

Reserved on 25.11.2020

CENTRAL ADMINISTRATIVE TRIBUNAL

ALLAHABAD BENCH, ALLAHABAD.

ORIGINAL APPLICATION NO. 668 OF 2020

This the 1st day of December, 2020

(Under Section 19 of the Administrative Tribunals Act, 1985)

Hon'ble Mrs. Justice Vijay Lakshmi, Member (J)

Hon'ble Mr. Devendra Chaudhry, Member (A)

DISTRICT-JHANSI

Girijesh Kumar Gaur S/o Late K.R. Gaur, aged about 47 years, permanent resident of Mahavidya Colony Govind Nagar, Mathura, presently posted as ADSTE Orai under NCR Jhansi Division R/o Railway Colony Station Road RB-4, Orai District Jalaun (U.P.) 285001.

Applicant

Advocate: Sri S.M. Ali

Versus

1. Union of India through General Manager, Head Quarter, North Central Railway, Allahabad.
2. General Manager (P), Head Quarter, North Central Railway, Prayagraj.
3. Senior Personal Officer, (Gaz.) Head Quarter, North Central Railway, Prayagraj.
4. Principal Chief Signal and Telecom, Head Quarter, North Central Railway, Prayagraj.
5. Senior Divisional Signal and Telecom Engineer (coordination) N.C.R., Jhansi.

Respondents

Advocate: Sri Shesh Mani Mishra

Judgement delivered by Hon'ble Shri Devendra Chaudhry, Member (Administrative)

The Original Application (O.A.) has been filed against the impugned order of transfer dated 30.09.2020 and order dated 28.10.2020/04.11.2020 passed by respondents rejecting his representation dated 06.10.2020.

2. The exact relief sought is to quash the impugned order of transfer dated 30.09.2020 passed by Respondent-3 as also impugned order dated 24.10.2020 served with covering letter dated 04.11.2020 in light of the Railway Board letter dated 31.08.2015 and OM dated 08.10.2018.

3. With the consent of the parties the OA is heard for final disposal. Accordingly both parties have been heard at length at the admission stage itself.

4. As per the applicant, he is currently working on the non-sensitive post of ADSTE (Assistant Divisional Signal and Tele Communication Engineer) at Orai, district Jalaun since December 2016. That the elder son of the applicant is suffering from genetic disorder Hemophilia 'A' in severe stage and is undergoing treatment at AIIMS/GRH, New Delhi. The medical reports have been filed as Annexure A-4. That the applicant is the only care giver of his son and has to perform frequent journeys to Delhi for this treatment. That the applicant has been requesting for transfer to Agra/Mathura station since 2017 without any consideration thereof by the respondents.

4.1 That the applicant had as part of his duties conducted an inspection and submitted a Inspection Report on the negligent working of the TCI, CSI, CTI in the interest of safety of running trains. Troubled by the inspection, the employee union made a complaint dated 01.06.2020 (Annexure A-7) to higher authorities (Sr. DSTE, Jhansi) with utterly misleading facts on which an explanation was called vide letter dated 29.07.2020 (Annexure A-8) to which the applicant has replied vide his detailed explanation dated 03.08.2020 (Annexure A-9). That now the SPO/GM Allahabad has issued posting order of the newly recruited staff vide order dated 30.09.2020 and also transferred the applicant through the same letter. The applicant then represented against the transfer vide letter dated 06.10.2020 (Annexure A-10) to the Principal Chief Signal and Telecom Engineer, Allahabad in light of the RBO dated 31.08.2015 and OM dated 08.10.2015 for exemption from transfer in the interest of the medical care of his son. That the applicant challenged the said transfer through an OA No 565/2020 before this Tribunal, which vide order 15.10.2020 (Annexure A-11) directed the respondents to decide the representation dated

06.10.2020, by a speaking order. However the authorities relieved the applicant vide order dated 05.10.2020 even though he was on sanctioned leave for the period 05.10.2020 to 09.10.2020, while rejecting his representation in an unlawful manner against the circulars vide order dated 28.10.2020 (Annexure A-2).

4.3 That the transfer order is unlawful on two main grounds:

- i. That it is against Railway Board letter dated 31.08.2015 and the Government of India, O.M. dated 8.10.2018 because the applicant is in the category of a 'Care Giver' Government employee on account of his son having affliction of severe Hemophilia – a blood cancer. Accordingly, he is exempt as per para 3(1) from routine exercise of transfer/rotational transfer as this disability is stated in O.M. dated 8.10.2018. That there is no cure available in any hospital in Allahabad for the disease which is treatable and being treated in Delhi at the Sir Ganga Ram Hospital. Proof in this regard is submitted vide Annexure A-14.
- ii. That the transfer is on a punitive basis as it has been expressly done on the basis of complaint dated 01.06.2020 (part of Annexure A-9) of alleged misconduct and misbehavior of the applicant. That a show cause was issued on this complaint vide letter dated 29.07.2020 of the respondents (Annexure A-8) and a detailed explanation was submitted by the applicant vide letter dated 03.08.2020 (Annexure A-9). However no decision has been taken on the said explanation and without doing so, the impugned transfer order has been passed. Therefore the transfer order becomes plainly punitive in nature and hence the transfer becomes vitiated *per se*. it is therefore unlawful and hence liable to be set aside as per law of the land upheld by Hon'ble Apex Courts/Hon'ble High Courts from time to time.

That the respondent no. 4 has rejected the representation dated 6.10.2020 of the applicant vide order dated 28.10.2020 passed on the basis of the order of this Tribunal dated 15.10.2020 in OA 330/00565/2020 without considering the above grounds which is highly unlawful. Hence the OA.

5. The OA has been considered on its full merits at the admission stage itself. Arguments were accordingly heard at length of both the parties.

6. The learned respondent counsel has argued vehemently that the impugned transfer order is wholly lawful on two main grounds:

i. That the applicant has already completed more than three years at the Orai station having been posted there in 2016. That as per rotational transfer policy he can be transferred on administrative grounds and since there is a vacancy at NCR Hq Allahabad on a non-sensitive post, hence his transfer is totally justified. That the needs of the son of the applicant have been taken into account and it is for this reason that he has been posted to Allahabad which is big city having all advanced medical facilities besides being the zonal headquarters of the NCR itself. That therefore the plea of applicant being 'Care Giver' and not being able to take care of his son as provided for in the quoted circulars is specious inasmuch that the 'Care Giver' employee, namely the applicant can very well take care of his son and give all the care necessary at Allahabad. Hence the plea of violation of the circulars relating to facilities for a 'Care Giver' is bogus and so the OA needs to be dismissed.

ii. Transfer is a privilege of the executive and the Hon'ble Apex Court in a catena of judgements has verily held the unchallengeable rights of the employer to post an employee as per administrative needs. That transfer is an incidence of service and it is not a punishment and so

there is no reason for the applicant to argue that it is punitive in nature as the transfer has been done on administrative contingent needs. Hence also the transfer is lawful. Therefore for this reason also the OA needs to be dismissed.

7. Based on the submissions of the parties, two issues fall for our consideration with regards to consideration of the matter of transfer:

- (i) **Whether there is merit in the submission of the applicant for annulment /stay of his transfer on the basis of humanitarian grounds; and**
- (ii) **Whether the transfer has not been made on administrative grounds but is driven by punitive reasons of complaints from the local employees' union as asserted by the applicant.**

8. As regards the **first issue**, the applicant has submitted two reasons: -

- a. That the Railway officers' transfer policy circular dated 31.08.2015 and O.M. dt 08.10.208 and the circular dated ---- of the DoPT provides for lawful consideration of the request as the applicant is a 'Care Giver' to his eldest son suffering from the disease of acute Hemophilia – a form of blood cancer;
- b. That the treatment of the disease is not possible at Prayagraj as it does not have adequate facilities to treat advanced Hemophilia. That, being at Orai he is able to travel by road at a moment's notice to Delhi, where the treatment is underway at Sir Ganga Ram Hospital which also has other facilities like AIIMS. That he is ready to be transferred to any station near Delhi such as Mathura/Agra which would still provide him opportunity for such emergent travel to Delhi predicated upon by the unpredictable disease

8.1 As regards the first reason, the circulars concerned are quite clear as to the existence of leniency which is to be given in case of 'care giver' parent/guardian for consideration of appropriate posting to facilitate the treatment and care of the afflicted dependent. The respondents have not denied the same also. But it is their submission that posting at Mathura/Agra is not possible because there is no 'non sensitive' post available at the ASDE level and the applicant cannot be posted to a 'sensitive' post because he is part of some inquiry being conducted by the CBI in some matter. That therefore the respondents have exercised the best alternative option of posting the applicant at a big station, viz Prayagraj where the twin objectives of posting on a non-sensitive post is possible as also that Prayagraj is undeniably a large city which apart from being the headquarters of the North Central Railways and thereby having its own advanced medical facilities, also has medical facilities in its own right being a large city.

8.2 This brings us to the second reason stated herein concerning the availability of adequate medical facilities at Prayagraj for treatment of the disease. On this we are of the view that we neither have the expertise and nor is it possible for the Tribunal to go into the technical details of assessing whether required medical expertise is available in Prayagraj or not for treatment of the disease as asserted by the respondents and denied by the applicant. Suffice it to say that while on one hand overnight travel can be done from Prayagraj to Delhi if required, on the other Prayagraj being the headquarters of North Central Railway zone would therefore surely having large hospital facilities of the Railways itself apart from the fact that it is a big city in its own right and so would, presumably have some facilities to treat the disease. Thus, we are not inclined to agree to the applicant's submission of taking pure humanitarian grounds coupled with the circulars above as adequate merit for consideration of any annulment or stay of the impugned

transfer order. Therefore, there is no need to also go into the applicability of the judgment and order of the Hon'ble High Court, Allahabad, cited by the respondents.

8.3 As regards the **second issue** concerning reasons for transfer of the applicant there is need to examine the same. On doing so we find that in the first round of litigation in the matter, this Tribunal vide order dated 15.10.2020 in the OA No.330/00565 of 2020 had directed the respondents to pass a reasoned order on the causes for transfer of the applicant. It would do well to reproduce important abstracts of the said order.

"...In compliance of Hon'ble CAT/ALD's direction as dated 15.10.2020, I have gone through the representation dated 06.10.2020 submitted by Shri G.K. Gaur, ADSTE/Orai. In the said representation dated 06.10.2020, Shri Gaur has requested for cancellation of his transfer to Prayagraj, issued vide order No. 160/2020 dated 30.09.2020, citing the instructions contained in comprehensive transfer policy for Railway Officers issued vide letter dated 31.08.2015 and OM dated 08.10.2018 and has requested for his posting at Agra/Mathura.

I have also perused the comprehensive transfer policy for Railway Officers issued vide letter dated 31.08.2015 and OM dated 08.10.2018.

It is observed that Shri G.K. Gaur, is working at Orai since 21.12.2016. He is undergoing CBI prosecution and is presently figuring in "Secret List." He, therefore, cannot be considered for posting against any sensitive post and may be posted only against non-sensitive post. It is to mention here that presently there is no "Non Sensitive" post at Agra & Mathura, hence, it is not feasible to consider the request of Shri G.K. Gaur for posting at Agra/Mathura. It is also to mention here that complaint regarding misconduct and misbehaviour has been received against Shri

G.K. Gaur during his posting as ADSTE/Orai,. This was also giving rise to industrial relations unrest situation in Orai S&T office.

In view of the compelling circumstances mentioned above, Shri G.K. Gaur has been transferred and posted at North Central Railway, Headquarter at Prayagraj on administrative grounds..."

8.4 From the above it may be seen that two key reasons have been cited by the respondents for rejecting the prayer concerning the transfer order:

- a) That the applicant is undergoing CBI prosecution and is presently figuring in the 'Secret List' and so cannot be posted to a 'sensitive post' and as no 'non-sensitive' post is available at Agra/Mathura, hence his request for posting to these stations cannot be considered; and
- b) That a complaint regarding misconduct and misbehavior has been received against the applicant during his posting as ASDTE/Orai which has given rise to industrial relations unrest at Orai office and so he cannot be consequently allowed to continue at Orai

8.5 As regards the first reason, that the applicant cannot be posted to a 'sensitive post' for reasons of inquiry is surely a prerogative of the respondents and the Tribunal would not for a moment cross the Rubicon and interfere in the executive ground of posting employees as per their needs.

However, the second reason stated by the respondents deserves further examination. Admittedly the respondents have transferred the applicant due to a complaint received from the union with regards to working relationship with his subordinates. We may examine this further first of all by studying the Inspection Report filed by the applicant (Annexure A-7). Important portions are extracted below:

“..PCDO – August 2020 and recent section inspection of undersigned has revealed that –

A. Regarding Scheduled maintenance Visits

1. Sectional SI and TCI are not carrying out scheduled visits of their section at scheduled frequency. These inspections are overdue UPTO 6 MONTHS. (annexure 1).

Again instructed to complete all these overdue visits by end of September 2020.

2. Scheduled visits of CSI and CTI are extremely overdue. Some station/sections are overdue for last 18 months. (annexure 1 and 2).

Again instructed to complete all these overdue visits by end of September 2020.

3. Each inspector is supposed to cover maintenance visits of 100% of gears at scheduled frequency. No inspector is covering 100% of gears at scheduled periodicity.

4. Each visit of inspector should be recorded with brief detail of gears visited in SFR.

5. Each inspectors is supposed to submit his inspection details on 1st day of every month in proforma attached. (annexure 1 and 2)

6. Recently some joint inspection with engg/TRD deptt found overdue. (Annexure 3)

Again instructed to do all these overdue joint inspections by end of this month And not to make due them again in future.

7. Point and crossing joint inspection should so planned that inspection by Sec SI and CSI should alternate. But No overdue on this account.

8. Compliance of Joint inspection of Point and crossing are to be ensured by Sec SI and CSI. If any delay, concerned Inspector

should advise to his counterpart and his senior in writing. If compliance remains pending for more than 20 days ADSTE should be advised without delay.

9. Nobody is ensuring compliance of Joint inspection of Track Circuits. This should not repeat.

10. Technicians are not following roster strictly. Sec SI to ensure it and should submit certificate in this direction on 1st day of every month.

At lx 179, during inspection found that – Technician opened the gate lock rod to do some work (without DCM).

ONE train passed on signal with respect lock unlocked.

Totally Unsafe working working after regular safety counselling.

To stop such unsafe working, only option is to suspend him.

Should we do so.

RDSO LOCK ROD

Did he applied for disconnection?

No Sir,..."

8.6 We may now quickly juxtapose the complaint and the the explanation by the applicant with respect to his defense. Relevant abstracts of the complaint dated 01.06.2020 and the explanation letter dated 03.08.2020 (Annexure A-9) filed by the applicant are reproduced herein below:

Abstracts of the complaint:

vr%Jleku th vki/s fouez fuonu gSfd ge I Hh depljh mDr vf/kdjh ds "Hsk.k I s vr; k/kd ijs'ku vlg H; Hh gA ge I Hh dh vki/s iFkuk gSfd mDr I lgc dk "Hpk vfr"Hpk ; gHh sLFkukrj.k dj fn;k tk;s; fn iz'kd u , I s HkV , oarkuk'kg I lgc dls tYn I s tYn gVk;k tk;s vLFHk ge I Hh I ij okbz'j VDuH'k; u] Dydz , oagYijs dk LFkukrj.k dj fn;k tk;sA rkd I Hh

deplkj; k dls, s srkuk'kg, oalk'V vfkdkjh l sepr fey tk;svlf ge l Hh
"Hst.k l scp l dA ge l Hh depljh vki dsl nk vHkh jgxsA

Abstracts of the reply to the show cause:

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1/2 tc Hh ;k=k Hrk vln ejs dk;ky; ea vlrsg 1&4 fnuk ds vnj mudks
glrk'kj djds vfxe dk; bgh dsfy, okil dj fn; k tkrk g t s k fd delad
1] 2 ij yxs l yku 1/4/2019 ds fjl HV, oafm lip jft LVj dh Qk'ls dki 1/2 l s
Li'V gSA ijarq Dec. 2019 ds i fke l lrg ea voxr gvk fd dñ ;k=k Hrk
tykb&2019 l s foyr gsrkrj ofjo [l H vfh0@l ds@mjbz dls l Hh i m/x
;k=k Hrk ds l f k cyk; k x; k, oal Hh l el; kvadk funku djrs gq bu l Hh
i m/x& ;k=k Hrk vk dls vfxe dk; bgh gsq> Hh v m/2 l Hst k x; k A rRi "pr
ofjo [l H vfh0@ l ds@mjbz noljk fnukad 07&12&2010 dls bl l mH eph fd
vkt dh rjkh[k eadkbz Hh ;k=k Hrk vc f miks ea i m/x ugh g, d fyf[kr
LVSeV Hh fn; k x; k 1/4 ksd delad 3@1 ij l yf tur gSA bl ds l f k gh ofjo
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1& tc ofjo [l H vfh0@l ds@mjbz noljk fnukad 07&12&2019 dls bl l mH eph
fd vkt dh rjkh[k eadkbz Hh ;k=k Hrk vc f miks ea i m/x ugh g, d fyf[kr
LVSeV nsfn; k x; k rls tykb&2019& fnl Ecj 2019 ds ;k=k Hrk ds a i m/x
gq A tlp djus ij irk pyk fd ; s l Hh ;k=k Hrk Vibe dlfia LVKQ vius
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vfh0@l ds@mjbz ds l Kku esyk; s i m/x djrs jgA ; g futh dkj. k fl Q, d
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8.7 It is clear from above that the applicant during his course of honest inspections found the above discrepancies against the concerned employees. This would have expectedly raised the heckles of the concerned employees against the applicant. Thus there is a clear nexus between the inspection report, the complaint letter by the union members and the transfer. This therefore, raises a fundamental point viz, that the impugned transfer order has been done quite plainly as if on a punitive ground of receipt of complaint regarding the applicant's relationship with his subordinates during the course of official functioning. It is not for the Tribunal to go into the merits or otherwise of the said complaint for or against the applicant. But what is important and as also asserted by the learned applicant counsel is, that the transfer cannot be made on the ground of complaints as evident and clearly even admitted from the contents of the order dated 20.10.2020 cited above and reproduced herein again for recounting the same:

"..It is also to mention here that complaint regarding misconduct and misbehaviour has been received against Shri G.K. Gaur during his posting as ADSTE/Orai,. This was also giving rise to industrial relations unrest situation in Orai S&T office..."

The reasons cited by the respondents clearly show the colour of a punishment being a reason for the transfer order and so the conclusion that it is punitive in nature is quite inescapable.

8.8 This brings to play abundant case law to the effect that a transfer should not be done on punitive grounds. This is because, while transfer is truly an administrative measure available to the employer for effective conduct of work, it cannot be availed of as being a mechanism to punish a person for which the necessary law on disciplinary proceedings should be taken

recourse to and not a mere transfer. This is logical law inasmuch that to transfer a person as a punitive measure tantamount to punishing a person without giving an opportunity of hearing which is violative of Article 311 of the Constitution. It is for this reason that the Hon'ble Apex court has repeatedly held that whenever there is a punitive reason, transfer is not the answer because the principle of *audi alteram partem* which comes into play in such a circumstance. Going by this reasoning the justiciable path to be taken by the respondents should have been to decide the complaints received and the reply thereof by the applicant and take suitable steps thereupon. However as asserted by the applicant, even though he has submitted his reply to the complaint vide his letter dated 03.08.2020, no decision has been taken on his reply and the same has gone un-inquired into in the manner it deserves to be done. That therefore the applicant submits that the impugned transfer order is punitive in nature and so deserves to be set aside.

8.9 It is also clear from the submissions of the applicant that he is not interested in continuing at Orai having earlier made several submissions seeking transfer elsewhere to Mathura/Agra. It is also not clear as per respondents as to the nature of the CBI inquiry, the location of the cause of the inquiry in terms of related incidents and hence the relation to Orai or elsewhere. The progress in the said inquiry is also not known. Hence the plea of the inquiry itself being the cause of transfer also seems vague apart from the fact that it is open for the respondents to take appropriate disciplinary action based on the results of the inquiry for which transfer in any case is not the justiciable remedy.

9.0 We would do well now, to examine some case law concerning the above issue of a transfer being done as a punitive measure in a bit more detail, moreso without reducing the weight of several existing citations that a

transfer is an administrative issue and not to be easily interfered with by the courts.

9.1 The Hon'ble Apex Court in the matter of Arvind Dattatraya Dhande vs State of Maharashtra, AIR 1997 SC 3067, has held in the matter of an appellant who had conducted raid on toddy shops at various places and samples were taken from the toddy for analysis; consequently offences were registered on the basis of the analyses report which revealed that the toddy was adulterated; aggrieved by this, the toddy contractor later lodged complaint against the appellant and action was taken against the officer by way of transfer. In this matter it was held that -

"..the transfer is not in public interest but is a case of victimization of an honest officer at the behest to the aggrieved complainants carrying on the business in liquor and toddy. Under these circumstances the transfer of the appellant is nothing but mala fide exercise of the power to demoralize honest officers who would efficiently discharge the duties of a public officer". The appeal was accordingly allowed.

9.2 Then again, the Hon'ble Apex Court has, in the matter of Somesh Tiwari vs UoI (16.12.2008) stated in para-20 as follows:

" 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 ie 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..."

In a famous judgement (December 1965) delivered by the Privy Council in the matter of Don John Francis Douglas Liyange & Ors. vs The Queen, Lord Pierce had said..." *What is done once, if it be done again and in a lesser crisis and less serious circumstances ...then such erosion is contrary to the clear intention of the Constitution..*"

9.3 *"Lustita est constans et perpetua voluntasius suum cuique tribuere unicuique partitus"*...Justice in the end is the constant and perpetual will to allot to every man his due. In the present case the due justice requires that there is a definite proof of a transfer based on punitive considerations. Hence, we are inclined to accept the plea of applicant that the impugned transfer is on a punitive bases driven as it were by the complaints of the union related employees when the applicant made the much abhorred inspections which albiet revealed the truth behind a seemingly false sense of railway safety and compliance relating to procedures and processes prescribed in the various work manuals.

10.0 Honest and upright government servants often face such tortures of service which pass as discretion of the short sighted employer who wishes to avoid short term trouble and sacrifices what is good for the system in the long term. A truth is still the truth, even if no one believes it. A lie is still a lie, even if everyone believes it. Justice has to stand for truth and so we uphold the plea of the applicant and in this matter it requires consideration as a typical and exceptional case in view of the attendant circumstances and evidence thereof.

11.0 Accordingly, on the basis of the foregoing discussions and reasons thereof, the impugned transfer order dated 30.09.2020 is liable to be quashed

and is quashed with the consequential setting aside of the order dated 28.10.2020. The OA is accordingly allowed.

10. No costs

DEVENDRA CHAUDHRY
(Member-Administrative)

JUSTICE VIJAY LAKSMI
(Member-Judicial)