

IN THE HIGH COURT OF JHARKHAND AT RANCHI

W.P. (S) No. 7295 of 2023

Dr. Pashupati Nath Priyadarshi, aged about 38 years son of Sri Suresh Paswan, IMO Grade-I, ESIC Hospital, Adityapur, resident of Quarter no. 2201, Sector-IV/A Bokaro Steel City, Bokaro, P.O. & P.S. Sector-4, Bokaro Steel City, Dist: Bokaro, presently residing at P.O. & P.S.: Adityapur, Dist: SeraikelaKharsawan (Jharkhand). **Petitioner**

Versus

1.The Union of India, through the Secretary, Ministry of Labour & Employment, Govt. of India, Shram Shakti Bhawan, Rafi Marg, P.O. & P.S. and Dist: New Delhi.

2.The Chairman, Employee's State Insurance Corporation, Ministry of Labour and Employment, Govt. of India, Panchdeep Bhawan, CIG Marg, P.O. & P.S. & Dist: New Delhi.

3.The Director General, Employee's State Insurance Corporation, Ministry of Labour and Employment, Govt. of India, Panchdeep Bhawan, CIG Marg, P.O. & P.S. & Dist: New Delhi.

4.The Financial Commissioner, Employee's State Insurance Corporation, Ministry of Labour and Employment, Govt. of India, Panchdeep Bhawan, CIG Marg, P.O. & P.S. & Dist: New Delhi.

5.The Deputy Director (Medical Administration), Office of the Director General, Employee's State Insurance Corporation, Ministry of Labour and Employment, Govt. of India, Panchdeep Bhawan, CIG Marg, P.O. & P.S. & Dist: New Delhi.

6.The Medical Superintendent, Employee's State Insurance Corporation, Ministry of Labour and Employment, Govt. of India, Adityapur, P.O. & P.S.: Adityapur, Dist SeraikelaKharsawan (Jharkhand).

7.The Assistant Director, (Medical Administration), Employee's State Insurance Corporation, Ministry of Labour and Employment, Govt. of India, Panchdeep Bhawan, CIG Marg, P.O. & P.S. & Dist: New Delhi.

... .. **Respondents**

with

W.P. (S) No. 7303 of 2023

Dr. Anita Kumari, aged about 43 years, wife of Dr. Manoj Kumar Paswan, Chief Medical Officer, ESIC Hospital,

Namkum, Ranchi, resident of Kajari, Daltonganj, Nawdhia,
P.O. & P.S.: Daltonganj, Dist. Palamau.

... .. **Petitioner**

Versus

1.The Union of India, through the Secretary, Ministry of Labour & Employment, Govt. of India, Shram Shakti Bhawan, Rafi Marg, P.O. & P.S. and Dist: New Delhi.

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4.The Finance Commissioner, Employee's State Insurance Corporation, Ministry of Labour and Employment, Govt. of India, Panchdeep Bhawan, CIG Marg, P.O. & P.S. & Dist: New Delhi.

5.The Deputy Director (Medical Administration), Office of the Director General, Employee's State Insurance Corporation, Ministry of Labour and Employment, Govt. of India, Panchdeep Bhawan, CIG Marg, P.O. & P.S. & Dist: New Delhi.

6.The Regional Director, Employee's State Insurance Corporation, Ministry of Labour and Employment, Govt. of India, Ranchi, P.O. & P.S. Ranchi, Dist: Ranchi.

7.The Medical Superintendent, Employee's State Insurance Corporation Hospital, Ministry of Labour and Employment, Govt. of India, Namkum, P.O. & P.S.: Namkum, Dist: Ranchi (Jharkhand).

8.The Assistant Director, (Medical Administration), Employee's State Insurance Corporation, Ministry of Labour and Employment, Govt. of India, Panchdeep Bhawan, CIG Marg, P.O. & P.S. & Dist: New Delhi.

9.The Medical Commissioner, Employee's State Insurance Corporation, Ministry of Labour and Employment, Govt. of India, Panchdeep Bhawan, CIG Marg, P.O. & P.S. & Dist: New Delhi.

... .. **Respondents**

with

W.P. (S) No. 7343 of 2023

Dr. Mithlesh Kumar Singh, aged about 41 years, son of Kameshwar Singh, Chief Medical Officer, ESIC Hospital, Adityapur, resident of Qtr. No. 219/2/3, Road No. 14, Near Ram Mandir, Adityapur, P.O. & P.S. Adityapur, Dist.-SeraikelaKharswan (Jharkhand). **Petitioner**

Versus

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... .. **Respondents**

CORAM :HON'BLE MR. JUSTICE SUJIT NARAYAN PRASAD
HON'BLE MR. JUSTICE PRADEEP KUMAR SRIVASTAVA

For the Petitioner : Mr. Mahesh Tewari, Advocate
For the Res. No. 1-UIO : Mrs. Bakshi Vibha, Sr. P.C
For Res. 2 to 5-ESIC : Mr. Ashutosh Anand, Advocate
Mr. Indu Paraskar, Advocate

Order No. 04 : Dated 17th January, 2024
Per Sujit Narayan Prasad, J:

1. Since similar issues are involved in these three writ petitions, hence with the consent of learned counsel for the parties, they are taken up together for disposal.

Prayer in W.P. (S) No. 7295 of 2023

2. The instant writ petition has been filed for quashing order dated 23.11.2023 passed by learned Central Administrative Tribunal, Patna in O.A. No. 885 of 2023, by which the tribunal refused to grant interim stay in respect of order dated 20.05.2023 of respondent-ESIC transferring the applicant from ESIC Hospital, Adityapur to DCBO, Daltonganj.

Prayer in W.P. (S) No. 7303 of 2023

3. The instant writ petition has been filed for quashing order dated 23.11.2023 passed by learned Central Administrative Tribunal, Patna in O.A. No. 883 of 2023, by which the tribunal refused to grant interim stay in respect of order dated 20.05.2023 of respondent-ESIC transferring the applicant from ESIC Hospital, Ranchi to ESIC Hospital, Rourkela.

Prayer in W.P. (S) No. 7343 of 2023

4. The instant writ petition has been filed for quashing order dated 23.11.2023 passed by learned Central Administrative Tribunal, Patna in O.A. No. 884 of 2023, by which the tribunal refused to grant interim stay in respect of order dated 20.05.2023 of ESIC transferring the applicant from ESIC Hospital, Adityapur to ESIC Hospital, Ranchi.

Brief facts of the case in W.P. (S) No. 7295 of 2023

5. The petitioner- Dr. Pushupati Nath Priyadarshi joined Employees State Insurance Corporation (ESIC) on 10.11.2016 as Insurance Medical Officer, Grade-II and at present is posted at ESIC Hospital, Adityapur as IMO Grade-I.

6. The respondent-Employees' State Insurance Corporation came with a Transfer/Posting Policy on the subject matter '*Transfer/posting policy for clinical postings of doctors in ESI Corporation*' on 20.06.2022, according to which ESIC staffs were asked to submit five options for the annual transfer as per his/her choice. Accordingly, the applicant mentioned ESIC Adityapur, R.O. Ranchi, DCBO Ghatshila, DCBO Hazaribagh and ESIC Model Hospital, Ranchi as his options priority-wise. But he was transferred to DCBO, Daltonganj vide transfer order dated 20.05.2023 *de hors* of five station of his choice violating the policy decision, by way of ESIC circular dated 20.06.2022 taken by the respondent-ESIC, of

completion of maximum extended period of nine years at one station i.e., ESIC Hospital, Adityapur. Being aggrieved he submitted a representation before the authority concerned as also approached the tribunal by filing O.A. No. 472 of 2023. The original application was disposed of vide order dated 21.09.2023 with direction upon the respondent-authorities to keep the transfer order in abeyance till a decision is taken on applicant's representation. However, the representation of the applicant was rejected vide order dated 11.10.2023.

7. Being aggrieved thereof, the petitioner preferred O.A. No. 885 of 2023 which was dismissed vide order dated 23.11.2023 refusing to grant interim stay in respect of order dated 20.05.2023 of respondent-ESIC by which the applicant was transferred from ESIC Hospital, Adityapur to DCBO, Daltonganj, hence, the instant writ petition.

Brief facts of the case in W.P. (S) No. 7303 of 2023

8. The petitioner-Dr. Anita Kumari, joined Employees State Insurance Corporation (ESIC) on 30.03.2012 as Insurance Medical Officer, Grade-II at ESIC Hospital, Adityapur, Jharkhand and at present is posted as Chief Medical Officer (CMO) at ESIC Hospital, Namkum, Ranchi.

9. The respondent-ESIC came with a Transfer/Posting Policy on 20.06.2022, according to which ESIC staffs were asked to submit five options for the annual transfer. Accordingly, the applicant mentioned ESIC Model Hospital,

Namkum, Ranchi R.O. Ranchi, DCBO, Hazaribagh, ESIC Hospital Adityapur and ESIC Model Hospital, Rourkela.

10. It is the case of the petitioner that the petitioner's husband is an Associate Professor in the Department of Pathology at RIMS Ranchi but the applicant-petitioner was transferred from ESICH, Ranchi to ESICH, Rourkela in violation of the policy decision taken by the respondent-ESIC itself. Being aggrieved thereof, the petitioner raised her grievance by submitting representation as also by approaching the Tribunal by filing O.A. No. 473 of 2023. The original application was disposed of vide order 21.09.2023 with direction upon the respondent-authorities to keep the transfer order in abeyance till a decision is taken on applicant's representation. However, the representation of the applicant was rejected vide order dated 11.10.2023 on the ground that the applicant had been posted at ESIC Hospital, Ranchi for the last twelve years.

11. Being aggrieved thereof, the petitioner preferred O.A. No. 883 of 2023 which was dismissed vide order dated 23.11.2023 refusing to grant interim stay in respect of order dated 20.05.2023 of respondent-ESIC by which the applicant was transferred from ESIC Hospital, Ranchi to ESIC, Rourkela, hence the instant writ petition.

Brief facts of the case in W.P. (S) No. 7343 of 2023

12. The petitioner-Dr. Mithilesh Kumar Singh, joined Employees State Insurance Corporation (ESIC) on 12.02.2010 as Insurance Medical Officer, Grade-II at ESIC Hospital, Adityapur, Jharkhand and at present is posted as Chief Medical Officer (CMO) at ESIC Hospital, Adityapur.

13. The respondent-ESIC came with a Transfer/Posting Policy on 20.06.2022, according to which ESIC staffs were asked to submit five options for the annual transfer. Accordingly, the applicant mentioned ESIC Adityapur, DCBO-Ghatshila ESIC Model Hospital, Namkum, Ranchi R.O. Ranchi, DCBO, Hazaribagh.

14. The wife of the appellant, namely, Dr. Sweta Kumari since is working as Deputy Manager (Medical Services) at Uranium Corporation of India Limited Hospital at Tarumdi, Jamshedpur, as he has opted first choice at ESIC Hospital, Adityapur but he was transferred to ESIC, Ranchi.

15. Being aggrieved thereof, the petitioner raised grievance by submitting representation as also by approaching the Tribunal by filing O.A. No. 471 of 2023 which was disposed of on 21.09.2023 with direction to the respondent-authorities to keep the transfer order in abeyance till a decision is taken on applicant's representation. However, the representation of the applicant was rejected vide order dated 11.10.2023 on the

ground that the applicant had been posted at ESIC Hospital, Ranchi for the last twelve years.

16. Being aggrieved thereof, the petitioner preferred O.A. No. 884 of 2023 which was dismissed vide order dated 23.11.2023 refusing to grant interim stay in respect of order dated 20.05.2023 of respondent-ESIC by which the applicant was transferred from ESIC Hospital, Adityapur to ESIC, Ranchi. Aggrieved thereof, the applicant has preferred the instant writ petition.

Argument advanced on behalf of petitioners:

17. Mr. Mahesh Tewari, learned counsel for the petitioners in all the writ petitions has submitted by raising the following issues, with a separate ground in W.P. (S) No. 7303 of 2023 and W.P.(S) No. 7343 of 2023 of posting by way of transfer on the basis of provision of the guideline which provides that the spouse is to be posted at the same place where the husband is posted:

- I.** The respondents-Employees State Insurance have framed out a guideline/policy decision/policy of transfer according to which preparatory work of 'Annual General Transfer' is to be started from 1st December of each year and is to be conducted stage by stage so as to come with a final order by 15th day of March of each year. Herein no exercise in terms of the aforesaid policy decision has been undertaken

and without following the action which is to be taken for transfer all of a sudden order of transfer has been passed on 20.05.2023. Hence, the order of transfer issued contrary to the aforesaid policy decision is liable to be quashed and set aside.

II. The said policy decision contains the option to be given of five stations. The petitioner in W.P. (S) No. 7295 of 2023, in exercise of said policy decision, who was posted at ESIC, Adityapur had given option of five of his choice but the committee did not consider the option which was opted by him and *de hors* the rule transferred the petitioner to DCBO, Daltonganj.

III. Learned counsel for the petitioner in W.P. (S) No. 7295 of 2023 further submits that the transfer order was also in violation of DoPT guidelines as applicant-writ petitioner has not completed the extended tenure of nine years [6 years plus extension of 3 years], as per para 5 of the circular dated 27.12.2022. But herein there is no consideration by the respondents-ESIC has been given by allowing the petitioner of W.P. (S) No. 7295 of 2023 to work for the extended period of total nine years even though he performed the services with utmost satisfaction to the authority concerned and

contrary to the mandate of such policy decision he was transferred to the place which was even not given in the option exercised by him.

IV. The contention has been raised that once the policy decision has been framed governing the decision to be taken for transfer then it is bounden duty of the respondents-authority to strictly adhere to the conditions contained therein but it is evident, as would be evident from the objection so raised by making representation before the committee in terms of order passed in earlier occasion by learned tribunal in O.A. No. 472 of 2023, O.A. No. 473 of 2023 and O.A. No. 471 of 2023 respectively, but there is no consideration of the above fact by the said committee hence the order passed by the committee is cryptic and without consideration of the material fact agitated before it.

V. The writ petitioners in W.P. (S) No. 7303 of 2023 and W.P. (S) No. 7343 of 2023 have raised the issue of posting of spouse at one station on the ground that as per guidelines as contained in circular dated 30.09.2009 of DoPT, the husband and wife is to be posted together. Learned counsel for the petitioner has submitted that the husband of petitioner in W.P. (S) No. 7303 of 2023 is an Associate Professor

in the Department of Pathology in RIMS, Ranchi and for cases in which one of the spouse is State Government employee and other Central Government employee the Office Memorandum provides that 'the spouse employed under the Central Government may apply to the competent authority and the competent authority may post the said officer to the station if there is no post in that station to the State where the other spouse is posted. Learned counsel for the petitioner has submitted that the respondents-ESIC since has adopted the said DoPT guidelines, as such since the applicant-petitioner is an Associate Professor in RIMS, Ranchi and his post is non-transferable hence the respondents-ESIC taking into account the predicament of the petitioner ought to have posted the petitioner at Ranchi or at least within the territory of Jharkhand but she has been transferred to another State, which is in utter violation of guidelines as issued by DoPT.

VI. Likewise, the wife of petitioner in W.P. (S) No. 7343 of 2023 is working as Deputy Manager (Medical Services) at Uranium Corporation of India Limited Hospital at Tarumdih, Jamshedpur hence, which is non-transferrable but in violation of

guidelines as issued by the DoPT, the petitioner was to be posted at Adityapur or nearer to Jamshedpur but in utter violation of such policy he was transferred to Ranchi.

VII. It has further been submitted by referring the personal difficulties which the writ petitioner of W.P. (S) No. 7303 of 2023 is facing that is she is having three children and younger one is three years but there is no sympathetic consideration on that count also.

VIII. To buttress his argument, Mr. Mahesh Tewari, learned counsel for the petitioners has relied upon judgments rendered in the case of ***Bank of India Vs. Jagjit Singh Mehta [(1992) 1 SCC 306]*** and ***S.K. Nausad Rahmand & Ors vs. Union of India & Ors [(2022) 12 SCC 1]***.

IX. It has been contended that the learned tribunal ought to have taken into consideration these aspects of the matter while considering the Interlocutory Applications filed for stay of order of transfer but the same has been refused to be granted. Therefore, it requires interference by this Court.

18. Per contra, Mr. Ashutosh Anand, learned counsel for the respondents-ESIC has defended the order passed by learned tribunal *inter alia* on the following grounds:

- I.** It has been contended that the learned tribunal while refusing to grant *ad interim* stay has not committed error reason being that the main prayer in all the three writ petitions are for quashing of order of transfer and hence if the order of transfer will be stayed at this stage it will amount to allowing the whole petition at the interim stage itself without providing an opportunity to defend and by filing written statement.
- II.** The writ petitioners are claiming the stay of order of transfer based upon the policy decision but the said policy decision cannot be said to be mandatory in nature.
- III.** However, he is fair enough to submit that since the learned tribunal has called upon the respondent-ESIC to file written statement hence the same shall be filed for adjudication of the issues/grounds which have been raised by learned counsel for the petitioners.
- IV.** He has further submitted that since these writ petitions have been filed challenging the legality and propriety of the impugned orders passed by the learned tribunal refusing to pass *ad interim* stay and as such the same is being defended by refuting the argument advanced by learned counsel for the

petitioners on the ground that the transfer being the incidence of service and as such none of the employees has vested right to be posted on a particular station for years together.

19. The learned tribunal if taking into consideration the aforesaid fact has declined to grant *ad interim* stay so as to decide the issue finally for which the respondents have been called upon to file written statement which cannot be said to suffer from error.

20. We have heard learned counsel for the parties, perused the impugned orders and circular/policy decision upon which the parties have put reliance as also the judgment cited by learned counsel for the petitioners.

21. This Court needs to refer herein that the power which is being exercised under judicial review under Article 226 of the Constitution of India so as to assess the legality and propriety of the impugned order as to whether the said order is suffering from any apparent error on record warranting judicial review of the same. The learned Tribunal has passed order refusing to pass *ad interim* stay of order of transfer.

22. This Court is not entering into the merit of the issue since the main issue is lying pending for consideration before learned tribunal which is to be adjudicated as per the date fixed since the contesting respondents-ESIC have been called upon to file written statement. If at this stage this Court will

adjudicate the issue then the same will amount to usurp the power of the learned tribunal which is the Court of first instance so far as the case of employees/officers of the Central Government or concerned recruitment as per the stipulation made under Section 14 of the Central Administrative Act, 1985 is concerned as also in view of the judgment rendered in the case of **L Chandra Kumar Vs. Union of India & Others** as reported in **(1997) 3 SCC 261**. Therefore, we are not delving upon the issue on merit as has been pointed out by Mr. Mahesh Tewari, learned counsel for the petitioners as referred hereinabove, rather we are going into the propriety of the said order.

23. This Court before considering the aforesaid facts deems it fit and proper to refer the principle governing the field in passing the ad interim stay. The Hon'ble Apex Court in the case of **Deoraj v. State of Maharashtra & Ors, [(2004) 4 SCC 697]** at paragraph 10 held as under:

“10. Ordinarily, this Court in its exercise of jurisdiction under Article 136 of the Constitution does not interfere with the orders of interim nature passed by the High Court or tribunals. This is a rule of discretion developed by experience, inasmuch as indulgence being shown by this Court at an interim stage of the proceedings pending before a competent court or tribunal results in duplication of proceedings; while the main matter is yet to be heard by the court or tribunal seized of the hearing and competent to do so, valuable time and energy of this Court are consumed in adjudicating upon a controversy the life of which will be coterminous with the life of the main matter itself which is

not before it and there is duplication of pleadings and documents which of necessity shall have to be placed on the record of this Court as well. However, this rule of discretion followed in practice is by way of just self-imposed discipline.”

24. Likewise, the Hon’ble Apex Court in the case of ***Bombay Dyeing & Mfg. Co. Ltd. v. Bombay Environmental Action Group* [(2005) 5 SCC 61]**, at paragraph 24 has been held as under:

“24. The courts, however, have to strike a balance between two extreme positions viz. whether the writ petition would itself become infructuous if interim order is refused, on the one hand, and the enormity of losses and hardships which may be suffered by others if an interim order is granted, particularly having regard to the fact that in such an event, the losses sustained by the affected parties thereby may not be possible to be redeemed.”

25. Further the Hon’ble Apex Court in the case of ***M. Gurudas & Ors Vs. Rasaranjan & Ors* [(2006) 8 SCC 367]**, at paragraphs 19 and 20 held as under:

“19. A finding on “prima facie case” would be a finding of fact. However, while arriving at such a finding of fact, the court not only must arrive at a conclusion that a case for trial has been made out but also other factors requisite for grant of injunction exist. There may be a debate as has been sought to be raised by Dr. Rajeev Dhavan that the decision of the House of Lords in American Cyanamid Co. v. Ethicon Ltd. [(1975) 1 All ER 504 : 1975 AC 396 : (1975) 2 WLR 316 (HL)] would have no application in a case of this nature as was opined by this Court in Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd. [(1999) 7 SCC 1] and S.M. Dyechem Ltd. v. Cadbury (India) Ltd. [(2000) 5 SCC 573] but we are not persuaded to delve therein.”

20. We may only notice that the decisions of this Court in Colgate Palmolive [(1999) 7 SCC 1] and S.M. Dyechem

Ltd. [(2000) 5 SCC 573] relate to intellectual property rights. The question, however, has been taken into consideration by a Bench of this Court in Transmission Corpn. of A.P. Ltd. v. Lanco Kondapalli Power (P) Ltd. [(2006) 1 SCC 540] stating: (SCC pp. 552-53, paras 36-40)

“36. The respondent, therefore, has raised triable issues. What would constitute triable issues has succinctly been dealt with by the House of Lords in its well-known decision in American Cyanamid Co. v. Ethicon Ltd. [(1975) 1 All ER 504 : 1975 AC 396 : (1975) 2 WLR 316 (HL)] holding: (All ER p. 510c-d)

‘Your Lordships should in my view take this opportunity of declaring that there is no such rule. The use of such expressions as “a probability”, “a prima facie case”, or “a strong prima facie case” in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.’

It was further observed: (All ER pp. 511b-c & 511j)

‘Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark on a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial.

The factors which he took into consideration, and in my view properly, were that Ethicon's sutures XLG were not yet on the market; so that had no business which would be brought to a stop by the injunction; no factories would be closed and no workpeople would be thrown out of work. They held a dominant position in the United Kingdom market for absorbable surgical sutures and adopted an aggressive sales policy.'

37. We are, however, not oblivious of the subsequent development of law both in England as well as in this jurisdiction. The Chancery Division in *Series 5 Software v. Clarke* [(1996) 1 All ER 853 (Ch D)] opined: (All ER p. 864c-e)

'In many cases before American Cyanamid [(1975) 1 All ER 504 : 1975 AC 396 : (1975) 2 WLR 316 (HL)] the prospect of success was one of the important factors taken into account in assessing the balance of convenience. The courts would be less willing to subject the plaintiff to the risk of irrecoverable loss which would befall him if an interlocutory injunction was refused in those cases where it thought he was likely to win at the trial than in those cases where it thought he was likely to lose. The assessment of the prospects of success therefore was an important factor in deciding whether the court should exercise its discretion to grant interlocutory relief. It is this consideration which American Cyanamid [(1975) 1 All ER 504 : 1975 AC 396 : (1975) 2 WLR 316 (HL)] is said to have prohibited in all but the most exceptional case. So it is necessary to consider with some care what was said in the House of Lords on this issue.'

38. In *Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd.* [(1999) 7 SCC 1] this Court observed that *Laddie, J.* in *Series 5 Software* [(1996) 1 All ER 853 (Ch D)] had been able to resolve the issue without any departure from the true perspective of the judgment in *American Cyanamid* [(1975) 1 All ER 504 : 1975 AC 396 : (1975) 2 WLR 316 (HL)]. In that case, however, this

Court was considering a matter under the Monopolies and Restrictive Trade Practices Act, 1969.

39. *In S.M. Dyechem Ltd. v. Cadbury (India) Ltd. [(2000) 5 SCC 573] Jagannadha Rao, J. in a case arising under Trade and Merchandise Marks Act, 1958 reiterated the same principle stating that even the comparative strength and weaknesses of the parties may be a subject-matter of consideration for the purpose of grant of injunction in trade mark matters stating: (SCC p. 591, para 21)*

‘21. ... Therefore, in trade mark matters, it is now necessary to go into the question of “comparable strength” of the cases of either party, apart from balance of convenience. Point 4 is decided accordingly.’

40. *The said decisions were noticed yet again in a case involving infringement of trade mark in Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd. [(2001) 5 SCC 73] ”*

26. It is evident from the aforesaid proposition of law that while passing ad interim stay three conditions are required to be fulfilled i.e., the litigant concerned has to make out a *prima facie* case, the balance of convenience and the irreparable loss.

27. The meaning of *prima facie* case is that litigant has to make out a *prima facie* case to establish the fact that he is having a case on merit. But herein we are of the view that since the matter is of transfer, wherein the ground has been taken of non-adherence of the policy decision. The requirement would be to decide the issue as to whether the said policy decision can be construed to have a statutory force or not. The transfer being the incidence of service

certainly can be interfered with if there is violation of the statutory provision or the order of transfer is without any jurisdiction etc.

28. We have found from the pleading that no such ground has been taken rather ground has been taken for non-adherence of policy decision particularly allowing the writ petitioner to stay for extended period of nine years in the first writ petition while in other writ petitioners ground of spouse to work at one station has been taken.

29. This Court, therefore, is of the view that based upon the judgment rendered by Hon'ble Apex Court if at this stage the order of transfer will be kept in abeyance the same being the main prayer in the original applications the entire original application will be said to be allowed at this stage, as has been held by Hon'ble Apex Court in the case of **State of Uttar Pradesh and Others v. Sandeep Kumar Balmiki and Others** reported in **(2009) 17 SCC 555** wherein at paragraph 5 it has been held which is being quoted and referred hereunder as :-

*“5. In our view, the interim order granted by the High Court staying the order of termination could not be passed at this stage in view of the fact that if such relief is granted at this stage, the writ petition shall stand automatically allowed without permitting the parties to place their respective cases at the time of final hearing of the writ petition.
....”*

30. Therefore, this Court is of the view that the petitioner has got no *prima facie* case for passing *ad interim* stay of transfer order at this stage.

31. So far as the balance of convenience is concerned, the said word means that the convenience is to be adjudged that who will be at loss. Certainly, transfer being the incidence of service and hence the prerogative lies with the employer who posts one or the other employees as per the administrative exigency. The balance of convenience is to be adjudicated along with the principle of irreparable loss or the loss said to be irreversible. Irreversible loss will be said to be loss which cannot be restored as per meaning of irreversible which has been decided by Hon'ble Apex Court in the case of **Best Sellers Retail (India) (P) Ltd. v. Aditya Birla Nuvo Ltd., (2012) 6 SCC 792 : wherein it has been held as under:**

“29. Yet, the settled principle of law is that even where prima facie case is in favour of the plaintiff, the Court will refuse temporary injunction if the injury suffered by the plaintiff on account of refusal of temporary injunction was not irreparable.

30. *In Dalpat Kumar v. Prahlad Singh [(1992) 1 SCC 719] this Court held: (SCC p. 721, para 5)*

“5. ... Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in ‘irreparable injury’ to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical

possibility of repairing the injury, but means only that the injury must be a material one, namely, one that cannot be adequately compensated by way of damages.”

To quote the words of Alderson, B. in Attorney General v. Hallett [(1857) 16 M & W 569 : 153 ER 1316] : (ER p. 1321)

“... I take the meaning of irreparable injury to be that which, if not prevented by injunction, cannot be afterwards compensated by any decree which the court can pronounce in the result of the cause.”

32. The Hon’ble Apex Court in the case of **Ajay Mohan & Ors Vs. H.N. Rai & Ors. [(2008) 2 SCC 507]** at paragraph 21 held as under:

“21. The plaintiffs, while praying for the relief of interim injunction, were bound to establish a prima facie case. They were also bound to show that the balance of convenience lay in their favour and unless the prayer is granted, they will suffer an irreparable injury.”

33. The Hon’ble Apex Court in the case of **Zenit Mataplast Private Limited Vs. State of Maharashtra & Ors [(2009) 10 SCC 388]**, at paragraph 30, 31 and 37 held as under:

“30. Interim order is passed on the basis of prima facie findings, which are tentative. Such order is passed as a temporary arrangement to preserve the status quo till the matter is decided finally, to ensure that the matter does not become either infructuous or a fait accompli before the final hearing. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial (vide Anand Prasad Agarwalla v. Tarkeshwar Prasad [(2001) 5 SCC 568] , and State of Assam v. Barak Upatyaka D.U. Karmachari Sanstha [(2009) 5 SCC 694 : (2009) 2 SCC (L&S) 109]).

31. *Grant of an interim relief in regard to the nature and extent thereof depends upon the facts and circumstances of each case as no straitjacket formula can be laid down. There may be a situation wherein the respondent-defendant may use the suit property in such a manner that the situation becomes irretrievable. In such a fact situation, interim relief should be granted (vide M. Gurudas v. Rasaranjan [(2006) 8 SCC 367 : AIR 2006 SC 3275] and Shridevi v. Muralidhar [(2007) 14 SCC 721]). Grant of temporary injunction is governed by three basic principles i.e. prima facie case; balance of convenience; and irreparable injury, which are required to be considered in a proper perspective in the facts and circumstances of a particular case. But it may not be appropriate for any court to hold a mini-trial at the stage of grant of temporary injunction [vide S.M. Dychem Ltd. v. Cadbury (India) Ltd. [(2000) 5 SCC 573 : AIR 2000 SC 2114] and Anand Prasad Agarwalla [(2001) 5 SCC 568] , SCC p. 570, para 6].*

37. *Thus, the law on the issue emerges to the effect that interim injunction should be granted by the court after considering all the pros and cons of the case in a given set of facts involved therein on the risk and responsibility of the party or, in case he loses the case, he cannot take any advantage of the same. The order can be passed on settled principles taking into account the three basic grounds i.e. prima facie case, balance of convenience and irreparable loss.”*

34. We, on scrutiny of the word irreparable or irreversible loss and coming back to the facts of the present case, are of the view that if the petitioners will assume charge on the place of transferred place of posting and in case the learned tribunal will come to the conclusion that the order of transfer is *per se* illegal or suffers from patent illegality and in consequence thereof it will be quashed and set aside then the consequence of the same will be that the status quo ante so

far as the petitioners are concerned will be restored. Thus, in that view of the matter we are further of the view that said loss cannot be said to be irreversible which cannot be restored rather the moment the order will be quashed and set aside the status quo ante will be operative meaning thereby all the petitioners will be in a position to render their duty in the place where they were prior to order of transfer. Therefore, this Court is of the view that the balance of convenience and irreparable loss is to be read together in the case of matter of transfer and taking the same into consideration is of the view that not granting ad interim stay cannot be said to be irreparable.

35. Therefore, in the entirety of facts and circumstances of the case, this Court is of the view that the learned counsel for the petitioners could not be able make out a case of availability of three conditions for granting ad interim stay.

36. This Court considering the law laid down in the case of ***L. Chandra Kumar (supra)*** wherein the power which is to be exercised by the High Court under Article 226 or judicial review has been dealt with. The power of judicial review can only be exercised if the order assailed suffers from error apparent on the face of record. But based upon the aforesaid reasoning we are of the view that no error on the face of record has been pointed out and even the principle for grant of ad interim stay is not available. Therefore, this Court is of

the view that the impugned orders needs no interference by this Court.

37. Accordingly, the writ petitions stand dismissed.

38. Since the matter is of transfer and the same requires early consideration, considering the same since the learned tribunal has called upon the respondent-ESIC to file written statement, which as per submission advanced by Mr. Ashutosh Anand, learned counsel for the respondent-ESIC, shall be filed in advance on or before the date fixed before the tribunal. Further undertaking has been given by learned counsel for the respondents-ESIC that no adjournment shall be taken on that date considering the urgency in the matter.

39. This Court considering the aforesaid fact requests learned tribunal to decide the issue preferably on the same date on its own merit.

40. The writ petitions accordingly stand disposed of.

(Sujit Narayan Prasad, J.)

(Pradeep Kumar Srivastava, J.)