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CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH

O.A. NO.1421/2002

New Delhi this the 8th day of November, 2002.

HON'BLE SHRI JUSTICE V.S.AGGARWAL, CHAIRMAN

HON'BLE SHRI M.P.SINGH, MEMBER (A)

Shri V.K.Gupta
S/o Shri Ram Kumar Gupta
Senior Booking Clerk
Railway Station
Delhi.

... Applicant

(By Shri B.S.Mainee, Advocate)

-versus-

Union of India: Through

1. The General Manager
Northern Railway
Baroda House
New Delhi.

2. The Divisional Railway Manager
Northern Railway
State Entry Road
New Delhi.

3. Senior Station Manager
Northern Railway
Railway Station
Delhi.

... Respondents

(By Advocate Shri D.S.Jagotra)

O R D E R

Justice V.S.Aggarwal:-

Applicant is a Senior Booking Clerk in Railways and posted at Delhi Railway Station. By virtue of the present application, he seeks to quash the order of his transfer dated 6/5/2002 (Annexure A-1) from Delhi Division to Ferozepur Division. Prior to the issue of the aforesaid transfer order, a charge-sheet for imposition of major penalty had been served upon him

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which contained allegations of misconduct in regard to his having indulged in malpractices of over-charging for issue of Railway tickets.

2. Applicant contends that the said orders had been passed under due pressure of Vigilance Branch and not in exigencies of service. He had been transferred to Ferozeur Division along with the post which shows that there was no vacancy in Ferozeur Division and only the applicant is being dislodged. According to the applicant, inter-divisional transfer of an employee after vigilance raid is clearly punitive and stigmatic. He contends that this Tribunal in a number of pronouncements has also held that such orders of transfer cannot be passed.

3. The application has been contested. It has been pleaded that during investigation by the vigilance team, the applicant was detected to have indulged in excess charging. In public interest, it was decided to transfer him to the Ferozeur Division. Necessary disciplinary proceedings had already been initiated in against him. The impugned actions are purely administrative and in public interest without mala fides. While working as a Senior Booking Clerk at Counter No.13 on 9.10.2000, the applicant is alleged to have demanded and accepted Rs.30/- over and above the actual fare from a decoy passenger and in

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another case of decoy, the applicant charged Rs.20 excess for the booking from Delhi to Jullundar.

4. Keeping in view that various decisions have been rendered by Single Member Benches of this Tribunal in different application which have taken conflicting views, this matter had been referred to a Larger Bench. It is in these circumstances that we have heard the present application.

5. The impugned order transferring the applicant from Delhi Division to Ferozepur Division reads:-

"In pursuance to orders contained in Confldl. letter No. E-752/72-XVII/Commr/Transfer/2002 dated 29-04-2002 of G.M./P, Northern Railway, New Delhi Shri V.K.Gupta working as SBC/Delhi is transferred to FZR division along with post. He is directed to report to D.R.M/FZR for further posting.

He should be spared immediately under advice to this office."

6. It is well-known that if the order of transfer is punitive in nature and has been passed without following the minimal requirement of natural justice and the relevant rules, the same would be invalid. A Full Bench of this Tribunal in the case of Kamelesh Trivedi v. Indian Council of Agricultural Research and Another, (1988) 7 ATC 253 had gone into this controversy and held that merely because a complaint is being investigated into the charge of

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mis-conduct, it will not be appropriate to say that the order is penal in nature. The findings of the Full Bench in this regard read:-

"But merely because a complaint is either being investigated into or a charge of misconduct is under enquiry, it cannot be presumed that the order of transfer is penal in nature. Whether a particular order of transfer is penal in nature or is the result of colourable or mala fide exercise of power or is wholly arbitrary must depend on the facts and circumstances of each case. When an order of transfer is challenged on any of these grounds, and a *prima facie* case is made out, the Tribunal would have to examine how far it stands judicial review."

In other words, it will not be appropriate thus to assail the order merely because the departmental proceedings as such were said to be pending.

7. We also deem it necessary to note that ordinarily when the transfers are effected on basis of the policy decision, instruction or rules then it has to be taken to be something falling exclusively within the purview of the executive. It could be quashed on basis of arbitrariness or discrimination but otherwise the judicial review of the same would not be permissible. Reference with advantage can be made to a decision of the Apex Court in the case of State of Andhra Pradesh and another v. V. Sadanandam and others etc. etc., AIR 1989 SC 2060 wherein this principle had been stated in the following words:-

"16. We are now only left with the reasoning of the Tribunal that there is no justification for the continuance of the old

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Rule and for personnel belonging to other zones being transferred on promotion to offices in other zones. In drawing such conclusion, the Tribunal has travelled beyond the limits of its jurisdiction. We need only point out that the mode of recruitment and the category from which the recruitment to a service should be made are all matters which are exclusively within the domain of the executive. It is not for judicial bodies to sit in judgement over the wisdom of the executive in choosing the mode of recruitment or the categories from which the recruitment should be made as they are matters of policy decision falling exclusively within the purview of the executive. As already stated, the question of filling up of posts by persons belonging to other local categories or zones is a matter of administrative necessity and exigency. When the Rules provide for such transfers being effected and when the transfers are not assailed on the ground of arbitrariness or discrimination, the policy of transfer adopted by the Government cannot be struck down by Tribunals or Court of Law."

8. The Supreme Court once again in the case of **Union of India and others v. S.L.Abbas**, AIR 1993 SC 2444 provided the necessary guide-lines that the Central Administrative Tribunal exercises jurisdiction akin to the jurisdiction of the High Court under Article 226 of the Constitution. The Central Administrative Tribunal is not an appellate authority sitting in judgement over the orders of transfer. However, it was further held that the authority must keep in mind the guide-lines issued by the Government on the subject but it does not confer on the Government employee, a legally enforceable right. The Supreme Court held:

"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 provision, the

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Court cannot interfere with it. While ordering the transfer, there is no doubt, the authority must keep in mind the guidelines issued by the Government on the subject. Similarly if a person makes any representation with respect to his transfer, the appropriate authority must consider the same having regard to the exigencies of administration. The guidelines say that as far as possible, 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."

Similarly in the case of State of Punjab and others v. Joginder Singh Dhatt, AIR 1993 SC 2486, it was held in clear terms that it is entirely for the employer to decide when where and at what point of time a public servant has to be transferred in which the court shall not ordinarily interfere.

9. With this backdrop, one can conveniently refer to the basic controversy. On 13.4.1967, the Railway Board issued a circular, copy of which has been placed at Annexure P-3 dated 25.3.1967. The said circular reads:-

"Reference Board's letter No.E(D&A)62 RG6-15 dated 29.3.1962 wherein it was laid down that non-gazetted staff whose conduct is under investigation for charges meriting dismissal/removal from service, including those under suspension should not be transferred from one Railway administration to another till after the finalisation of the departmental or criminal proceedings against them. The Board have considered the matter further and have now decided that non-gazetted staff against whom a disciplinary case is pending or is about to start, should not normally be transferred from one Railway/Division to another Railway/Division till after the finalisation of the Departmental or criminal proceedings, irrespective of whether the charges merit imposition of a major or a minor penalty."

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Circular of 30.10.1998 (Annexure R-1) also refers to the inter-divisional transfer of staff repeatedly figuring in vigilance cases which is reproduced below for the sake of facility:-

"Subject: Inter-divisional transfer of staff repeatedly figuring in vigilance cases.

The question of effecting inter-divisional transfer of staff repeatedly figuring in vigilance cases and where penalties have been imposed was discussed in the Conference on Malpractices and Corruption in mass contact areas organised by the Ministry of Railways on 10.7.98.

2. It has been decided that the cases of staff who have repeatedly figured in substantiated vigilance cases and where penalties have been imposed should be reviewed at appropriate level and such staff transferred on inter-divisional basis."

This is followed by a circular of 2.11.1998, a copy of which has been placed on record at Annexure R-1 which reads:-

"Subject:-Inter-divisional transfer of ticket checking staff and other staff in mass contact area.

In terms of existing instructions ticket checking staff detected to be indulging in malpractices, are required to be invariably sent on the inter-divisional inter railway transfer as a matter of policy.

2. the question of feasibility of effecting inter-divisional transfer of staff in mass contact areas including ticket checking staff, was discussed in the Conference on Malpractices and Corruption in mass contact areas organised by the Ministry of Railways on 10.7.98.

3. Pursuant to the above discussion, it has been decided that while the existing policy of inter-divisional/ inter-railway transfer of ticket checking staff detected to be indulging in malpractices shall continue, other staff in mass contact areas detected to be indulging in malpractices should also be transferred on inter-divisional basis."

10. It is on the strength of these circulars



that the learned counsel for the applicant urged that once the disciplinary proceedings are pending in terms of the earlier circulars when penalty had not been imposed, the transfer order so passed must be held to be punitive and is liable to quashed. According to him, transfer order could only be passed after completion of the disciplinary proceedings. The circular of 2.11.1998 was urged to be not dealing specifically with the case of pending disciplinary proceedings because according to him, both the circulars of 30.10.1998 and 2.11.1998 are the outcome of the meeting about pending disciplinary proceedings and once a final decision has not been arrived at, the orders so passed will not stand scrutiny. It is on this issue that the controversy had arisen and there were different decisions of this Tribunal.

11. The applicant's learned counsel relied upon a Single Member Bench decision of this Tribunal in OA No.2061/1998 (Shri Bhupenendra Kumar vs. The General Manager, Northern Railway and others) and batch of cases rendered on 18.12.1998. In the cited case, concerned persons were working as Booking Clerks and were transferred from Muradabad Division to the Lucknow Division and the orders were challenged on the ground that they were punitive in nature and not in public interest. Thus it was held that a line between the transfer on administrative grounds or penal action cannot become thin when the Government servants of

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doubtful integrity mix with similar elements and use their friendship, contacts and association with bad elements to further their nefarious activities. Their transfer becomes a matter of urgent administrative necessity and they would otherwise use their influence to nullify disciplinary proceedings against them. However when no disciplinary action is taken but administration contents itself by transfer to an inconvenient station, in that event the it becomes the hue of a punishment. The finding of the Tribunal so recorded reads:-

"10. The line between a transfer on administrative ground and a penal action becomes rather thin in certain circumstances. Where government servants of doubtful integrity mix with similar elements and use their friendship, contacts and association with bad elements to further their nefarious activities their transfer becomes a matter of urgent administrative necessity since they would otherwise use their influence to nullify disciplinary proceedings against them. However, when no disciplinary action is taken but the administration contents itself by transfer to an inconvenient station than the action of the authority begins to take the hue of a punishment with the sole object of teaching a lesson to the employee and of setting an example to others. In such cases there is a stigma and when the affected employee does not get to be heard, patently the right of natural justice has been denied to him.

11. In the present cases under discussion, it is an admitted position that vigilance checks were conducted against the applicants. Further the respondents themselves say that prima-facie cases have been established against the applicants. However, there is no whisper of any further action against the applicants except the impugned order of transfer. There is thus no allegation implied or otherwise that the

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continuation of the applicants at the present places of posting is likely to affect adversely the course of justice in that the applicants may try to win over the witnesses or in any other manner interfere with the enquiry. When the transfers are so unusual as to be against the current practice of continuing them within the Division, the punitive nature of such transfers become even more highlighted and in such cases the transfer becomes a stigma. Admittedly the scope of interference in the matter of transfers is limited and ordinarily no interference should be made. However where arbitrariness on malafide is writ large on the face of the order the courts can step to ensure that justice is done.

12. In the facts and circumstances of the case, finding that the impugned orders have not been issued in the ordinary course of administration but are a camouflage for an order of punishment the impugned orders in so far as the three applicants are concerned are quashed and set aside."

It must be remembered that in the case of Bhupenendra Kumar (supra), there was no whisper of any further ^{Challenged} action. He ^{accepted} the transfer order. In other words, the disciplinary proceedings even had not commenced. A clear distinction in this regard had been drawn in the case of Bhupenendra Kumar (supra) where the transfer order had been passed but no action as such had been taken to initiate disciplinary proceedings and, therefore, it was held that it was a camouflage.

12. In fact in the case of Mool Chand vs. The General Manager, Northern Railway and ors. in OA No.287/1999 decided on 4.6.1999, the same learned Single Member Bench of this Tribunal was dealing with a situation when a Senior Booking Clerk was accused of

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committing irregularity of over charging. The disciplinary proceedings had been initiated. The attention of the learned Single Member was drawn towards the decision of Bhupenendra Kumar (supra) rendered by him. A distinction was drawn and while dismissing the application, it was held that in the case of Bhupenendra Kumar (supra), no disciplinary proceedings had been initiated while in the case of Mool Chand referred to above, the disciplinary proceedings had been initiated. It was held that the transfer order, therefore, was not punitive in nature.

The finding read:-

"4. I find that the ratio of Bhupenendra Kumar (supra) does not apply to the present case. In the former case no disciplinary proceedings had been initiated even though the Government employee had been placed under suspension. Since the orders of transfer were in pursuance of the Government instructions dated 2.11.1998, which related to the transfer of staff found to be indulging in malpractices, it was held that the transfer was punitive and in contravention of principles of natural justice as no opportunity to show cause had been afforded. Here however, the respondents have initiated disciplinary proceedings against the applicant in so far as the instructions dated 13.4.1967 are concerned they do not constitute a total prohibition against inter divisional transfers. Furthermore, these instructions can be deemed to have been superseded by the instructions dated 2.11.1998 as both have been issued by the Railway Board. Consequent it cannot be said that the transfer of the applicant herein is by way of punishment by-passing the proper and appropriate course of initiating disciplinary proceedings."

That indeed is a clear distinction which cannot be lost sight of while coming to any conclusion. The

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decision rendered in the case of Bhupenendra Kumar (supra), therefore, cannot be taken to be laying down the principle that whenever disciplinary proceedings have been initiated still transfer orders cannot be passed. It appears that the case of Bhupenendra Kumar at times had been followed ignoring the said fact.

13. In the case of Shri Sarvjeet Singh Walia v. Union of India and others in OA No.546/2000 decided on 8.12.2000, the transfer orders were challenged. A reference was made to Rule 226 of the Indian Railway Establishment Code Vol.I to state that the staff in mass contact areas detected to be indulging in malpractices should be transferred on inter-divisional basis. It was held that the case of Bhupenendra Kumar (supra) would be applicable because transfer orders had been passed on the advice of the vigilance department. In fact, the cited decision also takes note of the fact that after the vigilance check was conducted, the department had not initiated the disciplinary proceedings against the person who appeared to have been affected by the transfer. Strong reliance in this regard was being placed on a decision of the Single Member Bench of this Tribunal in the case of Shri Mohd. Aslam Khan v. Union of India & ors. in OA No.845/2001 decided on 30.5.2002. Once again, the decision of this Tribunal in Bhupenendra Kumar's case (supra) was relied upon and with respect to circulars that had been issued, the learned Single

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Member of this Tribunal held:-

"8. In letter dated 30.10.1998, this has been specifically provided that while effecting an inter divisional transfer, the matter would be reviewed, if the disciplinary proceedings are concluded and the penalty is imposed. This clearly shows that in case where the staff are in mass contact areas, who have been proceeded against in a disciplinary proceedings their transfer is to be kept in abeyance and would be taken after the completion of the disciplinary proceedings. Till then as held by the Co-ordinate Bench of this Tribunal in Bhupendendra Kumar's case supra, which was upheld by the High Court, it is open for respondents to transfer applicant within the Division in public interest. As Railway Board's Circular dated 2.11.1998 does not deal specifically with the issue of pending disciplinary proceedings as both these orders referred to above, are the outcome of the meetings, letter dated 30.10.1998 would hold the field. Moreover, prior to 30.10.1998, respondents have issued Board's letter dated 13.4.1967 specifically precluding them to transfer the staff in case of pending disciplinary proceedings. Nothing has been brought on record to indicate that this instruction has been modified or substituted by any other instructions. In this view of the matter, the case of the applicant, in all fours is covered by Bhupenendra Kumar's case supra, already upheld by the High Court and also covered by the ratio in Ashok Kumar Chopra's case (OA No.547/2000). As the transfer resorted to is not in consonance with the guide-lines, the same cannot be upheld."

As already noted above, a view to the contrary had been taken in the case of Mool Chand (supra) and also in the case of **Shri Sheo Raj Singh v. Union of India & Others** in OA No.2311/1998 decided on 23.7.1999.

14. At the outset, we make it clear that so far as the decision rendered by this Tribunal in the case

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of Bhupenendra Kumar (supra) is concerned, it was confined to the peculiar facts. That was a decision rendered keeping in view that no disciplinary proceedings had been initiated despite the vigilance record. This Tribunal concluded that the transfer order was a camouflage.

15. But while reading the instructions of the department that have been issued from time to time and reproduced above, it is obvious that the circulars of 13.4.1967 and 30.10.1998 do not provide that inter-divisional transfer would be conducted against persons who have repeatedly figured in vigilance cases but where penalty had been imposed. To say that the circular of 2.11.1998 flows from the same meeting and must have the same effect would not be correct. On basis of the said circular, an exception has been drawn. Ticket Checking staff detected to be indulging in malpractices had been taken to be an exception and it was provided that in terms of the existing instructions, such staff is required to be invariably sent on inter-divisional/inter-railway transfer as a matter of policy. The expression "invariably sent on inter-divisional/inter-railway transfer" is the colour and strength of this circular. The words, "in terms of the existing instructions" seem to be redundant. Otherwise, there was no occasion for providing for invariable transfers on inter-divisional/inter-railway basis. The said circular necessarily has to be read

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so as to find out the true meaning of the same. It is obvious that what was provided was that so far as Ticket Checking staff detected to be indulging in malpractices is concerned, they could be transferred on inter-divisional/inter-railway basis. This becomes clear from paragraph 3 of the said circular which provides that existing policy of inter-divisional/inter-railway transfer of ticket checking staff detected to be indulging in malpractices shall continue and other staff in mass contact areas detected to be indulging in malpractices should also be transferred on inter-divisional basis. Therefore for such type of staff working with the Railways, it is not necessary that in terms of the instructions of 30.10.1998, penalties must have been imposed before conducting the transfers. The view to the contrary, therefore, so taken cannot be said to be correct.

16. Since the transfer had been effected in terms of the said circular of 2.11.1998, we hold that the same cannot be described to be punitive or camouflage. This is for the added reason that the charge-sheet for imposition of major penalty has already been served.

17. For these reasons, the application being without merit must fail and is accordingly dismissed.

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No costs.

M.P.S.
(M.P.Singh)
Member (A)

/sns/

V.S.A.
(V.S.Agarwal)
Chairman