

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
NEW DELHI

O.A. No. OA 770 1987.
T.A. No.

DATE OF DECISION 27.4.88

Shri Kamlesh Trivedi, Petitioner

Shri Umesh Mishra, Advocate for the Petitioner(s)

Versus

Indian Council of Agricultural Respondents.
Research & Another

Shri P.P.Rao, Sr. Advocate with Advocate for the Respondent(s)
Shri H.C.Kapoor,

CORAM :

The Hon'ble Mr. Justice K.Madhava Reddy, Chairman.

The Hon'ble Mr. Justice J.D. Jain, Vice-Chairman.

The Hon'ble Mr. Kaushal Kumar, Member (Admn.)

- 1. Whether Reporters of local papers may be allowed to see the Judgement? Yes
- 2. To be referred to the Reporter or not? Yes
- 3. Whether their Lordships wish to see the fair copy of the Judgement? No
- 4. Whether to be circulated to other Benches? Yes

(Signature)
(Kaushal Kumar)
Member (Admn.)

(Signature)
(J.D. Jain)
Vice-Chairman.

(Signature)
(K.Madhava Reddy) 27.4.88
Chairman.

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CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH: DELHI.

REGN. NO. OA 770/1987.

April 27, 1988.

Shri Kamlesh Trivedi ... Applicant.

Vs.

Indian Council of Agricultural .. Respondents.
Research & Another

CORAM:

Hon'ble Mr. Justice K.Madhava Reddy, Chairman.

Hon'ble Mr. Justice J.D.Jain, Vice-Chairman.

Hon'ble Mr. Kaushal Kumar, Member (Admn.).

For the applicant ... Shri Umesh Mishra,
Advocate.

For the respondents ... Shri P.P.Rao,
Sr.Advocate with Shri
H.C.Kapoor, Advocate.

(Judgment of the Larger Bench delivered by
Hon'ble Mr. Justice K.Madhava Reddy, Chairman)

In this application under Section 19 of the
Administrative Tribunals Act, 1985 (hereinafter referred
to as 'The Act'), the applicant, who is a Beldar in
the Office of the Indian Agricultural Research Institute,
Pusa, New Delhi calls in question the order dated
30.3.1987 transferring him along with his post to
Regional Station, IARI in Bihar with immediate effect
in public interest. While admitting that the applicant
who is a Beldar in the office of Indian Agricultural
Research Institute, New Delhi is liable for transfer,
it was urged that every public servant has certain
constitutional, statutory and legal rights guaranteed
to him under Article 311, Articles 14 and 16 of the

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Constitution and under the Service Rules which include Rules and instructions governing the matter of transfer. The order of transfer in this case is punitive and arbitrary and was ordered without making a proper enquiry. It was contended that in the light of the Judgement of this Tribunal in K.K.JINDAL Vs. GENERAL MANAGER, NORTHERN RAILWAY (1), the order must be quashed. The Division Bench came to the conclusion that "the report of the Inquiry Committee shows, the applicant was associated with the inquiry and his statement had been duly recorded. A finding of misconduct on the part of the applicant as providing the basis for transfer could not be held to be bad or contrary to the ruling given in K.K.JINDAL's case". The Bench referring to the observations made in K.K.JINDAL's case, said:

"the said judgment does not finally clinch the legal position on the following two issues:-

- (i) Whether the competent authority can transfer a delinquent official on the basis of the findings of a proper inquiry conducted in accordance with Article 311 (2) of the Constitution where the provisions of the said Article are applicable and/or in accordance with the rules governing disciplinary proceedings and the charges are held to be proved after following the prescribed procedure; and
- (ii) if the answer to (i) above is in the affirmative, whether an inquiry wherein no charge-sheet has been served or statement

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regarding imputation of misconduct given but the delinquent official's statement has been recorded by the Enquiry Officer or the Enquiry Committee, as in the instant case, can be considered to be a proper or adequate enquiry for the purpose of arriving at a finding of guilt which would provide a legally sustainable ground to effect a transfer".

the Division Bench

In that view of the matter referred the above two issues to a Larger Bench for decision.

The reference was occasioned because both sides relied upon the ruling of this Tribunal in the case of K.K. JINDAL Vs. GENERAL MANAGER, NORTHERN RAILWAY (1) in support of their respective contentions. The relevant paragraphs upon which the reliance is placed are paragraphs 16, 18 and 25 of that judgement occurring at pages 9 and 10 of the reference order. Two of us ((Madhava Reddy, J., & Kaushal Kumar) were party to the judgment in K.K. Jindal's case. This judgment is often relied upon as declaring that whenever transfer of a public servant is preceded by complaints against him, it must be held to be punitive and ^{if} such an order is not preceded by a proper enquiry, it should be quashed.

∟ to the larger Bench

The answer to the two questions referred and what exactly the case of Jindal lays down must be based on an appreciation, inter alia of (i) the general nature of an order transferring a government servant from one place to another or from one post to another at the same place; (ii) as to what is meant by transfer

being penal in nature and (iii) the extent to which it is subject to judicial review. It cannot be denied that the Government or the employer has the right to transfer a person holding a transferable post. Transfer is an incident of service and not a condition of service.

In B.VARADHA RAO Vs. STATE OF KARNATAKA AND OTHERS (2) the Supreme Court held:

"It is well understood that transfer of a government servant who is appointed to a particular cadre of transferable posts from one place to another is an ordinary incident of service and therefore does not result in any alteration of any of the conditions of service to his disadvantage. (emphasis supplied). That a government servant is liable to be transferred to a similar post in the same cadre is a normal feature and incident of government service and no government servant can claim to remain in a particular place or in a particular post unless, of course, his appointment itself is to a specified, non-transferable post".

Hence transfer per se cannot be deemed to be punitive.

Whether a particular order of transfer is penal in nature or not has to be considered in the perspective of the broad distinction between a disciplinary proceeding which may result in imposition of a penalty on the one hand and an administrative action ordering transfer on the other which is not per se a punishment. While the former action is taken after observing a quasi judicial procedure, the latter is the result of an

administrative decision. While in the case of all employees any such action is subject to the Fundamental Rights guaranteed to a citizen and to all employees under the State under Articles 14 and 16 of the Constitution and also other rules made governing the transfer and postings, in the case of persons holding civil posts under the State, it is further subject to Art.311 of the Constitution. Of course, the exercise of quasi judicial function and the administrative action are both subject to judicial review by the Tribunal. But having regard to nature of the power exercised by the authorities, the scope and extent of judicial review would vary in respect of these actions.

Power to impose penalty as well as to order transfer may be vested in the same authority and may be exercised from time to time. It is where the power to transfer is exercised by an authority competent to impose a penalty as well as order transfer, that the question of determining whether the impugned order of transfer is by way of penalty calling for interference, or is for unexceptional administrative reasons becomes difficult to determine. That is a matter which must be scrutinised with reference to certain well settled general principles.

That an innocuous order of transfer could be penal in nature and could be arbitrary causing great hardship to the employee is recognised in a number of judicial

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pronouncements. Suffice to note a few of them:

In the MANAGEMENT OF SYNDICATE BANK Vs. THE WORKMEN (3) considering the question as to when an order of transfer may be interfered with by Courts and Tribunals, the Supreme Court declared:

"If an order of transfer is made mala fide or for some ulterior purpose, like punishing an employee for his trade union activities, the Industrial Tribunals should interfere and set aside such an order of transfer".

In P. PUSHPAKARAN Vs. CHAIRMAN, COIR BOARD (4) (KERALA), Khalid J. (as he then was) observed:

" transfer can uproot a family, cause irreparable harm to an employee and drive him into desperation. It is on account of this, that transfers when effected by way of punishment, though on the face of it may bear the insignia of innocence, are quashed by courts".

These observations of Khalid J. find an echo in

B. VARADHA RAO vs. STATE OF KARNATAKA AND OTHERS (2)

as under:

"One cannot but deprecate that frequent, unscheduled and unreasonable transfers can uproot a family, cause irreparable harm to a government servant and drive him to desperation. It disrupts the education of his children and leads to numerous other complications and problems and results in hardship and demoralisation. It therefore follows that the policy of transfer should be reasonable and fair and should apply to everybody equally. But, at the same time, ^{it} cannot be forgotten

(3) AIR 1966 SC 1238

(4) 1979 (1) SLR 309

(2) 1986 4SCC 131

that so far as superior or more responsible posts are concerned, continued posting at one station or in one department of the government is not conducive to good administration. It creates vested interest and therefore we find that even from the British times the general policy has been to restrict the period of posting for a definite period. We wish to add that the position of Class III and class IV employees stand on a different footing. We trust that the government will keep these considerations in view while making an order of transfer".

Thus though a government servant is liable for transfer he too is guaranteed the protection of Articles 14 and 16. Even an administrative order of transfer when attacked as violating the said fundamental rights ~~xx~~ must stand scrutiny by the Tribunal.

In E.P. ROYAPPA Vs. STATE OF TAMIL NADU AND ANOTHER(5) , the Supreme Court by majority decision gave a new dimension to Articles 14 and 16 of the Constitution by declaring:

"Article 14 is the genus while Art. 16 is a species. Article 16 gives effect to the doctrine of equality in all matters relating to public employment. The basic principle which, therefore, informs both Arts. 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the

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other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Art. 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situated and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the latter comprehends the former. Both are inhibited by Arts. 14 and 16 It is also necessary to point out that the ambit and reach of Articles 14 and 16 are not limited to cases where the public servant affected has a right to a post. Even if a public servant is in an officiating position, he can complain of violation of Arts. 14 and 16 if he has been arbitrarily or unfairly treated or subjected to a mala fide exercise of power by a State machine. It is, therefore, no answer to the charge

of infringement of Articles 14 and 16 to say that the petitioner had no right to the post.... That might have some relevance to Article 311 but not to Articles 14 and 16.

The Court then considered:

"whether the transfer of the petitioner first to the post of Deputy Chairman and then to the post of Officer on Special Duty was arbitrary, hostile and in mala fide exercise of power. What was the operative reason for such transfer: was it the exigencies of public administration or extra administrative considerations having no relevance to the question of transfer? Was the transfer to the post of Deputy Chairman or Officer on Special Duty so irrational or unjust that it could not have been made by any reasonable administration except for collateral reason? These are the questions which call for our consideration".

An employee though liable for transfer may, therefore, successfully challenge the order of transfer, if the operative reason for ordering transfer is to punish or is an extraneous or impermissible consideration or is mala fide or is arbitrary.

Applying the various dicta of the Supreme Court, a Bench of this Tribunal in K.K.Jindal's case (supra) ruled as under:

"It cannot be gainsaid that transfer is an exigency (incident) of service and may be ordered for administrative reasons and the employer is the best judge in this regard. At the same time, an order of transfer as observed by V.Khalid J. (as he then was) in P.Pushpakaran V.Chairman, Coir Board (Kerala) (1979 (1) SLR 309, 'can uproot a family, cause irreparable harm to an employee

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and drive him into desperation. It is on account of this, that transfers when effected by way of punishment, though on the face of it may bear the insignia of innocence, are quashed by courts. That is the human aspect of the matter. However, exigencies of administration and public interest must take precedence over individual inconvenience or hardship. A welfare state, governed by Rule of Law has therefore attempted to ensure fairness and equality of treatment and eliminate arbitrary action even in the matter of transfers by enunciating a policy. Though the State was not bound to enunciate a policy in this regard, in which case each individual transfer when questioned would have to be considered on its merits, once a policy is enunciated, any action not conforming to it would prima facie be unsupportable. A very strong case would have to be made out to justify the deviation from the declared policy. Like every other administrative order, an order of transfer also must conform to rules, if any, framed, and policy, if any, enunciated by the Government. Even if there are none, an order of transfer cannot be arbitrary or discriminatory, for that is a Constitutional requirement which every order must satisfy".

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Power to take disciplinary proceedings and impose any of the penalties on civil servants is subject to Art.311 and governed by CCS(CCA) Rules and in the case of other public servants by their Service Rules and other administrative instructions issued in this behalf. The contravention of any of these would almost always vitiate the disciplinary proceedings and the penalty imposed is liable to be struck down. As the right of a government servant to hold a particular post or rank or to receive certain pay and allowances is affected by the imposition of penalty and a stigma is also attached on account of a finding of "misconduct" as understood in service law, ^{even} in the absence of any specific Rules governing disciplinary proceedings, principles of natural justice are required to be observed in taking disciplinary action. The power to order transfer, however, is generally not governed by any statute or rules. If a person is appointed to a transferable post, the competent authority may transfer him. The government or the employer, however, issues instructions or enunciates transfer policy to guide the competent authority in the exercise of this administrative discretion. Obviously, every exigency of service cannot be governed

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by instructions or policies. It has to be left to the discretion of the administrative head who may delegate this power to any other subordinate authorities. The transfer policies so enunciated or instructions so issued necessarily leave a lot of discretion in the competent authority. The transfer policy and the instructions issued in this behalf would themselves be subject to the Fundamental Rights guaranteed to a citizen and other provisions of law, if any. An innocuous transfer order may be penal in nature, may be arbitrary, may be actuated by mala fides or may be the result of colourable exercise of power. It may be ordered to favour someone else or teach the applicant "a lesson". Even a bonafide order of transfer may cause undue hardship to the employee. The fact that it causes hardship by itself may not be determinative of the order of transfer being penal. Instead of imposing penalty for the charges proved, the competent authority may on the conclusion of a disciplinary proceeding merely order transfer. It may have been ordered in addition to the penalty imposed for misconduct. Various decisions, as already noticed above, have held that transfer could be by way of penalty, and if it is by way of penalty, it will be vitiated.

In B.VARADHA RAO Vs. STATE OF KARNATAKA (2)

the Supreme Court ~~agreed with~~ ~~with~~ ~~with~~ laying down the view:

 2. (1986) 4 SCC 131.

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"That a Government servant is liable to be transferred to a similar post in the same cadre is a normal feature and incident of Government service and no government servant can claim to remain in a particular place or in a particular post unless, of course, his appointment itself is to a specified, non-transferable post"., did not declare that an order

of transfer is immune from judicial scrutiny. In fact the Supreme Court recognised that the power of transfer may be abused and may be otherwise vitiated.

The learned Judges observed:

"It is no doubt true that if the power of transfer is abused, the exercise of the power is vitiated. But it is one thing to say that an order of transfer which is not made in public interest but for collateral purposes and with oblique motives is vitiated by abuse of powers, and an altogether different thing to say that such an order per se made in the exigencies of service varies any condition of service, express or implied, to the disadvantage of the concerned government servant....

... ..

It was no doubt true that the Government has power to transfer its employees employed in a transferable post but this power has to be exercised bona fide to meet the exigencies of the administration. If the power is exercised mala fide, then obviously the order of transfer is liable to be struck down."

Therefore, when an order of transfer is attacked as penal, it must be considered from the basic postulate

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that no Government servant is entitled to be retained at a particular place, that transfer is an incident of service and the Government has the power and authority to transfer in the exigencies of administration.

However, any transfer must be ordered in public interest.

It may be pointed out that no decision has been brought to our notice which declares that transfer constitutes a penalty. None of the Service Rules governing disciplinary proceedings have enumerated transfer as one of the penalties that may be imposed. All that these decisions have observed is that the transfer may have been ordered by way of punishment. Since transfer is not one of the enumerated penalties, the procedure laid down for holding a disciplinary proceeding is not directly attracted. But complaints against a public servant as to his conduct, efficiency, integrity and suitability for the post he is holding may be made to the competent authority and in the interests of good and responsive administration, appropriate action has to be taken expeditiously. The competent authority may, or may not find any truth in that complaint, but having regard to the administrative exigency may be of the view that a more suitable or a more efficient person should be posted, and for making place for such a person affect a transfer. May be, having regard

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to the nature of the complaints received, the competent authority may think that in the interest of the employee himself, transfer should be ordered. In another case, having regard to the position an employee holds and the influence he commands at the place of his posting, a proper inquiry into the complaints itself may necessitate a transfer. Both pending investigation and an enquiry into the charges, the disciplinary authority is empowered to suspend an employee. But it is good administration not to resort to suspension of employees merely because complaints are received and must be investigated. Whether a person should be suspended or not is a decision which has to be taken on the facts and circumstances of the particular case by the competent authority, it may not be necessary to suspend the employee if the desired result of facilitating the inquiry could be achieved by transferring the employee concerned from that place or post. Suspension, pending an inquiry often results in loss of a part of emoluments and causes great hardship to the employee, yet it was never held to be a penalty. Suspension from service, is viewed by the public servant himself as a stigma, but yet when the courts have held that to be not a penalty, much less could an order of transfer, which does not result in loss of emoluments or attach a stigma and which is made without any finding on the merits of the complaint constitute a penalty or deemed to be by way of penalty. The competent authority has undoubted

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power to suspend an employee. If the competent authority instead of ordering suspension orders transfer, it cannot be said to be by way of penalty. Pendency of a disciplinary proceeding or receipt of a complaint may itself be, therefore, a valid ground for transfer. Nonetheless the power to transfer cannot be exercised out of ulterior motives, or resorted to, to favour one employee at the expense of another. That would amount to colourable and mala fide exercise of power. That would be an arbitrary order. Transfer should be made to facilitate the inquiry. But merely because a complaint is either being investigated or a charge of misconduct is under inquiry, 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.

Reliance upon the judgment in K.K.JINDAL Vs. GENERAL MANAGER, NORTHERN RAILWAY (1) to contend that every order of transfer must be preceded by an inquiry, we must at once say is misconceived. In paragraph 6 of that judgment, extracted above, it was clearly recognised "that transfer is an exigency of service and may be ordered for administrative reasons and the employer is the best judge in this regard." The transfer in that case as admitted in the counter affidavit, referred to in para 14 of the judgment was ordered because "he has been indulging in undesirable activities and he does not have a good reputation". The court on the facts of the case came to the conclusion that:

"Except the statement in the counter affidavit that the transfer is ordered in public interest and is intended to break the links of the petitioner, what

those links were, is not spelt out. One thing is obvious from the above that this transfer is not a routine administrative transfer".

The court then proceeded to consider in paragraph 16 that:

"though the order of transfer is innocuous, the respondents have relieved the Tribunal of the task of tearing the veil to find out what the "operative reason" for the transfer was. They have themselves stated in the counter affidavit that the transfer is ordered because the petitioner was indulging in "undesirable activities" and because "there is a cloud on his integrity". It is a transfer for the specific reasons mentioned in the counter affidavit referred to above. The transfer is not merely on complaints but on certain conclusions arrived at by the respondents with regard to the conduct of the petitioner, that he was indulging in undesirable activities. These conclusions drawn behind the back of the petitioner upon the complaints made, cast a stigma on the petitioner and positively mar his future prospects. Since the petitioner was occupying a sensitive post with public dealings, the respondents could perhaps have legitimately transferred him on administrative grounds on receipt of complaints. But the transfer made upon reaching a conclusion that he is indulging in undesirable activities goes a step further inasmuch as it finds him guilty of a conduct not expected of a public servant. Any action taken on that basis apart from attaching a stigma to the petitioner certainly impairs his future career as a public servant. The transfer is punitive. A routine transfer ordered merely on administrative expediency cannot have such penal consequences." (Emphasis supplied)

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The first portion of these observations viz. "since the petitioner was occupying a sensitive post with public dealings, the respondents could perhaps have legitimately transferred him on administrative grounds on receipt of complaints" is often overlooked in placing reliance upon this judgment to challenge the order of transfer and only the latter portion of these observations is highlighted. All that this judgment declares is that a positive finding as to misconduct cannot be given while ordering transfer and as any such finding would attach a stigma to the transferee, the transfer would ~~be~~ in that sense be punitive. It would be further observed that the court did not lay down in that judgment that any order of transfer made consequent upon complaints should always be preceded by an inquiry. What the court observed was that a finding of misconduct which attaches a stigma to a public servant cannot be arrived at without inquiry and any order of transfer based upon such a finding would be bad. This is made clear in paragraph 18 of that judgment where the court said:

"The respondents in their counter have themselves come up with a specific allegation that he was indulging in "undesirable activities" and that he was not enjoying a "good reputation". It is thus clear that, but for these conclusions reached by the respondents in regard to the petitioner's conduct, they would not have transferred him. It is thus incontrovertible

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that the petitioner's transfer was not a routine administrative transfer to meet the exigencies of service. When the respondents themselves state that the petitioner was transferred because he was indulging in undesirable activities, that amounts to arriving at a positive conclusion as regards his conduct. Transfer ordered upon reaching such a conclusion cannot be said to be one made merely because of bad reputation but is one based on a finding as to the conduct of the petitioner which conclusion is not based on any inquiry conforming to Art.311 (2) ~~xxxxxxx311(2)xxxxxxx~~ and the provisions governing disciplinary proceedings. Such a conclusion cannot be reached behind the back of the petitioner. Though transfer per se does not constitute a punishment, in certain circumstances it may be punitive. It would be so if ordered on reaching a conclusion that the person concerned is indulging in undesirable activities^u.

It is, therefore, clear that K.K.JINDAL's case is not an authority for the proposition that when complaints are received and the exigencies of service require that a transfer be made, an inquiry must necessarily be held into the complaint before transfer is ordered. Nor did it lay down that if a transfer is made on receipt of a complaint, it would necessarily be deemed to be penal in nature. All that it laid down was that a finding as to misconduct and a finding which attaches stigma to the employee not preceded by an inquiry and arrived at behind the back of the employee cannot form

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a valid basis for an order of transfer.

Merely because in that case, the transfer ordered was held to be punitive and was quashed, to conclude therefrom that it directs that whenever complaints are made against an employee, transfer cannot be ordered unless an inquiry is held, is to misread the judgment. As laid down by the Supreme Court in *AMBICA QUARRY WORKS ETC. Vs. STATE OF GUJARAT AND OTHERS (6)*:

"the ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only ~~an~~ an authority for what it actually decides, and not what logically follows from it".

Further that judgment only lays down that a transfer cannot be based on a finding of misconduct or any charge which attaches a stigma behind the back of the petitioner; it does not go further that once a finding on the complaints or charges is reached after inquiry in accordance with the principles of natural justice or the rules governing disciplinary proceedings, transfer cannot be ordered. Or if ordered, it would amount to a double jeopardy as contended by the applicant. The question of double jeopardy could never arise as

6. AIR 1987 SC 1073.

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transfer does not constitute a penalty. It is also not one of enumerated penalties under any of the service rules including those governing the applicant herein. In our opinion, if at the conclusion of the disciplinary proceedings, one of the enumerated penalties is imposed and having regard to the totality of circumstances, including the penalty imposed, the competent authority also deems it advisable to transfer the employee, it has undoubted power to do so. Such an order of transfer would not be vitiated. K.K.Jindal's case did not lay down that such a transfer was liable to be struck down. Nor could it be inferred from anything said therein that it would amount to double jeopardy. A bonafide decision taken in exercise of administrative discretion after the disciplinary proceedings have ended in the imposition of some penalty cannot be quashed either as contravening any principles of natural justice or as amounting to double jeopardy. Any such transfer cannot be said to be arbitrary either. What exactly is meant by saying that the transfer is arbitrary? In the circumstances, it can only mean that it was ordered mala fide or for extraneous considerations or in colourable exercise of power. In that sense it would be arbitrary and violative of Articles 14 and 16.

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When an order of transfer is made, after disciplinary proceedings have concluded, the Tribunal may be required to consider whether it is arbitrary, mala fide or in colourable exercise of power. But it certainly cannot strike down the order as penal merely because ^{it is in respect} of a person against whom there are allegations of misconduct. Any such view would make a person against whom there are serious allegations immune from transfer until those allegations are established in a regular inquiry which would necessarily take a long time. As already discussed above, the very inquiry that has to be made on the complaints may require transfer of the employee concerned. If transfer ordered in such circumstances is itself deemed to be penal and is liable to be struck down, how can an enquiry be held if transfer is found necessary for a fair enquiry. Further it would also result in a very unsavoury situation viz. that a person against whom there are complaints and allegations, is saved from transfer at least until the allegations are proved even though it is required to be ordered forthwith for administrative reasons but a person against whom there are no such complaints may be transferred without any hesitation. Although it was contended that once allegations are made, unless the enquiry is made and allegations are proved,

transfer cannot be effected, no judgment has been placed before us in support of this proposition. Jindal's case does'nt say so. Transfer is always to be ordered in the exigencies of administration and in public interest. Individual hardship and public interest have to be balanced. While petitioner may have a genuine grievance, public interest may require a transfer. Public interests must always have precedence. It should not be ordered for ulterior motives. It should not be ordered by way of punishment which means that it should not be the result of colourable or mala fide exercise of power. It should not be ordered arbitrarily.

The Government or the competent authorities have sought to regulate most transfers by instructions or what has come to be known as transfer policies. Most transfer orders are challenged before the Tribunal as being made in violation of these instructions and as arbitrary. It is, therefore, necessary to ascertain as to what is the nature of these instructions or transfer policies.

Referring to the nature and effect or norms or policy of transfer enunciated by the Government, the Supreme Court approved the observations of the Karnataka High Court in VARDHA RAO Vs. STATE OF KARNATAKA (2) that "the norms enunciated by government for the guidance of its officers in the matter of regulating

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transfers are more in the nature of guidelines to the officers who order transfers in the exigencies of administration than vesting of any immunity from transfer in the Government servants".

Even while so approving, the Supreme Court observed:

"One cannot but deprecate that frequent, unscheduled and unreasonable transfers can uproot a family, cause irreparable harm to a government servant and drive him to desperation. It disrupts the education of his children and leads to numerous other complications and problems and results in hardship and demoralisation. It therefore follows that the policy of transfer should be reasonable and fair and should apply to everybody equally. But, at the same time, it cannot be forgotten that so far as superior or more responsible posts are concerned, continued posting at one station or in one department of the government is not conducive to good administration. It creates vested interest and therefore we find that even from the British times the general policy has been to restrict the period of posting for a definite period. We wish to add that the position of Class III and Class IV employees stand on a different footing. We trust that the government will keep these considerations in view while making an order of transfer".

It would thus be seen that any transfer made in violation of transfer policy by itself would not be a ground for quashing the order of transfer for, as observed by the Supreme Court in Varadha Rao's case, instructions embodying the transfer policy are more

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in the nature of guidelines to the officers who are vested with the power to order transfers in the exigencies of administration than vesting any immunity from transfer in the Government servants or a right in the public servant. In fact, transfer policy enunciated by the Government or other authorities often allows a large amount of discretion in the officer in whom the authority to transfer is vested. However, as any transfer has to be made in public interest and in the exigencies of administration, if a complaint is made, that it is not ordered bona fide or is actuated by mala fides or is made arbitrarily or in colourable exercise of power, such a complaint is open to scrutiny. The fact that the transfer is ordered in derogation of the transfer policy would impose an obligation on the Tribunal to find out if it was necessitated in the exigencies of administration. If it is found that it is against the general policy of transfer, it may lend some prima facie basis to the allegation that it is an arbitrary order. But merely because the order is not in conformity with the transfer policy, it cannot be quashed for the competent authority is generally vested with the discretion to order transfer in the exigencies of service and in public interest. Hence the obligation to show that it is

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made mala fide or in colourable exercise of power still lies upon the applicant. While the burden of proof lies on the applicant, the onus may shift from time to time and ultimately it is for the Tribunal to determine whether the allegation of the applicant that the order of transfer is arbitrary, mala fide or made in colourable exercise of power is established and, therefore, deserves to be quashed. If that is established, the order can certainly be quashed. That does not mean that before making an order of transfer, an enquiry should be conducted in accordance with the principles of natural justice into the allegations, if any, made against the officer sought to be transferred.

In view of the above discussion, we hold that any order of transfer must be in public interest and in the exigency of service on administrative grounds. It must not be in colourable or mala fide exercise of power. It should not be arbitrary. It must be made by a competent authority in accordance with the rules and the instructions, if any, governing the transfer policy. But how far a transfer policy is mandatory, we express no opinion in this case. That must depend on the wording intendment of the instructions embodying the transfer policy. The transfer

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itself must be ordered by a competent authority in bonafide exercise of the power. It should not be a "fixed" transfer or for settling scores. However, merely because transfer is ordered on complaints or after an inquiry into the guilt of the employee, it cannot be said to be by way of punishment. The principle that 'justice should not only be done but appear to be done' is not contravened if transfer is made without any further inquiry after a penalty is imposed in a proper disciplinary proceeding. It does not amount to a double jeopardy.

Having regard to the above discussion, we answer the first question referred to us in the affirmative and the second question thus:

"No inquiry need be made if no finding of guilt, misconduct or stigma is attached. Transfer may be on administrative grounds and one of the grounds could very well be the allegations themselves. If the transfer is ordered in the exigency of service without giving any finding on the allegations, it would not be vitiated. If a chargesheet is issued and statement regarding imputation of misconduct is given or a memo is issued on a complaint and the representation of the employee or statement with reference thereto is recorded, or even where no charge sheet, or statement regarding imputation of misconduct or a memo has been issued but the concerned official's statement with regard to the allegations has been recorded, that would more than satisfy the principles of natural justice. But we must add that question of observing the principles of natural justice in a case of transfer does not arise where

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it is not based upon a finding on the allegations of misconduct or the like made against the employee. But if a finding of misconduct is arrived at without observing the principles of natural justice and that is the "operative reason" for transfer, it is liable to be quashed".

The papers may now be placed before the same Bench which referred this case for final hearing and disposal.

K. Kumar
(Kaushal Kumar)
Member (Adm.)

J. D. Jain
27.4.88
(J.D. Jain)
Vice-Chairman

K. Madhaya Reddy
27.4.88
(K. Madhaya Reddy)
Chairman.