be set aside. The learned Counsel further submitted that legal malice has been made out and the petitioner cannot be transferred based upon a discreet enquiry conducted behind his back. It is further submitted that the respondents cannot exercise the power in an arbitrary manner and there cannot be any order of transfer in lieu of departmental proceedings. Therefore in violation of principles of natural justice an order of transfer cannot be sustained and hence liable to be set aside. The learned Counsel further submitted that what was served originally was the consequential order of the second respondent and only on the request of the petitioner the order of the first respondent was served on him.

4. The learned Counsel for the petitioner has relied upon the judgments rendered in (2009) 3 MLJ 727 [Somesh Tiwari v. Union of India and Ors. W.A. No. 1138 of 2008 Dated 24.04.2009; 2006 (2) CTC 468 [S. Sevugan v. The Chief Educational Officer, Virudhunagar District, Virudhunagar and Anr.] W.A.(MD) Nos. 5 and 7 of 2007 Dated 09.01.2007; W.P. Nos. 20552 and 22160 of 2008 Dated 13.11.2008 in support of his contention that an order of transfer being punitive in nature cannot be sustained without affording an opportunity to the petitioner.

5. Per contra, the learned Government Advocate submitted that an order of transfer being incidental to service cannot be interfered by the Hon"ble High Court by exercising the power under Article 226 of the Constitution of India. The learned Government Advocate further submitted that inasmuch as the order having been passed in public interest the same need not be set aside. According to the learned Government Advocate in any case under Fundamental Rules 15 power is given to the Government to transfer a Government servant even on the ground of misconduct. The learned Government Advocate has relied upon the judgments reported in State of U.P. and Others Vs. Siya Ram and Another, .; National Hydroelectric Power Corporation Ltd. Vs. Shri Bhagwan and others, ; P. Samraj Vs. The Commissioner of Police and R. Riazuddin, and The Chief Commercial Manager, South Central Railway, Secunderabad and Others Vs. G. Ratnam and Others, in support of her contention that an order of transfer being incidental to service the same cannot be challenged.

6. The learned Government Government has made strong reliance upon the judgment of the Hon"ble Apex Court reported in Union of India (UOI) and Others Vs. Sri Janardhan Debanath and Another, and contended that even assuming there is a misconduct on the part of the petitioner in public interest an order of transfer can be made. According to the learned Government Advocate the impugned order of the first respondent has been served along with the order of the second respondent. Therefore, it is submitted that inasmuch as the transfer being incidental to the service and made on public interest it cannot be questioned before this Court. Hence, the learned Government Advocate prayed for the dismissal of the writ petitions.

7. The question as to whether the petitioner was served with the impugned order passed by the first respondent along with the consequential order passed by the second respondent or not, being a disputed question of fact and not relevant for the purpose of writ petition need not be gone into by this Hon"ble Court. Therefore this Court is not inclined to go into the said question.

8. The only question is to consider in the present case is that as to whether the impugned orders can be sustained based upon a discreet enquiry conducted behind the back of the petitioner on the ground of public interest or not and the same would be in violation of principles of natural justice or not.

9. EDMUND BURKE in 1788 has observed as follows:

Law and arbitrary power are in eternal enmity. Name me a magistrate, and I will name property; name me power, and I will name protection. It is a contradiction in terms, it is blasphemy in religion, it is wickedness in politics, to say that any man can have arbitrary power. In every patent of office the duty is included. For what else does a magistrate exist? To suppose for power, is an absurdity in idea.

10. In Spackman v. Plumstead District Board of Works reported in (1885) 10 AC 229, Earl of Selborne L.C. has held as follows:

No doubt in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word, but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter and he must act honestly and impartially and not under the dictation of some other person or persons to whom the authority is not given by law. There must be no malversation of any kind. There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice.

11. Similarly in Leeson v. General Council of Medical Education reported in (1889) 43 CH.D., Bowen L.J. stated as follows:

The statute imports that the substantial elements of natural justice must be found to have been present at the inquiry. There must be due inquiry. The accused person must have notice of what he is accused. He must have an opportunity of being heard and the decision must be honestly arrived at after he has had a full opportunity of being heard.

12. The above said principles of law evolved by the English Courts would clearly lead to the conclusion that while acting upon a fact the person who exercises the power treating the said fact as conclusive will have to satisfy himself about the due proof of the same before taking any action based upon the same. In other words when a power is vested upon an authority the said authority will have to exercise the said power only in the manner known to law which is by giving a sufficient opportunity to the person against whom the action is proposed. The basic requirement of the said principle is to inform the person concerned about the charges levelled against him and thereafter affording an opportunity to putforth his case followed by a further opportunity to peruse the materials placed against him and cross-examine the witnesses who deposed against him.

13. It is no doubt true that an order of transfer is incidental to the service but the question for consideration is as to whether such an order can be passed in total violation of principles of the natural justice and by dispensing with the enquiry.

14. As submitted by the learned Government Advocate in the judgment reported in State of U.P. and Others Vs. Siya Ram and Another, it has been held that the transfer being incidental to the service and the same having been made in public interest keeping in

view of efficiency in public administration the same cannot be interfered under Article 226 of the Constitution of India in the absence of any malafide shown by the party concerned. Similarly in the judgment reported in National Hydroelectric Power Corporation Ltd. Vs. Shri Bhagwan and others, , the Hon"ble Apex Court has taken the view that unless malafides are shown and violations of any statutory provisions are shown an order of transfer cannot be interfered. The Hon"ble High Court reported in P. Samraj Vs. The Commissioner of Police and R. Riazuddin, has observed as follows:

11. The scope of Judicial review in the matter of transfer is well settled by the Honourable Supreme Court.

(a) The Honourable Supreme Court in the decision reported in Union of India and Others Vs. S.L. Abbas, , in paragraph 7 held as follows:

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

(b) In State of Punjab and others Vs. Joginder Singh Dhatt, , the Honourable Supreme Court held thus:

3. We have heard learned Counsel for the parties. This Court has time and again expressed its disapproval of the Courts below interfering with the order of transfer of public servant from one place to another. It is entirely for the employer to decide when, where and at what point of time a public servant is transferred from his present posting. Ordinarily the Courts have no jurisdiction to interfere with the order of transfer. The High Court grossly erred in quashing the order of transfer of the respondent from Hoshiarpur to Sangrur. The High Court was not justified in extending its jurisdiction under Article 226 of the Constitution of India in a matter where, on the face of it, no injustice was caused.

c) In National Hydroelectric Power Corporation Ltd. Vs. Shri Bhagwan and others, , wherein at para5, the Honourable Supreme Court held as follows:

5. ...It is by now well settled and often reiterated by this Court that no Government servant or employee of a public undertaking has any legal right to be posted forever at any one particular place 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 of power or stated to

be in violation of statutory provisions prohibiting any such transfer, the Courts or the Tribunals cannot interfere with such orders as a matter of routine, as though they are the Appellate Authorities substituting their own decision for that of the management, as against such orders passed in the interest of administrative exigencies of the service concerned....

12. The power of the Court while dealing with the transfer order is explained by the Honourable Supreme Court in the following decisions.

(i) In State of U.P. and Others Vs. Siya Ram and Another, the Honourable Supreme Court held thus:

5. The High Court while exercising jurisdiction under Articles 226 and 227 of the Constitution of India 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 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. Vs. Shri Bhagwan and others, .

ii) In Kendriya Vidyalaya Sangathan Vs. Damodar Prasad Pandey and Others, , in paragraph 4 the Honourable Supreme Court observed as follows:

4. Transfer which is an incidence of service is not to be interfered with by Courts unless it is shown to be clearly arbitrary or visited by mala fide or infraction of any prescribed norms of principles governing the transfer (see Abani Kanta Ray Vs. State of Orissa and Others,). Unless the order of transfer is visited by mala fide or is made in violation of operative guidelines, the Court cannot interfere with it (see Union of India and Others Vs. S.L. Abbas,). Who should be transferred and posted where is a matter for the administrative authority to decide. Unless the order of transfer is vitiated by mala fides or is made in violation of any operative guidelines or rules the Courts should not ordinarily interfere with it. In Union of India (UOI) and Others Vs. Sri Janardhan Debanath and Another, , it was observed as follows:

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 another 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 order passed in the interest of administrative exigencies of the service concerned. This position was highlighted by this Court in National Hydroelectric Power Corporation Ltd. Vs. Shri Bhagwan and others, .

iii) I have also taken similar view in a transfer matter in the decision reported in A. Chinnasamy Vs. The District Collector, A. Sukumaran, I.A.S., District Collector, A.K. Murugesan, M.L.A. and M. Arunachalam, Special Deputy Tahsildar (Election), , and also in Dr. T. Mytle Grace v. Tamil Nadu Agricultural University, Coimbatore and Ors. W.P. No. 4511 of 2006 dated 25.8.2006.

13. Following the above said cited decisions and having regard to the facts in this case, I am of the view that the petitioner has no legal right to contend that he shall not be transferred and he should be permitted to work in the same T-9 Pattabiram Station.

15. On a consideration of the above said judgments, this Court is of the opinion that there is no dispute or quarrel on the settled proposition of law that a transfer which is administrative, made in public interest and being incidental to service cannot be challenged. However from the said judgments it cannot be construed to hold that in any given consideration an order of transfer cannot be challenged. In the judgment reported in (2009) 3 MLJ 727 [Somesh Tiwari v. Union of India and Ors.] the Hon"ble Apex Court has observed as follows:

19. Indisputably, an order of transfer is an administrative order. There cannot be any doubt whatsoever that transfer, which is ordinarily an incident of service should not be interfered with, save in cases where inter alia mala fide on the part of the authority is proved. Mala fide is of two kinds - one malice in fact and the second malice in law.

20. The order in question would attract the principle of malice in law as it was not based on any factor germane for passing an order of transfer and based on an irrelevant ground i.e. on the allegations made against the appellant in the anonymous complaint. It is one thing to say that the employer is entitled to pass an order of transfer in administrative exigencies but it is another thing to say that the order of transfer is passed by way of or in lieu of punishment. When an order of transfer is passed in lieu of punishment, the same is liable to be set aside being wholly illegal.

16. The Hon"ble Apex Court has further observed as follows:

25. No vigilance enquiry was initiated against him. The order of transfer was passed on material which was not existent. The order, therefore, not only suffers from total non application of mind on the part of authorities of respondent No. 1, but also suffers from malice in law.

26. The High Court while exercising its jurisdiction under Article 226 of the Constitution of India must consider the fact of each case. Mechanical application of the normal rule "no work no pay" may in a case of this nature, be found to be wholly injust. No absolute proposition of law in this behalf can be laid down.

17. A reading of the said judgment would show that the order of transfer passed in lieu of the punishment without conducting enquiry cannot be sustained.

18. A similar view has been expressed by the Hon"ble High Court in the judgment reported in 2006 (2) CTC 468 [S. Sevugan v. The Chief Educational Officer, Virudhunagar District, Virudhunagar and Anr.] has observed as follows:

7. It is seen from the impugned order of transfer that it is passed on administrative ground, but it appears that the order was passed by way of punishment and based on the complaint againt the conduct of the petitioner. If that be so, the petitioner is certainly entitled for proper opportunity to defend himself as to whether the complaints against him by the Public or by the Headmaster is proper or not by way of an enquiry.

8. In these, circumstances, this Court is of the view that the transfer order passed by way of punishment is without any opportunity to the petitioner and on the face of it, the order of transfer is illegal and the same is liable to be set aside. Accordingly, the impugned order is set aside.

19. The Division of the Hon"ble High Court in W.A. NO. 1138 OF 2008 DATED 24.04.2009 has held as follows:

8. Learned Counsel for the appellant submitted that though the order of transfer is stated to be passed on administrative grounds in the counter affidavit filed by the respondents in the writ petition it has been specifically stated that the transfer was effected since the appellant came to adverse notice. He further submitted that before the learned Single Judge some confidential files were shown and based on the averments in the counter affidavit as well as in the confidential files, the learned Judge has declined to interfere with the order of transfer. He further submitted that the respondents cannot resort to an order of transfer if there are complaints against the petitioner but it is open to the Department to proceed against the appellant under the relevant Rules if there is any evidence to prove his alleged misconduct. He in support of his aforesaid contentions based reliance on a decision of Mr. Justice P. Jyothimani reported in 2006 (2) CTC 468 (S. Sevugan v. The Chief Educational Officer, Virudhunagar District) wherein in

paragraph 8 it is held as under:

8. In these, circumstances, this Court is of the view that the transfer order passed by way of punishment is without any opportunity to the petitioner and on the face of it, the order of transfer is illegal and the same is liable to be set aside. Accordingly, the impugned order is set aside.

9. Learned Counsel for the appellant submitted that the said decision has been followed by Mr. Justice N. Paul Vasanthakumar in the order dated 29.11.2006 passed in W.P. (M.D) No. 9401 of 2006. He further submitted that the said order passed in W.P.(M.D.) No. 9401 of 2006 has been confirmed by an order dated 09.01.2007 passed by a Division Bench of this Court in W.A.(M.D.) Nos. 5 and 7 of 2007. Learned Counsel has produced the copies of those judgments also.

10. Countering the said submissions the learned Special Government Pleader submitted that the order of transfer as pointed out by the learned Single Judge can be challenged only when such order of transfer is actuated by malafied or that it is made against any statutory provision of Service Rules. He further submitted that the learned Single Judge has taken note off of the report of the Director General of Police addressed to the Inspector General of Police, West Zone, Coimbatore and has come to the conclusion that there are materials in the hands of the Police to transfer the petitioner to some other range to save the image of the police.

11. We have carefully considered the said submissions made by the learned Counsel on either side.

12. Though in the impugned order of transfer it is stated as if the transfer has been effected on administrative grounds, the same has been given a go-by in the counter affidavit filed by the respondents as stated above. As per the averments contained in the counter affidavit the transfer was passed on some adverse remarks/complaints received against the appellant and also on the basis of the report sent by the Director General of Police to the Inspector General of Police, West Zone, and in such circumstances we are of the considered view that the order of transfer passed against the appellant is by way of punishment and that too without giving any opportunity of hearing to the petitioner.

13. To the facts of this case, the aforesaid three decisions squarely apply. But this aspect has not been considered by the learned Single Judge. May be that these points were not argued before the learned Single Judge. But being a question of law the same can be argued before the Division Bench. We are in full agreement with the decisions referred to above. Hence applying the principles laid down therein, we are constrained to interfere with the order passed by the learned Single Judge. Hence the order dated 10.09.2008 passed in W.P. No. 4564 of 2008 is hereby set aside and the writ appeal is allowed. However there will be no order as to costs. Consequently the connected MP is closed.

20. Therefore this Court is of the opinion that the impugned orders passed by the respondents will have to be set aside being punitive in nature and therefore bad in law in not following the principles of natural justice, by affording an opportunity to the petitioner and by conducting an enquiry.

21. The proceedings are also liable to be set aside since the respondents have come to the conclusion based upon a discreet enquiry which is again based upon the statement obtained from persons behind the back of the petitioner. Even in an enquiry a statement obtained in a preliminary enquiry prior to a full-fledged enquiry cannot be relied upon. Therefore in such a case an order passed based upon such an enquiry cannot be sustained. In the judgment reported in (2006) 2 MLJ 202 [T. Pitchai v. Deputy Inspector General of Police, Tirunelveli Range, Tirunelveli and Anr.] the Hon''ble High Court after considering the judgment of the Hon''ble Apex Court and the Division Bench judgment of the Hon''ble High Court was pleased to hold that the punishment based upon a statement given a preliminary enquiry cannot be sustained. The Hon''ble High Court has observed as follows:

7. In the decision reported in Union of India v. Mohd. Ibrahim (2004) 10 S.C.C. 87, the Honourable Supreme Court in the facts and circumstances of the case before it held that the order of dismissal was vitiated as the findings have been based on consideration of statement of the persons examined during the preliminary enquiry and for the said fact the Tribunal set aside the order of dismissal which was upheld by the High Court and there is no error in the said order setting aside the dismissal order.

8. A Division Bench of this Court by Judgment in Deputy Inspector General of Police, Villupuram and Ors. v. V. Vanniaperumal and Ors. W.P. Nos. 29862 and 32581 of 2002, dated 22.02.2005 upheld the order of the Tribunal which set aside the order of removal from service. Paras 6 and 8 of the judgment can be usefully referred to, which reads thus:

6. We have carefully considered the relevant materials and the rival contentions. We have already referred to the charges levelled against the applicants. It is also relevant to note that apart from the applicants two more officers have also been implicated along with them. They are one Sattanathan, Sub-Inspector of Police and Antony, Inspector of Police. It is brought to our notice that Sattanthan is no more and so far as the other officer Antony is concerned lesser punishment has been imposed. Now we are concerned with the charges levelled against both the applicants. In the light of the conclusion arrived at by the Tribunal, we perused the finding of the Enquiry Officer. It is not in dispute that all the prosecution witnesses except PW.3, who is none other than the Deputy Superintendent of Police, the other witnesses viz. P.Ws.1, 2, 4 and 5 turned hostile before the Enquiry Officer and not supported their earlier statement made at the preliminary enquiry. The Enquiry Officer having noted the above aspect curiously submitted a report holding that all the three charges levelled against them are proved based on the preliminary enquiry.

7. ....

8. In our case, we have already referred to the fact that the prosecution witnesses viz., P.Ws.1, 2, 4 and 5 turned hostile and not supported their preliminary version. However, the Enquiry Officer basing reliance on their earlier statement in the preliminary enquiry found that all the charges levelled against them are proved. In the light of the decision of the Supreme Court referred to above, after full-fledged enquiry was held the preliminary enquiry had lost its importance. Further, we find no substance or material to arrive at a conclusion that "since all the three counts were proved by the prosecution beyond reasonable doubts, convincingly, I agree with the findings of the Enquiry Officer, "We are satisfied that there is no material to arrive at such a conclusion by the Deputy Inspector General of Police, while passing an order removing the applicants from service. All these aspects have been considered by the Tribunal in a proper manner and there is no acceptable material or evidence to take different view as that of the Tribunal. We find no merits in both the writ petitions. Accordingly, they are dismissed. No costs. Consequently, the connected miscellaneous petitions are dismissed."

The said conclusion was arrived at by the Division Bench based on the decision of the Honourable Supreme Court reported in Narayana Dattatraya Ramteerthakhar v. State of Maharashtra (1197) 1 S.C.C. 299.

9. The above referred decision of the Division Bench was followed by me in the order in B. Balamurugan v. The Inspector General of Police, Madurai-2 and two Ors. W.P. No. 27019 of 2005, dated 15.02.2006, wherein the order of punishment was set aside.

10. Applying the above principles laid down by the Honourable Supreme Court, Division Bench of this Court and also the earlier decision of mine, as referred above, I am of the opinion that the differing view taken by the disciplinary authority/second respondent herein against the Enquiry Officer''s report is unsustainable in view of the fact that the said view was taken solely based on the statements recorded during the preliminary enquiry. Consequently, the punishment imposed on the basis of the dissenting view is unsustainable and the order of the appellate authority confirming the order of the dismissal is also unsustainable."

Hence on a consideration of the above said principle also, this Court is of the opinion that the impugned orders passed by the respondents will have to be set aside.

22. The learned Government Advocate made strong reliance upon the judgment of the Hon''ble Apex Court reported in Union of India (UOI) and Others Vs. Sri Janardhan Debanath and Another, and submitted that under Fundamental Rules 15 an order of transfer can be passed even in a case of misbehaviour or misconduct by the employee concerned. It is a well settled principle of law that a judgment will have to be applied to the facts of each case, in the said case the Hon''ble Apex Court was dealing with the case where based upon certain allegation an order of transfer was made by exercising the power under the Fundamental Rules. Therefore, the Hon''ble Supreme Court was considering the powers of the authorities under the said Rules. Moreover a reading of the

said judgment would show that it was clearly observed that the question of misbehaviour can be gone into departmental proceedings whereas in the present case it has been clearly stated by the respondents that they have no intention to go with the departmental proceedings since they know very well that it is not possible to prove the factum of the alleged misconduct by the petitioner.

23. Moreover the interpretation of Fundamental Rules 15 is not in question in the present case since the power has been exercised by the first respondent under the Tamil Nadu Jail Subordinate Rules. Further a reading of the Fundamental Rules would show that the power has to be exercised by the Government whereas in the present case on hand the said power has been exercised under the Tamil Nadu Jail Subordinate Rules by the first respondent herein. In this connection, it is useful to refer the judgment of the Division Bench reported in 2009 (3) CTC 97 [D. Sivakumar v. The Government of Tamil Nadu] wherein the Hon"ble Division Bench has observed as follows:

11. The learned Senior Counsel has contended that inasmuch as in the absence of any power under the Parent Act, the impugned rule is not good in law. In support of his contention, the learned Senior Counsel has relied upon K.P. Enterprises v. District Collector Salem AIR 2004 Mad. 151; State of Tamil Nadu v. M.P.P. Kavery Chetty AIR 1995 SCC 858; K.T. Varghese and Others Vs. State of Kerala and Others, , to contend that u/s 15(1) of the MMRD Act, 1957, there is no power to control the movement of any minerals after the sale.

In the judgment reported in K.P. Enterprises v. District Collector, Salem AIR 2004 Mad. 151, unfortunately Section 23C has not been brought to the notice of this Court. It is well settled principle of law that when a particular point of law is not consciously determined by the Court, that does not form part of ratio decidendi. It is further to be noted that a judgment rendered without reference to the statutory provisions cannot be considered as a ratio decidendi and in any case such a judgment will not be binding when an issue is before the Division Bench. In this regard, we may refer the judgment reported in Arnit Das Vs. State of Bihar, , wherein the Hon"ble Supreme Court has held that a decision which is not expressed, not accompanied by reason and not proceeding on a conscious consideration of an issue cannot deem to be a law declared and the same is not the ratio decidendi. Similarly, in Tvl. N.V.S. Agro Derivatives Vs. The Commercial Tax Officer, , the Hon"ble High Court has also taken the same view.

24. Similarly in the judgment reported in 2009 AIR SCW 942 [Commissioner of Central Excise, Bangalore v. Srikumar Agencies] the Hon"ble Supreme Court has observed as follows:

4. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid"s theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the

context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgements. They interpret words of statutes; their words are not to be interpreted as statutes. In London Graving Dock Co. Ltd. v. Horton (1951 Apex Court 737 at p. 761), Lord Mac Dermot observed:

The matter cannot, of course, be settled merely by treating the ipsissima vertra of Willes, J. as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge."

In Home Office v. Dorset Yacht Co. 1970 (2) All ER 294 Lord Reid said, "Lord Atkin"s speech...is not to be treated as if it was a statute definition. It will required qualification in new circumstances." Megarry, J. in (1971) 1 WLR 1062 observed: One must not, of course, construe even a reserved judgment of Russell L.J.as if it were an Act of Parliament." And, in Herrington v. British Railways Board 1972 (2) WLR 537 Lord Morris said:

There is always peril in treating the words of a speech or judgment as though they are words in a ligislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case."

5. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

The following words of Lord Denning in the matter of applying precedents have become locus classicus:

Each case depends on its own facts and a close similarity between on case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.

25. Therefore on a reading of the said judgments, this Court is of the opinion that the judgments relied upon by the learned Government Advocate do not apply to the present case on hand.

26. Thus on a consideration of the facts and circumstances and also on a consideration of the legal issues involved, this Court is of the considered view that the impugned orders passed by the respondents are liable to be set aside. Accordingly they are set aside and

the writ petitions are allowed. No costs. Consequently, connected miscellaneous petitions are closed.